IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C3 of 2017

BETWEEN:

THE QUEEN
Appellant

and

AARON JAMES HOLLIDAY
Respondent

APPELLANT'S SUBMISSIONS

Part I: PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: ISSUES

2. The appellant contends that the following issues arise in the appeal:
   i. Under s 47 of the *Criminal Code 2002* (ACT) ("the ACT Code"), a Model Criminal Code ("the Model Code"), can a person be convicted of the offence of incitement on the basis that they incited another to procure a third person to commit an offence?
   ii. When is the offence of incitement under s 47 of the ACT Code committed?
   iii. Are ss 45(2)(a) and (3) of the ACT Code "limitation or qualifying provisions" for the purposes of ss 47(5)?

Part III: SECTION 78B

3. The appellant considers that notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: CITATIONS

4. The citations for the decision of the ACT Court of Appeal appealed from are:
   - *Holliday v The Queen* (2016) 312 FLR 77.
   - *Holliday v The Queen* [2016] ACTCA 42.

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Part V: RELEVANT FACTS

Case at trial

5. The facts of the matter are summarised in the judgment of Murrell CJ in the court below.[1] Briefly stated, while in prison awaiting trial for child sex offences the respondent urged another inmate, Powell, to organise a person outside the prison to kidnap the two Crown witnesses who were brothers of the complainants. A financial incentive was offered. The purpose of the kidnapping was to force the witnesses to adopt statements the respondent had prepared, recanting their evidence against him. The respondent prepared a number of written documents setting out statements that he wanted the complainants to recite whilst being recorded. He gave these to Powell to pass on to the "third man" together with instructions about how the witnesses could be found. Powell did not act as urged, instead reporting the respondent's proposal to prison authorities.

6. Relevantly, the respondent was convicted at trial of two counts of inciting kidnapping after the trial judge dismissed a no case submission from his counsel. The Crown case was that the respondent had urged Powell to procure a third party to commit the offence of kidnapping. If Powell had acted as urged by the respondent then he would have been taken to have committed the offence of kidnapping pursuant to s 45(1) of the ACT Code. The respondent appealed his convictions.

Court of Appeal decision

7. Although the Court of Appeal agreed in the result, it was divided in its reasons for allowing the appeals against the incitement counts. The division arose on two issues:
    - First, whether the offence of incitement under s 47 of the ACT Code can be committed where the person incited is urged to procure a third person to commit an offence; and
    - Secondly, whether s 47(5) of the ACT Code requires a principal offence to be committed in order for a person to be liable to conviction for incitement where the person has incited someone to procure the commission of the offence.

8. With respect to the first issue, Murrell CJ concluded that when no substantive offence is committed, a person cannot be convicted of incitement on the basis that they incited another to procure a third person to commit the substantive offence.[2] Notwithstanding that the Chief Justice purported to limit her reasons to circumstances where no substantive offence was committed,[3] the appellant submits her Honour's reasoning would apply equally to circumstances where a substantive offence is committed. In effect, her Honour found that the offence of incitement under s 47 of the ACT Code cannot be committed where the alleged offence incited is taken to be an offence only because of s 45, i.e. 'inciting to procure' is not an offence known to law.

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[1] *Holliday v The Queen* (2016) 312 FLR 77 ("Court of Appeal") at [1]-[9].
[2] Court of Appeal at [20].
[3] Cf. Court of Appeal at [29].

9. Refshauge and Wigney JJ were also of the view that the Chief Justice's reasons stand for the proposition that inciting a person to procure an offence is not an offence known to law.[4] Wigney J ultimately came to the opposite conclusion,[5] while Refshauge J declined to decide the question.[6]

10. With respect to the second issue, Wigney J found that ss 45(2)(a) and (3) of the ACT Code were together "limitation or qualifying provisions" that applied to the offence of incitement by virtue of s 47(5).[7] Despite acknowledging the inchoate nature of the offence of incitement,[8] Wigney J's finding on the second issue resulted in a construction of s 47 that required a substantive offence be committed before the respondent could be convicted of inciting kidnapping by way of inciting another to procure the commission of that offence. Refshauge J agreed with Wigney J on this issue.[9] Murrell CJ considered this to be "arguable".[10]

Part VI: ARGUMENT

Summary

11. The appellant's arguments can be summarised as follows:

i. The correct construction of ss 45 and 47 is that there is no bar to charging an offence of inciting another to perform conduct which, if completed, would attract liability under s 45. Murrell CJ's conclusion to the contrary was erroneous.

ii. The offence created by s 47(1) is an inchoate offence which was complete (that is, committed) when the respondent there urged Powell with the requisite intent. It follows that Wigney J's requirement[11] that Powell be convicted of the substantive offence of kidnapping before the respondent could be convicted of inciting kidnapping was erroneous.

iii. Although Wigney J referred to "limitation or qualifying provision" as though it were a composite expression,[12] in fact the expressions "limitation" and "qualifying provision" describe distinct concepts. The legislative context suggests that "limitation" is a time limitation and a "qualifying provision" is one which puts an evidentiary onus on an accused. Sections 45(2)(a) and (3) are neither limitations nor qualifying provisions.

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[4] Court of Appeal at [64] (Refshauge J) and [85] (Wigney J).
[5] Court of Appeal at [108].
[6] Court of Appeal at [65].
[7] Court of Appeal at [109]-[115] (the appellant notes that at [115] Wigney J appears to have mistakenly referred to sub-section (6) instead of sub-section (5)).
[8] Court of Appeal at [91].
[9] Court of Appeal at [63].
[10] Court of Appeal at [37].
[11] Court of Appeal at [112].
[12] See e.g.: Court of Appeal at [111].

iv. The reference in s 47(5) to "an offence ... the offence" is a reference to the substantive offence, here kidnapping. Sections 45(2)(a) and (3) are not limitations or qualifying provisions to the offence of kidnapping and accordingly are not picked up by s 47(5).

12. The appellant will briefly refer to incitement at both common law and under the Model Code. However, s 47 was not an attempt to codify the common law: in particular the verb "urges" in s 47(1) was selected after consideration of various statutory definitions of incitement.[13] Further, the legislative context shows that under the Model Code incitement to procure an offence was specifically contemplated as one way the offence of incitement could be proved.

Incitement at common law

13. At common law it is an offence to incite another to commit a crime.[14] The *actus reus* and *mens rea* of incitement have evolved over time but the authorities make clear that the offence of incitement is constituted solely by what the inciter says or does and intends and does not require proof of any action or response on the part of the person incited, least of all proof that the offence incited was actually committed.[15]

14. It follows that the offence of incitement at common law is complete at the coincidence of the inciter's act urging the commission of an offence and the inciter's intention that the offence incited be committed. It is immaterial whether the person incited does anything in furtherance of the offence incited or whether the incitement has impressed upon them at all. Lord Parker CJ's seminal statement of the law in *R v Assistant Record of Kingston-Upon-Hull; ex parte Morgan*[16] was that:

> [I]n the crime of incitement ... it matters not that no steps have been taken towards the commission of the attempt or of the substantive offence. It matters not, in other words, whether the incitement had any effect at all. It is merely the incitement or the attempting to incite which constitutes the offence.

15. What does matter is that the conduct or course of conduct urged would, if it had been acted upon as the inciter intended, amount to the commission of an offence. This is the accepted position in Australia.[17] The act incited must be one which, when done, would amount to the commission of an offence by the person incited.[18]

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[13] Explanatory Statement, Criminal Code Bill 2002 (ACT) at 26; Explanatory Memorandum, Criminal Code Bill 1994 (Cth) at 38.
[14] *R v Higgins* (1801) 2 East 5; 102 ER 269.
[15] See e.g.: *R v Claydon* [2006] 1 Cr App R 20; *R v Fitzimaurice* [1983] QB 1083; *R v Whitehouse* (1977) 65 Cr App R 33; *Walsh v Sainsbury* (1925) 36 CLR 464 at 476 (Isaacs J); *R v Shephard* (1919) 14 Cr App R 26.
[16] [1969] 2 QB 58 at 62.
[17] *R v Zhan Yu Zhong* (2003) 139 A Crim R 220; *R v Dimozantis* (1991) 56 A Crim R 345; *Walsh v Sainsbury* (1925) 36 CLR 464 at 476 (Isaacs J).
[18] See, e.g.: *R v Whitehouse* (1977) 65 Cr App Rep 33 in which the Court of Appeal allowed an appeal against the defendant's convictions on two counts of inciting his 15 year old daughter to commit incest with him, on the basis that the defendant did not incite any offence because a girl under the age of 16 could not be convicted of an offence by permitting a man to commit incest against her.

16. In other words, the substantive offence incited need not actually be committed: liability for incitement arises prior to criminal harm being caused. Incitement is, like attempt and conspiracy, an "inchoate" or "preliminary" offence.[19] A person "may 'incite' or 'urge' a particular person or generally, but, the 'incitement' or the 'urging' once proved, the offence is completed".[20] Inchoate offences are typically contrasted with substantive offences that result in an actual harm.

"Inciting to procure" at common law

17. There is doubt amongst commentators about whether it is an offence at common law to incite another person to aid, abet, counsel or procure an offence.[21] The same commentators, however, recognise that a person may be guilty of inciting another to incite a third person to commit an offence.[22] Gillies notes in particular that inciting another to commit an offence as an accessory may be an offence "on the basis that if the incitee acts, he or she will by virtue of the doctrine of accessoryship, be deemed to commit any such offence as is ultimately committed".[23] The appellant cannot otherwise find any cases directly on point.

18. The question of whether there could be an incitement to procure did arise in *Walsh v Sainsbury*[24] in the context of s 7A of the *Crimes Act 1914* (Cth),[25] but the matter was not satisfactorily determined and it does not appear to have been considered since. There were two charges in issue. The first – the Morris charge – alleged that the appellant had urged one Morris to strike. The other – the O'Neill charge – alleged that the appellant had incited one O'Neill to counsel a union to strike. The Court delivered a range of opinions on the O'Neill charge. Chief Justice Knox and Starke J decided there was insufficient evidence to support the charge, and it was unnecessary to determine the question whether the acts alleged constituted an offence.[26] Justice Higgins held that neither charge could be made out, as striking single-state industrial dispute was not an offence, but also agreed with Knox CJ and Starke J that the evidence on the O'Neill charge was insufficient, without adverting to the issue of whether the acts could constitute an offence in any

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[19] Definitions include: Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 609; J W Cecil Turner, *Russell on Crime*, vol 1, 12th ed (1964) at 172-173; Peter Gillies, *Criminal Law*, 4th ed (1997) at 661; Andrew Ashworth, *Principles of Criminal Law*, 5th ed (2006) at 444; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, 3rd ed (2010) at 443.

[20] *Walsh v Sainsbury* (1925) 36 CLR 464 at 476 (Isaacs J). In a preceding sentence in the same passage Isaacs J refers to incitement contrary to s 7A of the *Crimes Act 1901* (Cth) as a "new and substantive offence". His Honour might best be understood as stating that incitement is a new statutory offence *of itself* rather than it is not an inchoate offence.

[21] See e.g.: Gillies, *Criminal Law*, 4th ed (1997) at 665-666; Smith and Hogan, *Criminal Law* (Butterworths, 6th ed, 1988) at 255. The case often cited in support of the proposition that it is not an offence is *R v Bodin and Bodin* [1979] Crim L R 176 where a single judge concluded "*despite the lack of authority*, that it is not a crime to incite someone to be an accessory before the fact to a crime": at 177 (emphasis added).

[22] Gillies, *Criminal Law*, 4th ed (1997) at 666; Smith and Hogan, *Criminal Law* (Butterworths, 6th ed, 1988) at 255. See also: *R v Sirat* (186) 83 Cr App R 41 at 43 (Parker LJ). This is precluded under the ACT Code: s 47(6).

[23] Gillies, *Criminal Law*, 4th ed (1997) at 666.

[24] (1925) 36 CLR 464

[25] This section dealt with inciting or urging the commission of offences.

[26] (1925) 36 CLR 464 at 473 (Knox CJ and Starke J).

event.[27] Justice Rich agreed that the O'Neill charge should be set aside, but did not address the question.[28] Justice Isaacs was of the view that the O'Neill charge required proof that the substantive offence (the strike) had happened,[29] but his Honour ultimately decided that there had been no strike.

Reports preceding the Model Code

19. In the Interim Report of the Review of the Commonwealth Criminal Law Committee chaired by Sir Harry Gibbs ("the Gibbs Committee Interim Report") the committee observed that:[30]

> [18.14] Under present law, incitement being a distinct offence [it] is not subject to procedural requirements applicable to the substantive offence: *R v Asst Recorder of Kingston-Upon Hull; ex parte Morgan.*

20. In the same report the committee also observed that:[31]

> [18.49] There would seem to be no reason why the procedural requirements of the substantive offence, such as time limits and consents to prosecution, should not apply to the offence of incitement and the Review Committee so recommends.

21. The committee made a recommendation to the same effect.[32] It also made similar recommendations with respect to attempts[33] and conspiracy to commit summary offences.[34]

22. In its Interim Report the committee also noted 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", rejecting a contrary conclusion from the UK Law Commission.[35] The committee's recommendation was not subject to further comment in either the subsequent MCCOC reports[36] or the relevant explanatory memoranda.

23. Leaving discussion of the term "urging" and related terms to one side, the substance of the conceptual changes recommended to the common law offence of incitement were that

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[27] (1925) 36 CLR 464 at 487 (Higgins J).
[28] (1925) 36 CLR 464 at 488 (Rich J).
[29] (1925) 36 CLR 464 at 476-478 (Isaacs J).
[30] Attorney-General's Department, 'Review of Commonwealth Criminal Law – Principles of Criminal Responsibility and Other Matters' (Interim Report, July 1990) at p 234.
[31] Interim Report at p 242.
[32] Interim Report at pp 249-250, recommendation (h) to [19.3].
[33] Interim Report at p 349, [32.1](b)(iv).
[34] Interim Report at p 428, [49.1](p)(iv).
[35] Interim Report at p 240-241, [18.37]-[18.40].
[36] 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) ("MCCOC Discussion Draft"); Criminal Law Officers Committee of the of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility,* Final Report (December 1992) ("MCCOC Final Report"). The "CLOC" was later renamed the "MCCOC": *The Queen v LK* (2010) 241 CLR 177 at [53].

the procedural requirements of the substantive offence incited apply to the offence of incitement and that it should be an offence to incite to procure another person to commit a substantive offence. Plainly, the first recommendation was adopted. The appellant contends the second recommendation was also adopted in the Model Code, as is argued below. It was not recommended that the other key aspects of the offence should be altered in the Model Code: that it is inchoate; that impossibility is not a defence;[37] and that it is completed when urging with the requisite intent happens. The MCCOC Final Report did recommend, however, that "it should not be possible to be guilty of inciting to incite, inciting to conspire, or inciting to attempt".[38] This was reflected in the Model Code, to which the appellant now turns.

Incitement under the ACT Code

24. Section 47 of the Criminal Code relevantly provides that:

> (1) If a person urges the commission of an offence (the ***offence incited***), the person commits the offence incited.
>
> ... [Differential penalties are set out.]
>
> (2) However, the person commits the offence of incitement only if the person intends that the offence incited be committed.
>
> (3) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of incitement to commit the offence.
>
> (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.

25. Section 47 appears in Part 2.4 of the ACT Code. This part, although entitled "Extensions of criminal responsibility", contains two sorts of provisions:
    - Those creating discrete (and inchoate) offences, namely the offences of attempting to commit an offence (s 44); the offence of incitement (s 47); and the offence of conspiracy (s 48); and
    - Provisions providing for modes of proof of substantive offences, namely complicity and common purpose (s 45), joint commission (s 45A), and commission by proxy (s 46).[39]

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[37] Cf Gibbs Committee Interim Report at pp 235-236, [18.17]-[18.18].
[38] MCCOC Final Report at p 95, [404.4].
[39] These provisions are "a means whereby persons who knowingly instigate, encourage or assist another to perpetrate an independent offence are made liable for this offence along with the perpetrator": Gillies, *The Law of Criminal Complicity* (1980) at 7, cited in Court of Appeal at [22] (Murrell CJ).

26. These extensions of criminal responsibility are framed in a manner complementary to Part 2.2 of the ACT Code, the Commonwealth analogue of which was considered by the Court in *The Queen v LK*.[40] Part 2.4 is designed to "avoid uncertainty"[41] with respect to the operation of these modes of proof and offences.

27. Section 47(1) is the "law that creates the offence" of incitement.[42] Like s 11.5(1) of the Commonwealth Criminal Code ("the Commonwealth Code") discussed in *The Queen v LK*, s 47(1) "reads naturally as the law creating the offence".[43] It criminalises a particular act, namely, urging the commission of an offence (here, kidnapping).

28. Section 47(1) states a single physical element – urging – which is "an act", i.e. conduct, which attracts the default fault element of intention.[44] There are two other requirements for the offence of incitement to be made out: what is urged must be an offence (this is implicit in s 47(1)); and the inciter must intend that the offence incited be committed (s 47(2)). It is submitted that these two requirements are epexegetical of what it is to incite another person, just as the requirements of paragraphs (a) and (b) of s 11.5(2) of the Commonwealth Code were epexegetical of what it is to conspire with another person within the meaning of s 11.5(1) of the Commonwealth Code.[45] Neither of these two requirements appears to be the specification of an element of the offence.[46]

29. It follows that to prove the offence of incitement the prosecution must prove that:
    a. The accused urged another person (or others) to commit an offence;
    b. The accused engaged in this conduct intentionally (default fault element);
    c. What was urged amounted to an offence; and
    d. The accused intended that the offence incited be committed.

30. Like conspiracy (s 48(5)(a)) and attempt (s 44(4)(a)), a "person may be found guilty of incitement even though it was impossible to commit the offence incited": s 47(4). Given the inchoate nature of the offence of incitement created by s 47(1) it is clear that no 'condition subsequent', in particular the requirement for the commission of a substantive offence, can be read into the ACT Code offence of incitement.

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[40] (2010) 241 CLR 177 at [99]-[102], [125]-[127].
[41] (2010) 241 CLR 177 at [127].
[42] Cf. ACT Code ss 11 and 12. "Create" is defined at p 213 of the Dictionary to the ACT Code: "a law creates an offence if it directly or indirectly creates the offence or directly or indirectly affects its scope or operation."
[43] (2010) 241 CLR 177 at [131].
[44] ACT Code ss 13 and 22(1).
[45] (2010) 241 CLR 177 at [133].
[46] Cf. (2010) 241 CLR 177 at [133]. See also: *The Queen v LK* at [138] where the plurality found that the requirement in s 11.5(2)(c) of the Commonwealth Code that the accused and one other party to the agreement must have committed an overt act was "the prescription of a factual matter as a condition of guilt" rather than an element of the offence of conspiracy. In *Milne v The Queen* (2014) 252 CLR 149 at [13] this Court, in dealing with s 400.3 of the Commonwealth Code, left open the question whether an "element of intention" stated in s 400.3(1)(b)(ii) "should be characterised as a fault element or otherwise".

31. The appellant now turns to consider the four issues identified above at [11].

(i) Is inciting to procure an offence?

32. The appellant respectfully submits that Wigney J's reasoning on this question[47] – excluding his Honour's reasons with respect to "limitation or qualifying provisions" – is to be preferred to that of Murrell CJ. The Chief Justice relied too heavily on irrelevant common law and impermissibly introduced ambiguity that was not otherwise apparent in the terms of the ACT Code.[48] The verb "urges" in s 47(1) was selected after consideration of various statutory definitions of incitement.[49] The enacted provision does not use terms that had an established meaning under pre-existing law,[50] rather it creates an offence independent of the various statutory or common law tests in force throughout Australia and in the UK at the time of enactment.

33. Moreover, the Chief Justice's reliance on English authorities addressing the issue as to whether there is an offence of *conspiring* to aid and abet[51] failed to reflect the fact that those decisions concerned the operation of specific statutory provisions. As Wigney J noted,[52] s 47(6) specifically provides that s 47 does not apply to other inchoate offences in the ACT Code, including itself. Thus it is not possible to incite an attempt or a conspiracy, or to incite an incitement. There is, however, no bar in the ACT Code or elsewhere to charging incitement in circumstances where the person incited would, if he or she were to act in the manner urged, be taken to have committed an offence by virtue of s 45(1). The ACT Code can therefore be said to provide for incitement of a substantive offence proved through a statutory extension of criminal liability but not for incitement of other inchoate offences. This is the only relevant limit with respect to what can be incited.[53]

34. In contradistinction, s 44(10) of the ACT Code (and its Commonwealth counterpart)[54] preclude reliance on the offence of attempt to establish liability for an offence that would be taken to have been committed by virtue of s 45. Where another inchoate offence such as attempt is explicitly precluded from applying to offences taken to have been committed by virtue of s 45, it may readily be inferred that the legislature did not intent to extend that restriction to the offence of incitement under s 47.

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[47] Court of Appeal at [87]-[108] (Wigney J).
[48] Cf. *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 309.
[49] Explanatory Statement, Criminal Code Bill 2002 (ACT) at 26; See also Explanatory Memorandum, Criminal Code Bill 1994 (Cth) at 38.
[50] Cf. *R v LK* (2010) 241 CLR 177 at 220.
[51] Court of Appeal at [34]-[35].
[52] Court of Appeal at [93].
[53] Cf. Court of Appeal at [32]-[33] (Murrell CJ]. While the need to limit inchoate offences was discussed in the Gibbs Committee's Interim Report at pp 240-241 the MCCOC Final Report recommended at [404.4] only the limits that are now ss 44(10) and 47(6).
[54] See also: *Criminal Code Act 1995* (Cth) s 11.1(7) which provides that "It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose)...".

35. Further support for the proposition can be gained from the fact that it is consistent with a recommendation of the Gibbs Committee that any model legislation clarify that it is an offence to incite an aider, abettor or procurer of a crime.[55] It is noted that the Gibbs Committee considered it "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", and ultimately that any technical grounds for denying such an offence do "not seem sufficient reason to refrain from making such incitement subject to criminal sanction".[56]

10 36. It must be said there are clear reasons of public policy which support this conclusion. The 'Mr and Ms Bigs' of crime will often seek to distance themselves from the commission of crime through the use of intermediaries. In the case of incitement, there is no moral difference between the position of an inciter who directly incites another to commit a crime, and an inciter who incites another to procure the commission of a crime. Indeed, there may be practical reasons for the inciter to adopt that approach, as there were here.

37. The committee's recommendation was not subject to further comment in either the subsequent MCCOC reports or the relevant explanatory memoranda. The Chief Justice
20 found it significant that the recommendation for explicit clarification was not adopted.[57] Wigney J took a contrary view.[58]

38. The approach taken by Wigney J is to be preferred as the position taken by the Chief Justice conflated two issues: whether the recommended statutory clarification was considered necessary and whether the legislature wished to limit the scope of incitement. The Chief Justice considered a reference in the MCCOC Final Report to the necessity of there being "some limit on preliminary offences"[59] to warrant a construction that precluded an offence of inciting a person to procure a substantive offence. This analysis failed to acknowledge that the limit referred to was a reference to preventing the offence
30 of inciting another inchoate offence.[60] The legislature explicitly created that restriction, however it did not enact any such limitation with respect to accessorial liability under s 45.

39. The expression "taken" in s 45(1) means "deemed".[61] In other words, in the event that a person *procures* an offence they are deemed to have committed the substantive offence that has been procured. The respondent was charged with inciting kidnapping; that is, that he urged the commission of an offence intending that acts would be done that would

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[55] Gibbs Committee Interim Report at [18.38].
[56] Gibbs Committee Interim Report at [18.38]. (It does not appear that the MCCOC dealt with this issue.)
[57] Court of Appeal at [30]-[33].
[58] Court of Appeal at [98].
[59] Court of Appeal at [32]-[33], citing MCCOC Final Report at [404.4].
[60] Gibbs Committee Interim Report at pp 240-241; MCCOC Final Report at [404.4].
[61] *Hookam v The Queen* (1994) 181 CLR 450 at 458-459 (Deane, Dawson and Gaudron JJ); *R v Hughes* (2000) 202 CLR 535 at [23]-[24].

result in the commission of an offence.[62] As such, the respondent was not merely urging Powell to procure a "hitman" generally, but urging the commission of a substantive offence, namely kidnapping. If Powell had done what was urged of him he would have, in fact, procured the commission of the substantive offence by another person.

(ii) When is the offence of incitement committed?

40. The appellant submits that the offence of incitement is committed at the time when the urging is done, accompanied by the accused's intention that the offence incited be committed. Justice Wigney's conclusion that "a person can be charged with an offence of incitement"[63] but "cannot be convicted ... where the offence incited is alleged to be an offence of procuring ... if, as events transpire, the third person does not ultimately commit the substantive offence"[64] is contrary to principle and unsupported by authority. It is unsustainable because it introduces uncertainty into the law by separating the ability to charge a person from their liability to be found guilty of the offence with which they are charged. It is inconsistent with the inchoate nature of the offence of incitement by making liability subject to the happening of a condition subsequent, i.e. the actual procuring of the substantive offence.

41. Some examples will suffice to illustrate the difficulty with Wigney J's position. On his Honour's analysis:

- If A incites B to procure C to murder D, and D is murdered by C, B will be "taken to have committed" murder because they procured the "commission of the offence by" C.[65] On Wigney J's analysis, A "can be charged"[66] with incitement at the time of the urging, but A "cannot be convicted"[67] until C commits the murder.
- If A incites B to procure C to murder D, but B decides it would be easier to murder D themselves, A would not be liable because C did not "ultimately commit the substantive offence".[68]
- If A incites B to procure C to murder D but C is unsuccessful and only inflicts grievous bodily harm on D, A would not be liable because a "limitation or qualification on liability for the offence incited was not only that [B] procured [C] to [commit murder], but that [C] in fact committed the offence incited".[69]

42. These scenarios using Wigney J's analysis demonstrate the absurd results that flow from contradicting the inchoate nature of incitement and ignoring the coincidence of A's urging and intent that the murder be carried out as the point at which the offence of incitement is completed.

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[62] Court of Appeal at [103] (Wigney J).
[63] Court of Appeal at [85].
[64] Court of Appeal at [86].
[65] Section 45(1).
[66] Court of Appeal at [85] (Wigney J).
[67] Court of Appeal at [86].
[68] Court of Appeal at [86].
[69] Court of Appeal at [112] (Wigney J).

(iii) Are ss 45(2)(a) and (3) limitations or qualifying provisions?

43. Section 47(5) of the ACT Code provides that:[70]

> Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence.

44. It is submitted that Wigney J erred by:
    - Treating "limitation or qualifying provision" as a compound expression (and as a result treating them synonymously);[71] and
    - Interpreting s 47(5) so that s 45(2)(a) and (3) limited or qualified the offence of incitement.[72]

45. It is submitted that "limitation" and "qualifying provision" are separate concepts; that a "limitation" is apt to refer to a temporal limitation and that "qualifying provisions" are apt to refer to provisions which cast an evidential burden upon an accused seeking to rely on an exception, exemption, excuse, qualification, or justification provided by the law creating the offence. Sections 45(2)(a) and (3) are neither limitations nor qualifying provisions for the offence of kidnapping.

46. The expressions "defence", "procedure", "limitation", and "qualifying provision" are not defined in the ACT Code. Each has a long history in the common law and should be understood as having its established legal meaning, subject to statutory amendment.[73] From this entirely orthodox approach to interpreting the ACT Code it follows that each word is to be read separately.

Common law meanings

47. To explain the conclusion this approach leads to, the appellant first turns to the meaning of these words at common law.

"Defence"

48. In their Interim Report the Gibb's Committee noted that at common law distinctions had been drawn between "justifications" and "excuses" and that:[74]

> [11.6] ... There is no reason to perpetuate the distinction drawn by the [State] Codes between authorisation, justification and excuse. In providing for a defence it is better to declare directly that a person is not criminally responsible, or not to be found guilty, in the circumstances described in the provision.

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[70] Identical provisions exist in the ACT Code with respect to attempt (s 44(7)) and conspiracy (s 48(8)) and in the Commonwealth Code; attempt (s 11.1(6)), incitement (s 11.4(4)) and conspiracy (s 11.5(7)).
[71] See e.g.: Court of Appeal at [111]-[112].
[72] Court of Appeal at [113]-[115].
[73] *The Queen v LK* (2010) 241 CLR 177; *Agius v The Queen* (2013) 248 CLR 601 at [32]; *Handlen v The Queen* (2011) 245 CLR 282 at [5]; *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 at [29].
[74] Gibbs Committee Interim Report at pp 124-125.

49. This is an accurate summary of the common law meaning of "defence", although the caution sounded by the plurality in *CTM v The Queen*[75] should be kept in mind. The common law distinguished between provisions defining an offence which included a defence, and provisions defining an offence which did not, a distinction which raises fundamental questions of the onus of proof.[76] In the first case, the onus is on the prosecution to disprove the defence beyond reasonable doubt. An example is honest and reasonable mistake with respect to s 233B of the *Customs Act 1901* (Cth), considered in *He Kaw Teh v The Queen*.[77] In the latter case, the onus is on the defendant to prove the defence on the balance of probabilities. An example is insanity, considered in *The Queen v Falconer*.[78]

"Procedure"

50. The common law recognises a distinction between procedural law and substantive law. In *John Pfeiffer Pty Ltd v Rogerson*[79] this Court adopted Mason CJ's summary of a procedure or procedural law from an earlier decision: "rules which are directed to governing or regulating the mode or conduct of court proceedings".[80] These rules include rules about "the admissibility of evidence and the effect to be given to evidence".[81] They would also include rules governing the election for a judge alone or a jury trial, such as s68B(4) of the *Supreme Court Act 1933* (ACT). Section 68B(4) excludes trials for, inter alia, various scheduled sexual offences from being tried by a judge sitting alone. Were an indictment laid alleging the incitement of a scheduled sexual offence, s 47(5) would operate to exclude the accused from electing a judge alone trial.

"Limitation"

51. In *John Pfeiffer Pty Ltd v Rogerson* this Court held that "the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure".[82] This reflects the common law meaning of limitation: a temporal limitation on the availability of a right or remedy. An example of a relevant limitation is s 192(1)(a) of the *Legislation Act 2001* (ACT). A prosecution alleging the incitement of a substantive offence punishable by less than six months imprisonment would, by virtue of s 47(5), need to be commenced within 12 months of the incitement.

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[75] (2008) 236 CLR 440 at [6].
[76] See e.g.: *The Queen v Khazaal* (2012) 246 CLR 601 at [8] (French CJ); *Woolmington v Director of Public Prosecutions* [1935] AC 462.
[77] (1985) 157 CLR 523 at 545-546 (Gibbs CJ, Mason J agreeing), 582 (Brennan J) and 592-593 (Dawson J).
[78] (1990) 171 CLR 30 at 63 (Deane and Dawson JJ), at 70 (Toohey J), at 82 (Gaudron J). While the appeal turned on ss 23 and 27 of the Criminal Code (WA) the Code incorporated the common law of insanity: e.g. at 82 (Gaudron J).
[79] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [97]-[98] and the authorities cited there.
[80] (2000) 203 CLR 503 at [99] citing *Stevens v Head* (1993) 176 CLR 433 at 445 (Mason CJ).
[81] *Rodway v The Queen* (1990) 169 CLR 515 at 521.
[82] (2000) 203 CLR 503 at [100]; cf *Rodway v The Queen* (1990) 169 CLR 515 at 518-519.

"Qualifying provision"

52. This phrase does not appear to have a direct analogue in the common law. The closest related concept appears to be a qualification. As a matter of ordinary English meaning, a thing that is "qualifying"[83] another thing is properly described as a "qualification"[84] of the latter thing. It is therefore submitted that the expression "qualifying provision" is best understood as a provision stating a qualification. The words are, in effect, a drafting device to pick up provisions stating qualifications as that term is understood in the common law. In *Dowling v Bowie* Dixon CJ stated:[85]

> ...the common law doctrine [is] that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification.

53. The application of this doctrine turns on "considerations of substance".[86] The doctrine now finds expression in ss58(3) and 59 of the ACT Code and the related doctrine applying to defences is dealt with in ss58(2) and 59, both of which the appellant addresses below. It is submitted that a provision stating any such exception or qualification or the like that is not a defence, is a qualifying provision.

"Qualifying provision": Reports preceding the Model Code

54. The appellant next turns to the reports that preceded the introduction of the Model Code. As noted above, in its Interim Report the Gibbs Committee observed that:[87]

> [18.49] There would seem to be no reason why the procedural requirements of the substantive offence, such as time limits and consents to prosecution, should not apply to the offence of incitement and the Review Committee so recommends.

55. Incitement was not the subject of further discussion in the Gibbs Committee's Final Report although it was noted, in the context of attempt, that defences should be

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[83] Qualify is a transitive verb the meaning of which includes "3. to modify in some way; limit; make less strong or positive: *to qualify a statement*": *Macquarie Dictionary*, 5th ed (2009) at p 1354. Similarly, "3. modify (statement, opinion), make less absolute or sweeping, subject to reservations or limitation": *The Concise Oxford Dictionary*, 7th ed (1982) at p 843. Adding "-ing" indicates the use of the present participle, i.e., it is used to describe a general rule that is qualified by the operation of the provision at the time the offence is committed.

[84] Qualification is a noun the meaning of which includes "3. the act of qualifying. 4. the state of being qualified": *Macquarie Dictionary* at p 1354. Similarly, "1. Modification, recognition of contingency (*statement with many qualifications*), restricting or limiting circumstances (*hedged with qualifications*), detraction from completeness or absoluteness (*his delight had one qualification*): *The Concise Oxford Dictionary* at p 843.

[85] (1952) 86 CLR 136 at 139-140 (Fullagar and Kitto JJ agreeing).

[86] (1952) 86 CLR 136 at 140.

[87] Interim Report at p 242.

incorporated into this recommendation "in the light of *Beckwith v The Queen*".[88] The term "qualifying provision" was not discussed. Qualifications as understood at common law were discussed in the Gibbs Committee's Interim Report and Final Reports[89] and were mentioned in the recommended bill.[90] The phrase "qualifying provision" did not appear.

56. During the discussion of the offence of attempt the MCCOC Discussion Draft this observation was adopted and it was recommended that the word "defences"[91] be added to the proposed sub-section 404.5 (equivalent to s 47(5)) "to take account of *Beckwith.*":[92]

> *401.5 Rules applicable to substantive offence*
> The Code provides that special rules applicable to the completed offence should also apply to the attempt. The word "defences" should be added to take account of *Beckwith*....

57. The MCCOC Final Report recommended the adoption of a sub-section in nearly identical terms to s 47(5)[93] for attempt, incitement and conspiracy without explaining the meaning of "qualifying provision". The Final Report did refer to exceptions and qualifications and cited, inter alia, *Dowling v Bowie*.[94]

58. The appellant submits that the legislative context leads to the conclusion that the "special rules" which came to be crystallised in the ACT Code as "defences, procedures limitations and qualifying provisions" were special rules which applied to the **substantive offence**, here the offence of kidnapping.

"Qualifying provision": Proof of criminal responsibility under the Code

59. The appellant's position finds further support in the scheme with respect to proof of criminal responsibility, set out in Part 2.6 of the ACT Code. The ACT Code creates legal and evidential burdens of proof:

> ***legal burden***, in relation to a matter, means the burden of proving the existence of a matter.[95]
>
> ***evidential burden***, in relation to a matter, means the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.[96]

60. Part 2.6 provides that the prosecution is subject to legal burdens of proof and must prove them beyond a reasonable doubt, subject to a law providing a different standard of proof

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[88] Gibbs Committee Final Report at p 144-145 citing *Beckwith v The Queen* (1979) 135 CLR 569.
[89] See e.g.: Gibbs Committee Final Report at pp 14-17.
[90] Gibbs Committee Final Report in Annexure A at p 4. "...(3) The rule at common law that ... (b) introduces, by a distinct provision, a matter of exception, qualification or excuse; a person prosecuted for the offence to prove the facts that would establish the exception, qualification or excuse is abolished in relation to the laws of the Commonwealth." The common law rule was to be replaced with a rule requiring an explicit statement of an onus on a defendant before such an onus could be imposed: at p 5.
[91] The Commonwealth Code uses the plural whereas the ACT Code uses the singular.
[92] MCCOC Discussion Draft at p 73.
[93] MCCOC Final Report at p 92.
[94] MCCOC Final Report at p 115-117.
[95] Section 56(3).
[96] Section 58(7).

(s 57). The defence is subject to legal and evidential burdens of proof. A defence legal burden must be discharged on the balance of probabilities (s 60) and an evidential burden is discharged as described above or when "evidence sufficient to discharge the burden is presented by the prosecution": s 58(5). Whether an evidential burden has been discharged is a question of law: s 58(6). Where a defendant discharges an evidential burden about a matter the prosecution has a legal burden of disproving that matter: s 56(2). In *Khazaal v The Queen*[97] the plurality accepted, with respect to the equivalent provisions in the Commonwealth Code, that only "slender evidence" may be required to discharge the evidential burden and considering whether it has been discharged involves taking that evidence at its "most favourable to the accused".[98]

61. One matter about which a defendant assumes an evidential burden is a "qualification". Section 58(3) provides that:

> Subject to s 59, a defendant who wishes to rely on any exception, exemption, excuse, qualification, or justification provided by the law creating the offence (whether or not it accompanies the description of the offence) has an evidential burden in relation to the matter.

62. A provision similar to s 58(3)[99] was considered by this Court in *Chugg v Pacific Dunlop Ltd.*[100] The plurality, using the word "exception" to capture all the terms used in the statute,[101] stated that whether or not a matter was an exception, that is, some matter that "serves to take a person outside the operation of a general rule",[102] was left "to the ordinary process of statutory construction",[103] citing *Dowling v Bowie*. The question to be resolved using that process was "whether there is to be discerned a legislative intention 'to impose upon the accused the ultimate burden of bringing himself within [the exception]'".[104]

63. Section 58(3) reflects a not uncommon "catch-all" legislative provision. It captures a range of concepts that are not, in the technical sense noted in *CTM v The Queen*, defences, but which might be considered matters in the purview of the accused.

Judicial consideration of the provision

64. Provisions corresponding to s 47(5) have received little consideration and nothing which is of particular assistance here.

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[97] (2012) 246 CLR 601.
[98] (2012) 246 CLR 601 at [74] cf at [11]-[12] (French CJ).
[99] Section 168(1) of the *Magistrates (Summary Proceedings) Act 1975* (Vic).
[100] (1990) 170 CLR 249.
[101] "Any exception, exemption, proviso, excuse or qualification...".
[102] (1990) 170 CLR 249 at 257.
[103] (1990) 170 CLR 249 at 258.
[104] Citing *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 599-601. Cf. *Hookam v The Queen* (1994) 181 CLR 450 at 459 (Deane, Dawson and Gaudron JJ), at 462 (Toohey J).

65. *R v Onuorah*[105] considered the corresponding provision under the Commonwealth Code for attempt.[106] There had been a complete substitution of a border controlled drug before an importation of an article into Australia. It was argued that there was an absence of an element of an offence, and this gave rise to a defence, limitation or qualifying provision that applied to the offence within s 11.1(6). Hodgson JA[107] rejected that argument, stating[108]:

> In my opinion, generally, it could not: those expressions in s 11.1(6) are apt to refer to matters extrinsic to the elements of the offence, rather than to the requirement on the prosecution to prove all the elements of the offence.

66. Justice Wigney appeared to doubt the correctness of this opinion.[109]

67. One difficulty with Hodgson JA's analysis is that it treats "limitation or qualifying provision" as though it were a composite expression and provides no analysis of what a "qualifying provision" may be. Further, it must be said that the usefulness of Hodgson JA's distinction between matters extrinsic to the elements of the offence on the one hand and elements of the offence on the other may be doubted. The examples his Honour gives of limitation or qualifying provisions extrinsic to elements of the offence are actually examples of elements, or at least not matters extrinsic to the elements.[110]

68. The appellant submits that a more useful distinction for the purposes of determining what is a qualifying provision is between matters to be proved by the Crown and those in the purview of the accused.

(iv) Are s45(2)(a) and (3) either limitations or qualifying provisions to the offence of kidnapping?

69. Justice Wigney held[111] that ss 45(2)(a) and (3) "provide a limitation or qualification to the operation of s 45(1)". But s 45(1) does not create a discrete offence: there is no offence of "procuring". Section 45(1) is a mode of proof of a substantive offence. Section 45(2)(a) and (3) further condition the mode of proof. For the Crown to establish that an accused has, say, procured the commission of an offence by someone else, it must establish the matters set out in s 45(2)(a) and (3). If it does so, the accused is "taken to have committed" the offence committed by that someone else. Section 45(2)(a) and (3) are not "qualifying provisions"; they are not matters on which the accused bears an evidentiary onus. They are matters for which the Crown bears the onus at all times.

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[105] (2009) 76 NSWLR 1.
[106] Section 11.1(6).
[107] The other members of the Court all agreed with Hodgson JA.
[108] (2009) 76 NSWLR 1 at [35].
[109] Court of Appeal at [113].
[110] In *TAN v The Queen* (2011) 216 A Crim R 535 at [34] Redlich JA referred to Hodgson JA's analysis without apparent approval or disapproval.
[111] Court of Appeal at [113].

70. Section 47(5) is plain: it is only qualifying provisions which apply to the substantive offence (here, kidnapping) that apply to the offence of incitement to commit the offence (here, incitement to kidnap). The law reform process that led to the ACT Code, set out above, confirms this view: s 47(5) (and s 44(7) and s 48(7)) embody the principle that "special rules" that apply to the substantive (or completed) offence also apply to the inchoate offences created in Part 2.4.

71. In the present matter, the respondent incited the substantive offence of kidnapping. It may be accepted that Powell was not liable for procuring kidnapping by of virtue s 45(1) because the substantive offence contrary to s 38 of the *Crimes Act 1900* (ACT) was not committed. However, that fact is irrelevant to whether or not the respondent was liable to be found guilty of inciting kidnapping. Incitement is an inchoate offence that by its nature does not require a substantive offence to be committed: indeed a person may be "found guilty" of incitement "even if it was impossible to commit the offence incited" (s 47(4)). The respondent's urging may have involved what can be called procuring, but the offence incited, and the offence which the respondent intended be committed, was kidnapping. There being no qualifying provisions applicable to the offence of kidnapping, s 47(5) had no work to do with respect to the respondent's liability for incitement.

Part VII: RELEVANT MATERIALS

72. The relevant statutory provisions are set out verbatim in Annexure A (attached).

Part VIII: ORDERS SOUGHT

73. The following orders are sought:
    (a) The appeal be allowed.
    (b) That the orders of the Court of Appeal be set aside, and the conviction of the respondent on counts 4 and 5 on the indictment dated 24 January 2015 be restored.
    (c) That there be no order as to costs.

Part IX: ORAL ARGUMENT

74. The appellant estimates no more than two hours will be required to present its argument.

Dated: 17 March 2017

Jonathan White SC
Director of Public Prosecutions (ACT)

Margaret Jones
Deputy Director of Public Prosecutions (ACT)