HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

THE QUEEN APPELLANT

AND

AARON JAMES HOLLIDAY RESPONDENT

The Queen v Holliday
[2017] HCA 35
6 September 2017
C3/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

J White SC with M A Jones for the appellant (instructed by Director of Public Prosecutions (ACT))

S J Odgers SC with J T Lawton for the respondent (instructed by Gabbedy Milson Lee)

CATCHWORDS

The Queen v Holliday

Criminal law – Incitement – Aiding, abetting, counselling or procuring – *Criminal Code* 2002 (ACT), ss 45, 47 – Where respondent charged with offence of incitement – Where prosecution alleged that respondent intentionally urged another person to procure third person to commit offence of kidnapping – Where offence of kidnapping not committed – Whether respondent urged commission of offence – Whether offence of incitement to procure offence exists under *Criminal Code* – Whether aiding, abetting, counselling or procuring commission of principal offence a discrete offence.

Words and phrases – "discrete offence", "incitement", "incitement to incite", "incitement to procure", "principal offence", "substantive offence".

Criminal Code 2002 (ACT), Pt 2.4.
Criminal Code (Cth), s 11.4.
Crimes Act 1914 (Cth), ss 5, 7A.

1 KIEFEL CJ, BELL AND GORDON JJ. The appellant, the prosecution, alleged that, while in custody pending sentence for sex offences, the respondent, Mr Holliday, offered another inmate, Mr Powell, a reward for organising people outside prison to kidnap two witnesses, force them to adopt a statement prepared by Mr Holliday that was designed to exculpate him of the sex offences, and then kill them. Mr Powell did not go through with the plan and reported Mr Holliday.

2 Mr Holliday was tried on indictment before a judge and jury in the Supreme Court of the Australian Capital Territory on five counts. Count 1 charged that Mr Holliday "attempted by his conduct to intentionally pervert the course of justice" contrary to ss 44 and 713(1) of the *Criminal Code* 2002 (ACT). Mr Holliday was convicted on that count. Counts 2 and 3 charged that Mr Holliday "committed the offence of incitement in that he urged [Mr Powell] to murder" each witness contrary to s 47 of the Criminal Code and s 12 of the *Crimes Act* 1900 (ACT). Mr Holliday was found not guilty on these counts.

3 Counts 4 and 5 charged that Mr Holliday "committed the offence of incitement in that he urged [Mr Powell] to kidnap" each witness contrary to s 47 of the Criminal Code and s 38 of the Crimes Act. The prosecution conducted its case alleging that Mr Holliday urged Mr Powell to procure a third person to kidnap each witness. Mr Holliday was convicted on these counts.

4 Mr Holliday appealed against his convictions to the Court of Appeal of the Supreme Court of the Australian Capital Territory. His appeal on count 1 was dismissed. The verdicts on counts 4 and 5 were set aside and verdicts of not guilty were entered; these counts are the subject of the appeal to this Court.

5 In general terms, this appeal is concerned with a situation in which Person A incites Person B (or persons generally) to undertake a course of conduct that might ultimately result in Person C committing a substantive offence. That form of conduct is not uncommon and is not to be condoned. The question is what offence or offences under the Criminal Code attach to the conduct of Person A.

6 Section 47(1) of the Criminal Code provides that a person commits the offence of incitement if the person "urges the commission of *an offence*" (emphasis added). Section 45(1) of the Criminal Code relevantly provides that a person is "taken to have committed an offence" if the person procures the commission of the offence by someone else.

7 At issue in this appeal is whether Mr Holliday could be convicted of urging the commission of the offence of kidnapping, contrary to s 47 of the Criminal Code, by urging Mr Powell to procure a third person to kidnap. The parties identified two questions. The first question was whether inciting the

procurement of a substantive offence (here, kidnapping) is an offence under the Criminal Code. The second question was whether ss 45(2)(a) and 45(3) of the Criminal Code are "limitation[s] or qualifying provision[s]" within the meaning of s 47(5) of the Criminal Code.

8 As these reasons will demonstrate, there is no offence of incitement to procure in the Criminal Code. If that is a gap or omission in the Criminal Code, that gap or omission cannot be filled or resolved by resort to the text or structure of the Criminal Code or its legislative history[1]. If the legislature wishes incitement to procure to be a discrete offence under the Criminal Code (and, given the serious nature of the conduct, that is an available view), then that is a matter for the legislature to consider; and it is for the legislature, if appropriate, to expressly provide for that offence.

9 Accordingly, the second question – whether ss 45(2)(a) and 45(3) of the Criminal Code are "limitation[s] or qualifying provision[s]" within the meaning of s 47(5) of the Criminal Code – is not reached. The appeal should be dismissed.

10 These reasons will address the prosecution case at trial, the Court of Appeal's decision, the statutory framework and then whether inciting the procurement of a substantive offence is an offence under the Criminal Code.

Prosecution case at trial

11 Counts 4 and 5 charged that Mr Holliday "committed the offence of incitement in that he urged [Mr Powell] to kidnap" each witness contrary to s 47 of the Criminal Code and s 38 of the Crimes Act.

12 In the prosecution's opening address, the prosecutor said that it was "not alleged that [Mr Holliday] intended [Mr Powell] to commit the kidnapping ... personally as he was in prison himself at the time, rather that Mr Powell was urged to procure other people or other persons to commit the offence". Procuring others was said to be "just a mechanism by which [the prosecution] would say [Mr Holliday] urged [Mr Powell] to commit" the offence of kidnapping. Indeed, the prosecution case statement referred to s 45 of the Criminal Code in addressing the elements of counts 2 to 5. Mr Holliday did not object to, or raise any complaint about, this aspect of the prosecution case statement or the prosecution's opening address.

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1 cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-306, 336; [1981] HCA 26.

13 At the close of the prosecution case, Mr Holliday made an unsuccessful no case submission in relation to counts 2 to 5. In the course of submissions relating to that application, there was a discussion between the trial judge and the prosecutor about whether s 47 could operate with s 45. That discussion reveals that the prosecution thought it necessary to rely on s 45 to attach criminal liability to Mr Holliday for counts 2 to 5. Although this basis did not reflect the framing of the counts in the indictment, Mr Holliday did not object to the indictment, or raise any complaint about the way the indictment was framed.

14 In closing submissions, the prosecutor put the question to the jury in this way: "Did [Mr Holliday] urge [Mr Powell] to procure others" to commit the offence of kidnapping? The prosecutor explained that the mechanism by which Mr Holliday intended to "derail[]" his prosecution "was to urge [Mr Powell] to organise the two [witnesses] to be kidnapped".

15 In directing the jury on counts 4 and 5, the trial judge said that "the evidence ... was to the effect that [Mr Holliday] urged [Mr Powell] not to personally kidnap [each witness] but to arrange for a third party to do so". His Honour continued:

> "[A]s I have said, it does not appear to me to be any part of the [prosecution] case that [Mr Holliday] intentionally urged [Mr Powell] personally to undertake either of the kidnappings that are referred to in counts 4 and 5. ... [T]he law in this Territory is that a person who procures the commission of [an] offence is taken to have committed the offence themselves."

16 In particular, the jury was directed that the prosecution had to prove that: (1) "[Mr Holliday] intentionally urged [Mr Powell] to procure a third party to kidnap" each witness; and (2) "he did so intending" that each witness "should be kidnapped".

17 It is apparent that the trial judge's reference to the "law in this Territory" was intended to invoke s 45(1) of the Criminal Code. However, at no point during the directions was s 45(1) referred to or were further directions given about how s 45(1) might relate to counts 2 to 5.

Court of Appeal's decision

18 The Court of Appeal plainly understood s 45 to be central to the prosecution case at trial. Referring to the no case application, Murrell CJ said that[2]:

> "[Mr Holliday] submitted that there was no case to answer on the incitement counts because the law does not recognise an offence of inciting another to procure an offence where the latter offence is not committed.
>
> The prosecution response was that, if Mr Powell had procured the kidnappings, then he would be 'taken to have committed' the substantive offences of kidnapping and murder, despite the fact that the substantive offences were to be committed by procurement.
>
> The trial judge acknowledged that the submission raised a difficult question, but found that there was a case to answer. Detailed reasons were not given."

19 Murrell CJ's understanding of the prosecution case was shared by Wigney J, who stated that the prosecution case was that "Mr Holliday urged Mr Powell to commit the crime of kidnapping by operation of s 45 of the Criminal Code"[3]. Wigney J also noted that the prosecution case statement "referred to s 45 of the Criminal Code in addressing the elements of the incitement counts"[4].

20 It was against that background that Wigney J identified the central issue as being "whether the offence of inciting someone to procure a third person to commit an offence is an offence known to the law"[5]. Murrell CJ also considered this as the central issue but in a more qualified manner – whether it is an offence known to law when the person incited does not procure the offence.

21 The members of the Court of Appeal agreed in the result but not in the reasons for allowing the appeal in relation to counts 4 and 5. Murrell CJ

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2 *Holliday v The Queen* (2016) 12 ACTLR 16 at 19 [6]-[8].

3 *Holliday* (2016) 12 ACTLR 16 at 32 [73].

4 *Holliday* (2016) 12 ACTLR 16 at 32-33 [74].

5 *Holliday* (2016) 12 ACTLR 16 at 33-34 [80].

concluded that, "at least when no substantive offence occurs, a person cannot be convicted of incitement on the basis that they incited another to procure a third person to commit a substantive offence"[6]. Although her Honour did not consider it necessary to finally decide whether the same is true if a substantive offence is committed (given that none was in this case), her Honour's reasoning suggests that the same would be true in those circumstances.

22 Wigney J disagreed with her Honour's conclusion, holding that if a person "urges someone to procure a third person to commit an offence ... the person can be charged with inciting the commission of that offence"[7]. Refshauge J did not decide the issue. Wigney J, with whom Refshauge J agreed in this respect, allowed the appeal in relation to counts 4 and 5 on the basis that ss 45(2)(a) and 45(3) of the Criminal Code – which together provide that a person is taken to have committed the substantive offence only if the person's conduct in fact aids, abets, counsels or procures the commission of the offence by the other person and the other person commits the offence – are "limitation[s] or qualifying provision[s]" within the meaning of s 47(5). The requirement that the substantive offence be committed therefore applied to the offence of incitement. That led Wigney J to conclude that "[b]ecause Mr Powell did not successfully procure anyone to kidnap, and nobody was kidnapped, not only did Mr Powell not commit an offence, but Mr Holliday also could not be convicted of inciting Mr Powell"[8].

23 Although Murrell CJ and Wigney J reasoned differently, they each concluded that the convictions on counts 4 and 5 were to be quashed and each considered the fact that no substantive offence had been committed to be important to that conclusion.

Statutory framework

24 Part 2.4 of the Criminal Code, titled "Extensions of criminal responsibility", extends criminal responsibility in one of two distinct ways: a person may commit a discrete offence by doing certain things by reference to a

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6 *Holliday* (2016) 12 ACTLR 16 at 23 [20].

7 *Holliday* (2016) 12 ACTLR 16 at 34-35 [85].

8 *Holliday* (2016) 12 ACTLR 16 at 41 [112].

substantive offence[9] or a person is "taken to have committed" a substantive offence if certain conditions are met in relation to that offence[10].

25 Section 47, titled "Incitement", was the offence charged in counts 2 to 5. It relevantly provides that:

> "(1) *If a person urges the commission of an offence (the* ***offence incited****), the person commits the offence of incitement.*
>
> ...
>
> (2) However, the person commits the offence of incitement only if the person *intends* that the offence incited be committed.
>
> ...
>
> (4) A person may be found guilty of the offence of incitement even though it was *impossible* to commit the offence incited.
>
> (5) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence.
>
> (6) This section does not apply to an offence against section 44 (Attempt), section 48 (Conspiracy) *or this section*." (emphasis added)

26 Section 47(1) extends criminal responsibility by providing that a person commits the discrete offence of "incitement" if that person "*urges* the commission of an *offence*" (emphasis added).

27 The physical element of s 47(1) is conduct: that the person urges the commission of an offence. Under the Criminal Code, the fault element that applies to conduct is intention[11]: the person commits the offence of incitement *only* if the person intentionally urges the commission of an offence.

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9 Sections 44 (Attempt), 47 (Incitement) and 48 (Conspiracy) are provisions of this kind in Pt 2.4.

10 Sections 45 (Complicity and common purpose) and 46 (Agency) are provisions of this kind in Pt 2.4.

11 See s 22(1) of the Criminal Code.

28 Further, the person will commit the offence of incitement *only* if the person intends that the offence incited be committed. However, it is not necessary that the offence incited be completed. Moreover, as s 47(4) provides, impossibility is not a defence.

29 As the prosecution submitted, to prove the offence of incitement the prosecution must establish that:

(1) a person "urge[d]" some conduct, namely "the commission of an offence"[12];

(2) the person *intentionally* urged the conduct[13];

(3) the conduct that was urged would amount to the commission of an offence; and

(4) the person intended that the offence incited be committed[14].

30 It can be accepted that a person can be found guilty of incitement if they either urge a particular person to commit an offence or urge the commission of an offence generally. In either case, once the urging is done, the offence of incitement is complete[15].

31 Each of ss 44, 47 and 48 creates a discrete offence which is phrased "[i]f a person [does X], the person commits the offence of [X]"; provides that impossibility is not a defence[16]; and provides that "any defence, procedure, limitation or qualifying provision" that applies to the substantive offence also

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12 s 47(1) of the Criminal Code.

13 s 22(1) of the Criminal Code.

14 s 47(2) of the Criminal Code. This is not an element of the offence, but rather "epexegetical" of what it is to "urge": see *R v LK* (2010) 241 CLR 177 at 232 [132]-[133]; [2010] HCA 17.

15 See *Walsh v Sainsbury* (1925) 36 CLR 464 at 476-477; [1925] HCA 28. See also Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 95 [404].

16 ss 44(4)(a), 47(4) and 48(5)(a) of the Criminal Code.

applies to the attempt (s 44), the incitement (s 47) or the conspiracy (s 48) to commit the substantive offence[17].

32 The other provisions in Pt 2.4 are concerned with modes of proof[18] – complicity and common purpose (s 45) and agency (s 46). And, in particular, s 45, titled "Complicity and common purpose", does not create a discrete offence. The prosecution did not contend otherwise.

33 Section 45 relevantly provided[19]:

> "(1) A person *is taken to have committed an offence if the person aids, abets, counsels or procures* the commission of the offence by someone else.
>
> (2) However, the person commits the offence because of this section only if—
>
> (a) the person's conduct in fact aids, abets, counsels or procures the commission of the offence by the other person; and
>
> ...
>
> (3) To remove any doubt, the person is taken to have committed the offence only if the other person commits the offence.
>
> (4) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of the offence.
>
> (5) A person must not be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person—

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17 ss 44(7), 47(5) and 48(8) of the Criminal Code.

18 See *Handlen v The Queen* (2011) 245 CLR 282 at 288 [6]; [2011] HCA 51.

19 Section 45 has been amended to include circumstances where a person is "knowingly concerned in or a party to" the commission of an offence: see s 6 of the *Crimes (Serious Organised Crime) Amendment Act* 2010 (ACT). It will be convenient from this point to use the present tense to refer to the provision as it stood prior to the amendment.

(a) ended his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the person who committed the offence is not prosecuted or found guilty.

(7) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

..." (emphasis added)

34 Section 45(1) provides that a person is "taken to have committed" an offence if the person "*aids, abets, counsels or procures the commission of the offence* by someone else" (emphasis added). In those specified circumstances, it extends criminal responsibility for a substantive offence[20]. The "offence" that a person is taken to have committed is the "offence" the commission of which, by the other person, is aided, abetted, counselled or procured (ie, the substantive offence). There is no discrete offence of aiding, abetting, counselling or procuring.

35 This construction – which follows from the words used in s 45(1) – is supported by s 45(2), which provides that the person "commits the offence" because of s 45 only if certain conditions are met, including that the person's conduct "in fact aids, abets, counsels or procures the commission of the offence by the other person"[21], and by s 45(3), which provides that "the person is taken to have committed the offence only if the other person commits the offence".

36 Section 45 has no operation until the substantive offence has been completed. And, once the substantive offence has been completed, s 45 does not create a discrete offence of aiding, abetting, counselling or procuring. Instead, by reason of s 45, the person is liable to be charged with the substantive offence.

37 There are some aspects of s 45 that might be thought to support the conclusion that the provision creates a discrete offence. For example, s 45(4)

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20 See *Franze v The Queen* (2014) 46 VR 856 at 872 [97].

21 s 45(2)(a) of the Criminal Code.

refers to "*the offence of* aiding, abetting, counselling or procuring the commission of the offence" (emphasis added) and ss 45(5) and 45(6) refer to a person being found guilty (or not) of "aiding, abetting, counselling or procuring the commission of an offence". However, as a matter of statutory construction, these provisions should be understood as secondary to s 45(1), which must be treated as the leading provision in s 45. It is s 45(1) that operates to provide that a person is "taken to have committed" an offence in the circumstances specified. The balance of s 45 then explains and circumscribes the scope of the liability for which s 45(1) provides. Elevating the importance of s 45(4), (5) and (6) would ignore the primacy of s 45(1), which does not create a discrete offence, in contradistinction to those provisions in Pt 2.4 that do create discrete offences.

38 That result is neither novel nor surprising. It must be recalled that Isaacs J in *Walsh v Sainsbury*[22], when considering the interaction between the incitement and procurement provisions in the *Crimes Act* 1914 (Cth) (which were in somewhat different terms from ss 47 and 45), stated that the procurement provision in that Act (being s 5) did not create a new and substantive offence and did not operate until the substantive offence had been committed. It was, in his Honour's view, only when the offence had been committed that the procurement provision operated to make any person falling within its terms a principal participating in the substantive offence.

Incitement to procure an offence under the Criminal Code?

39 The principal question in this appeal is whether the Criminal Code provides that Person A is guilty of committing the offence of incitement if they urge Person B (or persons generally) to *procure* Person C to commit an offence.

40 As identified at the start of these reasons, the key statutory question under s 47 of the Criminal Code is whether the conduct (or course of conduct) urged, if acted upon as the inciter intended, would amount to the commission of an offence. That is, the question is whether the conduct that was incited, when completed, would amount to the commission of an offence by the person incited, and, if so, what offence.

41 The prosecution identified the conduct incited as the procurement of the commission of the offence of kidnapping. So identified, that conduct (the procuring), when completed by Mr Powell, would not of itself amount to the commission of an offence under s 45 of the Criminal Code. Procurement of a

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22 (1925) 36 CLR 464 at 476-477.

substantive offence is not a discrete offence which exists separately from the substantive offence.

42 Put another way, procurement is addressed in s 45 of the Criminal Code, but s 45 does not create a discrete offence[23]. Thus, there is no offence under s 45 to which s 47 can attach.

43 Moreover, no implication that s 47(1) can operate upon s 45(1) should be drawn from the absence of a reference to s 45 in s 47(6). As seen above, s 47(6) provides that "[t]his section does not apply to an offence against section 44 (Attempt), section 48 (Conspiracy) or this section". The natural reading of s 47(6) is that s 47 does not apply to s 47: there is no offence of inciting to incite the commission of an offence. Nor are there offences of inciting an attempt or inciting a conspiracy. In other words, s 47(6) carves out extension provisions from the scope of s 47(1). But it only carves out those provisions that create discrete offences. Because s 45(1) does not create an "offence", there is no need for it to be carved out in the same way.

44 Reference also should be made to s 44(10). Section 44(10) provides that s 44 (dealing with attempts) "does not apply to an offence against section 45 or section 48 (Conspiracy)". There are a number of things that should be noticed. When referring to the discrete offence created by s 48, s 44(10) identifies the offence as "Conspiracy". In contrast, when the provision refers to s 45, which does not create a discrete offence, it does not name the offence. The fact that, in the context of the attempt offence created by s 44, s 44(10) uses the phrase "an offence against section 45" is not determinative of the interaction (if any) between ss 47 and 45. Section 44(10) does not provide a sufficient basis for construing s 45 so that it creates, or is to be treated as creating, a discrete offence to which s 47(1) can attach.

45 The conclusion that s 47(1) cannot operate by reference to s 45(1) is not undermined by observing, as Wigney J did, that it would be "a very strange result indeed if a person who incited someone to procure a third person to commit an offence would escape liability even in circumstances where the person urged or incited successfully procured the third person to commit the substantive offence"[24]. That observation ignores the other ways in which criminal responsibility might attach to a person in that position under Pt 2.4. For example, assuming that Mr Holliday's plan had come to fruition, s 45(1) might have operated on Mr Holliday himself on the basis that his conduct aided, abetted,

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23 See [31]-[38] above.

24 *Holliday* (2016) 12 ACTLR 16 at 37-38 [97].

counselled or procured the commission of the kidnapping. Or, if Mr Holliday and Mr Powell had entered into an agreement, it may have been open to charge Mr Holliday with conspiracy[25].

46 And, of course, under the Criminal Code, there is nothing to preclude a distinct offence of attempting to commit the offence of incitement. So, for example, where a communication amounting to an incitement did not reach the intended recipient of the communication[26], that would be an offence of attempting to incite.

47 The legislative history of the *Criminal Code* (Cth)[27], upon which the Criminal Code was based, demonstrates that, although there was early discussion about the need for an offence of incitement to procure to be included, no such offence was in fact included.

48 In 1990, the Gibbs Committee, established in 1987 to review Commonwealth criminal laws as part of a project to develop an Australian criminal code, recommended that "it should be made clear that it is an offence to incite a person to assist, encourage or procure another person to commit an offence"[28]. This recommendation was made in light of the observation by the England and Wales Law Commission that[29]:

> "it appears that the incitement of another to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person is not an offence known to the law. The reason for this is that aiding and abetting is not in itself an offence. It attracts liability only on the commission of the substantive offence."

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25 See s 48(2) of the Criminal Code.

26 See Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 95 [404.4].

27 See generally *LK* (2010) 241 CLR 177 at 203-204 [51]-[53], 220-223 [99]-[102].

28 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 241 [18.40].

29 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 240 [13.19] (footnote omitted) quoted in *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 240 [18.37].

49 However, as the Gibbs Committee recognised, "it is possible to conceive of circumstances where a person is incited to take steps of an active or positive nature to assist or facilitate the commission by another of an offence"[30]. The Committee went on to state that "the technical ground put forward by the Law Commission that these steps would not represent an offence until taken does not seem sufficient reason to refrain from making such incitement subject to criminal sanction"[31].

50 It was therefore unsurprising that the Draft Bill annexed to the Report prepared by the Gibbs Committee specifically included a provision that provided that, for the purpose of incitement, "offence" included an offence under what ultimately became the Commonwealth equivalent of s 45 of the Criminal Code[32].

51 However, neither the Discussion Draft nor the Final Report of the Model Criminal Code Officers Committee ("the MCCOC")[33] – established following the release of the Gibbs Committee Report – addressed, when dealing with the general principles of criminal responsibility, the issue of whether the incitement offence could operate upon the provision dealing with aiding, abetting, counselling or procuring. Nor was a provision akin to the one recommended by the Gibbs Committee included in the *Criminal Code* (Cth) as enacted.

52 In circumstances where, at best, it was uncertain whether there was a common law offence of incitement to procure and, at worst, there was no such offence[34], one might reasonably expect that, if the drafters had intended that the *Criminal Code* (Cth) include an offence of incitement to procure, they would have expressly provided for one, as suggested by the Gibbs Committee.

53 In the Court of Appeal, Wigney J suggested that the Gibbs Committee's recommendation may not have been taken up "for any number of reasons,

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30 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 240 [18.38].

31 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 240 [18.38].

32 See *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990), Pt IX (Draft Bill) at 20.

33 The former title of which was the Criminal Law Officers Committee of the Standing Committee of Attorneys-General.

34 See *R v Bodin* [1979] Crim LR 176.

including that it was not considered that such a clarification was necessary"[35]. It is not useful to speculate. It is sufficient to observe that, given the legislative history and the fact that the express terms of s 45(1) provide that it does not create a discrete offence, if incitement to procure were to be an offence under the Criminal Code, one would have expected it to have been expressly dealt with.

Relationship between incitement to incite and incitement to procure

54 As the prosecution recognised on appeal to this Court, the concepts of incitement and procurement have the potential to overlap. For that reason, it is relevant to consider the Criminal Code's treatment of "incitement to incite". As noted above, because of s 47(6), there is no offence of incitement to incite. It is useful to consider the legislative history that led to that position.

55 The Gibbs Committee did not recommend creating an offence of incitement to incite the commission of an offence[36]. The Committee "doubt[ed] the need for such an offence"[37], although this was in the context of it recommending that there be an offence of inciting a person to be "knowingly involved in" an offence[38]. In the event, the *Criminal Code* (Cth) adopted the language of aiding, abetting, counselling or procuring rather than knowing involvement. And as noted above, no express provision was made for an offence of incitement to aid, abet, counsel or procure.

56 In the MCCOC Discussion Draft, the draft incitement provision read: "[t]his section does not apply to an offence under section 401 (attempt), [section] 405 (conspiracy) or this section (incitement)"[39]. Then, in the MCCOC Final

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35 *Holliday* (2016) 12 ACTLR 16 at 38 [98].

36 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 241 [18.42].

37 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 241 [18.42].

38 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990) at 241 [18.39].

39 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Discussion Draft, (July 1992) at 82 [404.4].

Report, the draft incitement provision no longer included the word "(incitement)" after "this section"[40]. However, the MCCOC stated that it had decided that[41]:

> "it should not be possible to be guilty of inciting to incite, inciting to conspire, or inciting to attempt. *There has to be some limit on preliminary offences.* This follows the position taken by the Gibbs Committee (paras 18.41-18.46) rather than that taken by the English Law Commission. The Gibbs Committee did not think it necessary to include a provision to achieve the abolition of incitement to incite in its Bill (s 7B). [The MCCOC] considered that this was necessary in a Code." (emphasis added)

57 That passage from the Final Report was included, in relevantly identical terms, in the Explanatory Memorandum to the Criminal Code Bill 1994 (Cth)[42], and the passage from the Commonwealth Explanatory Memorandum was then quoted in full in the Explanatory Memorandum to the Bill for the Criminal Code[43].

58 The contrary view of the England and Wales Law Commission expressed in 1989 – that an offence of incitement to incite should not be excluded – was in part due to the fact that the offence had recently been stated to exist at common law by the Court of Appeal of England and Wales[44]. The Law Commission considered that "[i]t would not be right", within the scope of the project it was

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40 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 92 [404.4].

41 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 95 [404.4].

42 Australia, Senate, Criminal Code Bill 1994, Explanatory Memorandum at 39.

43 Australian Capital Territory, Criminal Code 2002, Explanatory Memorandum at 26.

44 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 238 [13.13] citing *Sirat* (1986) 83 Cr App R 41 and *R v Evans* [1986] Crim LR 470.

undertaking at the time, "to attempt to overturn the recent decisions" and that "[s]uch a course would require much fuller discussion and consultation"[45].

59 In this context, it is relevant to note that the Law Commission was alive to the apparent tension between retaining an offence of "inciting to incite" but not creating an offence of "inciting to procure"[46]. The Law Commission noted that taking that course "embodies a distinction that might be thought by some to be purely technical"[47]. The Law Commission observed that the reason that it is not an offence to incite another person to procure the commission of an offence by a third person is that *procuring* an offence[48]:

> "is not in itself an offence. It attracts liability only on the commission of the substantive offence. Until that offence is committed the incitement is only to do acts which may or may not turn out to be criminal. The logic of this rule ... has been undercut to some extent by the decisions that incitement to incite is an offence known to the law."

60 This legislative history reveals that the drafters of the *Criminal Code* (Cth) intended to expressly exclude an offence of incitement to incite. They can also be taken to have been aware of the postulated need to make provision for an offence of incitement to procure, as suggested by the Gibbs Committee. Against that background, it is unlikely that the failure to include such a provision was inadvertent. And by not including either of those offences in the *Criminal Code* (Cth), the drafters avoided the tension, noted by the England and Wales Law Commission, created by having one offence and not the other.

61 The prosecution's contention that, as "a matter of evidence", a person can be found guilty of inciting the commission of an offence if they incite another person to procure a third person to commit that offence would permit the prosecution to circumvent s 47(6) and would potentially undermine the legislative choice not to make procurement a discrete offence. In substance,

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45 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 239 [13.15].

46 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 239-240 [13.19].

47 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 240 [13.19].

48 The Law Commission, *A Criminal Code for England and Wales*, Law Com No 177, (1989), vol 2 at 240 [13.19].

it would permit a person to be convicted for conduct that would in many cases amount to no more than incitement to incite. Such a conviction would be contrary to the express terms of s 47 and inconsistent with the legislative history of the Criminal Code and its Commonwealth progenitor.

62 The prosecution further contended that, although incitement and procurement overlap, they target different conduct, in that the former would normally be charged only where there had been no completed offence. In particular, the prosecution contended that if a person is urged to urge the commission of an offence, they are not being urged to take active steps that might result in them being found guilty of the substantive offence. Instead, they are merely being urged to undertake further urging, which is a step further removed from the ultimate commission of any substantive offence. The remoteness of that urging from the substantive offence is reflected in the less serious penalties for incitement under s 47(1).

63 That contention is contrary to the legislative scheme of the Criminal Code. Under the Criminal Code, there is no offence of incitement to incite[49], and procurement (s 45) is not a discrete offence. The legislative intention is not to capture conduct that amounts to either incitement to incite or incitement to procure. Put another way, the existence of an offence of incitement to procure would "undercut" the logic of the express exclusion of incitement to incite under s 47(6).

Limitation or qualifying provision

64 Once it is accepted that s 45(1) does not create an offence on which s 47(1) can operate, the issue of whether ss 45(2)(a) and 45(3) are "limitation[s] or qualifying provision[s]" within the meaning of s 47(5) does not arise. Section 47(5) provides that "[a]ny defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence". It is plain that the reference to "an offence" in this provision is to the substantive offence that is the subject of s 47(1). Because the prosecution could not rely upon s 45(1) as creating that offence, the question about ss 45(2)(a) and 45(3) is not reached.

Conclusion

65 The appeal should be dismissed.

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49 s 47(6) of the Criminal Code.

66 GAGELER J. I agree with Kiefel CJ, Bell and Gordon JJ that the appeal must be dismissed because s 47(1) of the Criminal Code is not engaged.

67 The critical question for the purpose of s 47(1), as I see it, is whether Mr Powell would have been taken by s 45(1) to have committed the offence of kidnapping had Mr Powell done what the jury must have found that Mr Holliday urged him to do so as to have arranged for another person to kidnap a witness. The answer compelled by s 45(3) is that, unless that other person actually went on to kidnap a witness, Mr Powell could not have been taken by s 45(1) to have committed that offence by procuring it.

68 Odd as it might seem at first blush, that outcome is not incomprehensible having regard to policy choices embedded within the scheme of Pt 2.4 of the Criminal Code. If there is no offence of incitement to incite an offence (as s 47(6) says there is not), but if there is an offence of incitement to procure an offence (as s 47(6) leaves open), and if procurement cannot be an offence unless and until the procured offence is committed (as s 45(3) makes clear), it is unsurprising that incitement to procure an offence should not be an offence unless and until the offence is procured and committed. Without the added requirement that the offence incited to be procured actually be procured and committed, the distinction between the known offence of inciting to procure and the unknown offence of inciting to incite would be so fine as to be illusory.

69 The outcome is even less surprising against the background of *Walsh v Sainsbury*[50], which relevantly concerned the relationship between ss 5 and 7A of the *Crimes Act* 1914 (Cth). Section 5 provided that "[a]ny person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against this Act or any other Act ... shall be deemed to have committed that offence and shall be punishable accordingly". Section 5 was an "aiding and abetting section" which could apply "only where what has been called the principal offence [had] been committed"[51]. Section 7A made it an offence to "incite" the commission of an offence against a law of the Commonwealth.

70 The clearly expressed view of Isaacs J in *Walsh v Sainsbury* was that Mr Walsh could not be convicted of having "incited" another person (Mr O'Neill) (within the meaning of s 7A) to "counsel" (within the meaning of s 5) the Waterside Workers' Federation of Australia to strike (contrary to another law of the Commonwealth) in the absence of proof of "the fact of an actual strike of the

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50 (1925) 36 CLR 464; [1925] HCA 28.

51 *Mallan v Lee* (1949) 80 CLR 198 at 205; [1949] HCA 48; *Walsh v Sainsbury* (1925) 36 CLR 464 at 477. See also *Cain v Doyle* (1946) 72 CLR 409 at 419; [1946] HCA 38.

Waterside Workers' organization"[52]. The reasoning of other members of the Court did not contradict that view. The language and structure of ss 45 and 47 provide no basis for considering their relationship to be materially different.

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52 (1925) 36 CLR 464 at 478.

71 NETTLE J. The issue in this appeal is whether it is sufficient to constitute an offence of incitement contrary to s 47 of the *Criminal Code* 2002 (ACT) for an accused ("the incitor") to urge another person ("the incitee") to procure a third person to commit an offence against the *Criminal Code* (the "principal offence") in circumstances where, despite the incitor's urging, the incitee does not procure the third person to commit the principal offence. The facts of the matter and the relevant provisions of the *Criminal Code* are sufficiently stated in the reasons for judgment of Kiefel CJ, Bell and Gordon JJ and there is no need to repeat them.

72 In substance, s 47(1) of the *Criminal Code* provides that, if a person urges the commission of "an offence", the person commits an offence of incitement. Thus, consistently with the position that pertained at common law[53] and under s 7A of the *Crimes Act* 1914 (Cth)[54], which s 47 of the *Criminal Code* replaced[55], in order to constitute an offence of incitement under s 47(1), what is incited must be "an offence". The Crown alleged that the respondent ("Holliday") urged the commission of an offence by another person ("Powell"). The offence which it was contended that Holliday had urged Powell to commit was an offence contrary to s 45 of the *Criminal Code*, namely, procuring a third person to commit offences of kidnapping and the suborning of persons proposed to be called as witnesses in Holliday's then forthcoming trial for child sex offences. As will be explained, that contention was ill-founded. Section 45 of the *Criminal Code* does not create an offence of procuring the commission of an offence by a third person.

73 In form and substance, s 45 of the *Criminal Code* is similar to earlier iterations of what Isaacs J described in *Walsh v Sainsbury*[56] as "merely an 'aiding and abetting' section". His Honour was there speaking of s 5 of the *Crimes Act* and s 87 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth). Although in different terms, each was held to be of relevantly similar effect[57]. Section 5 provided that:

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53 See *R v Whitehouse* [1977] QB 868 at 872-873, 875-876. See also Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, 6th ed (1904) at 39, 399-400; Kenny, *Outlines of Criminal Law*, 10th ed (1920) at 79-80.

54 *Walsh v Sainsbury* (1925) 36 CLR 464 at 476 per Isaacs J; [1925] HCA 28; *Clyne v Bowman* (1987) 11 NSWLR 341 at 347-348.

55 To the extent that s 47(1) is modelled on s 11.4(1) of the *Criminal Code* (Cth).

56 (1925) 36 CLR 464 at 477.

57 *Walsh v Sainsbury* (1925) 36 CLR 464 at 476-477 per Isaacs J.

> "Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against this Act or any other Act ... shall be deemed to have committed that offence and shall be punishable accordingly."

74 Section 87 was as follows:

> "Every person who, or organization which, is directly or indirectly concerned in the commission of any offence against this Act, or counsels takes part in or encourages the commission of any such offence, shall be deemed to have committed that offence and shall be punishable accordingly."

75 Isaacs J considered[58] that neither provision operated until and unless a principal offence was committed and that, even then, neither provision created an offence. Rather, when and if a principal offence was committed, each provision operated so as to deem a person who had counselled or procured the commission of that principal offence to be a principal participant in the principal offence. Thus, with respect to s 5, Isaacs J stated[59]:

> "That section, construed in accordance with a long-continued and consistent judicial and legislative view, is merely an 'aiding and abetting' section. It creates no new offence. It does not operate unless and until the 'offence' – which may be called, for convenience, the principal offence, though it really is the only substantive offence – has been committed. Then, and then only, does the section operate to make any person falling within the terms of the section a principal participating in that offence."

Similarly, with respect to s 87, his Honour observed[60]:

> "I am unable to discern any distinction between the effect of [s] 5 above quoted and [s] 87 now in hand. In each there is supposed to be an 'offence' committed and the section deems any person answering the given description 'to have committed that offence,' and to be punishable 'accordingly,' that is, as having actually as a principal committed the offence. It does not create a new and substantive offence. It does not say, for instance, that a person who 'counsels' or 'encourages' a person to lock out his workmen is deemed to have locked out the workmen even though

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58 *Walsh v Sainsbury* (1925) 36 CLR 464 at 477-478.

59 *Walsh v Sainsbury* (1925) 36 CLR 464 at 477.

60 *Walsh v Sainsbury* (1925) 36 CLR 464 at 477-478.

> the employer has refused to accept the counsel or yield to the encouragement. No special penalty is provided for the offence of counselling or encouraging apart from the punishment for actually committing the offence."

76 Isaacs J concluded[61] accordingly that a person could not be convicted of an offence of unlawfully inciting a person to counsel a union to undertake an illegal strike contrary to s 7A of the *Crimes Act* until and unless the unlawful strike was undertaken.

77 Section 45(1) of the *Criminal Code* is, in relevant substance, the same as s 5 of the *Crimes Act* and s 87 of the *Commonwealth Conciliation and Arbitration Act*, and s 47(1) of the *Criminal Code* is, in relevant respects, identical to s 7A of the *Crimes Act*. There is little reason to doubt that they operate in a similar fashion. Like s 5 of the *Crimes Act* and s 87 of the *Commonwealth Conciliation and Arbitration Act*, s 45(1) of the *Criminal Code* has no effect in terms until and unless a principal offence has been committed. And like s 5 of the *Crimes Act* and s 87 of the *Commonwealth Conciliation and Arbitration Act*, s 45(1) of the *Criminal Code* does not create a new offence. Instead, when and if a principal offence is committed, s 45(1) has the effect that a person who has counselled or procured the commission of the principal offence "is taken to have committed" (*scil* "is deemed to have committed") the principal offence. Sub-sections (2) and (3) of s 45 explicitly confirm that.

78 To the contrary, it was observed in the Court below[62] that, because sub-ss (4), (5) and (6) of s 45 speak in terms of "*the offence* of aiding, abetting, counselling or procuring the commission of the [principal] offence", or a person being guilty of such an offence, unlike s 5 of the *Crimes Act* and s 87 of the *Commonwealth Conciliation and Arbitration Act*, s 45 relevantly creates an offence: an offence of aiding, abetting, counselling or procuring the commission of the principal offence.

79 At first sight, that presents as an attractive proposition. But it does not withstand closer analysis. As is apparent from s 45(1), (2) and (3) – those being the sub-sections principally concerned with the imposition of criminal liability – the operative effect of s 45 is to subject a person who aids, abets, counsels or procures the commission of a principal offence to being taken to have committed the principal offence. That operation is reinforced by the references in s 45(7) to a "person ... taken to have committed an offence because of this section" being liable to punishment "as if, *apart from the operation of this section*, the person had committed the offence" (emphasis added). As appears

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61 *Walsh v Sainsbury* (1925) 36 CLR 464 at 475-476.

62 *Holliday v The Queen* (2016) 12 ACTLR 16 at 37 [94], 39 [103] per Wigney J.

from s 45(1), (2) and (3), the only offence which a person is "taken to have committed" because of s 45 is the principal offence, not an offence of aiding, abetting, counselling or procuring the principal offence contrary to s 45. Equally, as is apparent from s 45(7), the only penalty to which a person may be subjected by reason of s 45 is the penalty applicable to the principal offence when and if the principal offence is committed, and even then only because the person is, by reason of having aided, abetted, counselled or procured its commission, "taken to have committed" the principal offence. There is also the reference in s 45(8) to a "trier of fact [being] satisfied ... that a defendant committed an offence because of this section *or otherwise*". In that context, "an offence because of this section" can only mean the principal offence which a person is "taken to have committed" because of s 45.

80 Thus, read in context, and especially in light of s 45(1), (2), (3), (7) and (8), the expression in s 45(4) "the offence of aiding, abetting, counselling or procuring the commission of the [principal] offence" presents not as creating or recognising the existence of an offence of aiding, abetting, counselling or procuring the commission of the principal offence, but rather as an epithetical, compendious descriptor of the criminal liability of a person who, by operation of s 45(1), is "taken to have committed" the principal offence by reason of having aided, abetted, counselled or procured its commission. Similarly, the stipulation that a person "must not be found guilty of aiding, abetting, counselling or procuring the commission of [the principal] offence" in s 45(5) is to be understood not as creating or recognising the existence of an offence of aiding, abetting, counselling or procuring the commission of the principal offence, but rather as a similarly epithetical, compendious means of stipulating that a person must not be found guilty of having committed the principal offence by reason of having aided, abetted, counselled or procured its commission if the person ended his or her involvement and took all reasonable steps to prevent the commission of the principal offence. And, likewise in context, it is apparent that the stipulation in s 45(6) that a person "may be found guilty of aiding, abetting, counselling or procuring the commission of [the principal] offence" is designed to convey that a person may be found guilty of having committed the principal offence, by reason of having aided, abetted, counselled or procured its commission, notwithstanding that the principal in the first degree is not prosecuted for or found guilty of the principal offence.

81 None of this suggests that s 45 creates a new offence of aiding, abetting, counselling or procuring the commission of a principal offence, as opposed to deeming a person who aids, abets, counsels or procures the commission of a principal offence to have committed the principal offence, when and if it is committed.

82 Perhaps it could be argued that, because s 45(4) employs the expression "the offence of aiding, abetting, counselling or procuring the commission of the offence" as a means of describing the criminal liability of a person who, by

reason of s 45(1), is taken to have committed the principal offence, the reference to "an offence" in s 47(1) should equally be understood as picking up and including the criminal liability of a person who, by operation of s 45(1), is taken to have committed the principal offence. On that construction, it would be sufficient to constitute an offence of incitement under s 47(1) for a person to urge another to aid, abet, counsel or procure the commission of the principal offence; and, because an offence of incitement is complete upon the act of urging[63], Holliday would be liable to be convicted of inciting Powell to procure the commission of the kidnapping and subornation of the witnesses via a third person, despite Powell not having done so.

83 The difficulty with that argument, however, is that where s 45(4) employs the expression "the offence of aiding, abetting, counselling or procuring the commission of the offence" as a means of describing the criminal liability of a person who is taken to have committed the principal offence, it does so in order to describe a species of accessorial criminal liability which has arisen by reason that the principal offence has been committed. The use of the present perfect "taken to have committed" in s 45(1), (3) and (7) is calculated to achieve that result and s 45(3) emphasises the point by providing that a person is to be taken to have committed a principal offence only if the principal offence is committed. By contrast, s 47(1) uses the expression "an offence" to describe a criminal offence which has not yet been committed. It proscribes the act of urging a person to do something which, if that person were to do it, would be "an offence". It is not in terms directed to proscribing an act of urging a person to do an act which, if that person were to do it, would not itself comprise an offence but would, when and if the principal committed the principal offence, result in the person so incited being taken to have committed the principal offence. And, although it would not be impossible to read the provision as being so directed, it would require the reading in of a significant number of words in order to conclude that "urges the commission of an offence" in s 47(1) includes "urges the commission of such acts of aiding, abetting, counselling or procuring the commission of a principal offence as might, when and if the principal offence is ever committed, result under s 45(1) in the incitee being taken to have committed the principal offence". Beyond question, it is a strong thing to read words into a statute and, therefore, it is something which courts should be hesitant to do[64].

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63 *Walsh v Sainsbury* (1925) 36 CLR 464 at 476 per Isaacs J; *R v Zhan Yu Zhong* (2003) 139 A Crim R 220 at 224 [18] per Buchanan JA (Winneke P and Phillips JA agreeing at 221 [1], 222 [5]); Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 612.

64 *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 at 190-191 per Lord Simonds; *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J (Menzies J agreeing at 646); [1972] HCA 27; *Parramatta City Council v*

(Footnote continues on next page)

And where the effect would be to create a degree of criminal liability that the Parliament has not clearly signalled it intends to impose, it is necessary to be still more hesitant[65].

84 The Crown contended that, because s 47(4) provides that a person may be found guilty of the offence of incitement even if it is impossible to commit the offence incited, it would only be logical to construe s 47 as having the effect that a person may be found guilty of an offence of incitement where, although it is possible to commit the offence incited, the offence is not committed. So much may readily be accepted. But it does not detract from the conclusion already expressed that s 47 proscribes the act of urging a person to do something which, if that person were to do it, would be an offence (*scil* "procuring the commission of a principal offence"); as opposed to urging a person to do something which, if the person so incited were to do it, would not be an offence, but would, when and if the principal offence were committed, result in the person so incited being taken to have committed the principal offence. Section 47(4) restates the position which existed at common law that an accused could be convicted of an offence of incitement even though the offence incited was not committed and even though the offence incited could not in fact be committed[66]. But, consistently with the common law[67], s 47(4) does not imply that an accused may be convicted of inciting another person to do something which, if it could be done and were done, would not be an offence.

85 There are also indications elsewhere in the *Criminal Code* that s 47(1) does not apply to an act of urging a person to procure the commission of an offence. Section 47(6) provides that s 47 does not apply to an offence against s 44 (attempt), s 48 (conspiracy) or s 47 (incitement). The manifest purpose of

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Brickworks Ltd (1972) 128 CLR 1 at 12 per Gibbs J (Barwick CJ, Menzies J and Owen J agreeing at 3, 4); [1972] HCA 21.

65 *Scott v Cawsey* (1907) 5 CLR 132 at 154-155 per Isaacs J; [1907] HCA 80; *Beckwith v The Queen* (1976) 135 CLR 569 at 576 per Gibbs J; [1976] HCA 55; *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145 per Mason, Deane and Dawson JJ; [1983] HCA 44; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 210-211 [45] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2005] HCA 58.

66 See, for example, *McDonough* (1962) 47 Cr App R 37 at 41; *Director of Public Prosecutions v Nock* [1978] AC 979 at 999 per Lord Scarman (Lord Diplock, Lord Edmund-Davies, Lord Russell of Killowen and Lord Keith of Kinkel agreeing at 990, 993, 994). See also *Dimozantos* (1991) 56 A Crim R 345.

67 See *Whitehouse* [1977] QB 868 at 872-873, 875-876; *R v Pickford* [1995] QB 203 at 208, 212-213.

that provision is to ensure that it is not an offence to incite the commission of an inchoate offence of attempt, conspiracy or incitement. Section 47(6) does not provide, however, that s 47 does not apply to an inchoate offence of aiding, abetting, counselling or procuring the commission of an offence. The most likely reason for that is that the drafters of the *Criminal Code* did not intend s 45 to create, or consider that it did create, an inchoate offence of aiding, abetting, counselling or procuring the commission of an offence. Instead, for the reasons already stated, it is to be inferred that they intended and considered that s 45 should and would do no more than deem a person who has aided, abetted, counselled or procured the commission of an offence, when and if the offence is committed, to have committed that offence.

86 The likelihood of that being so is further fortified by an appreciation of what the consequences would be if that were not the case. If s 47 did make it an offence to urge a person to procure the commission of an offence, it would mean that, although a person cannot be convicted of inciting another person to "incite" (*scil* "urge") a third person to commit an offence (because of the express exclusion in s 47(6) of offences of incitement from the application of s 47), such a person may be convicted of an offence of inciting another person to "procure" (*scil* "urge") a third person to commit an offence. There is no sense in that, and it was not suggested that there is any other explanation for caprice and incongruity of that order within the frame of the one provision. The more likely, and therefore more compelling[68], construction is that s 47 does not apply to the incitement of a person to procure the commission of a principal offence because, even when and if the principal offence is committed, it will remain that the person so incited will not have committed an offence of procuring the commission of the principal offence. Instead, when and if the principal offence is committed, the person so incited to procure the commission of the principal offence will be deemed by operation of s 45(1) to have committed the principal offence; and, at that point, but not before, the incitor will have committed an offence of inciting the person so incited to commit the principal offence.

87 Reference was made in the course of the parties' written submissions and oral arguments to the recommendations of the Gibbs Committee[69] and the Model Criminal Code Officers Committee[70] in relation to the drafting of the *Criminal Code* (Cth). Each side contended that some of the recommendations, and the

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68 See and compare *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs CJ; [1981] HCA 26.

69 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters*, (July 1990).

70 *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992).

extent to which those recommendations do or do not appear to have been implemented, support that party's preferred construction of s 47. In fact, there is little assistance to be derived from the extrinsic materials either way. At various points and in various ways the reports of the Gibbs Committee and the Model Criminal Code Officers Committee point in opposite directions. The safest guide is the language of the legislation and the requirement for clarity in the framing of criminal provisions[71].

Conclusion

88 In the view which I take of the operation of s 47(1), it is unnecessary to consider the effect of s 47(5). Accordingly, for these reasons, I agree in the orders proposed by Kiefel CJ, Bell and Gordon JJ.

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71 See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *Momcilovic v The Queen* (2011) 245 CLR 1 at 175 [441] per Heydon J; [2011] HCA 34; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 [28] per French CJ, Hayne, Kiefel and Bell JJ; [2012] HCA 3.