INCITE, URGE AND ENCOURAGE: SECTION 7A AND THE NATIONAL SERVICE ACT

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What would you do if you were asked to break the law? What would your answer be when you were told that you must do so by encouraging other people to break the law? And would it influence your answer to know that the direct object of such transgressions was the achieving of a political hope, the repeal of an Act of Parliament? Two years ago, these questions would have been entirely hypothetical, the subject of energetic discussion and, perhaps, learned discourse.[1] Today, they are vital, and are being put to an increasing number of people. Often, the answer is "yes", action is suited to the will, and prosecuting authorities and the courts are left to cope with the problem, and the controversy. In Australia, the controversy centres upon the Commonwealth National Service Act 1951-1968. Re-introduced in 1964, the operations of this Act were met with immediate opposition. About two years ago, this opposition began to take on methods that involve direct "confrontation" with the provisions of the Act, and led to well-publicised infringements of those sections of the Act which impose penal sanctions,[2] in particular, those sections which concern the obligation of twenty year old males to register for National Service.

Section 10 of the National Service Act empowers the Minister for Labour and National Service to require, by public notice, all male persons who will reach the age of twenty years during a specified period, and who are ordinarily resident in Australia, to register under the Act.[3] Section 11 provides that persons who are liable to register are required to do so within fourteen days of a specified date. In practice, each year is divided into two periods of six calendar months each (January to June, and July to December), a date is specified which falls in the early part of the period, and all young men turning twenty within the period are obliged to register. They do so by obtaining the appropriate form, filling it in and sending it to a National Service Registration Office (s.13). Liability to register, for those

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1 Some of this discussion has been gathered together in Bedau (ed), Civil Disobedience: Theory and Practice (Pegasus, 1969).

2 A cursory glance at the files of any major newspaper covering this period will produce a considerable number of examples. This article is not concerned with the various public order problems which have arisen in the context of demonstrations, moratoriums, and so forth.

3 There are certain exceptions. See s.10 and s.18.

who do not comply with s.11, continues till age twenty-six, or, in some cases, till age thirty (s.12). Under s.48 of the Act, failure to register by a person required to do so, or remaining unregistered while the liability continues, is an offence, punishable by fine. Section 48A provides that if a form, purporting to be a properly completed and submitted registration form, is false or misleading in a material particular, it is an offence, punishable by fine, on the part of the person who signed the form.[4]

It is known that false registration forms in some numbers have been received by the National Service Registration Offices,[5] owing, largely, to the efforts of an Australia-wide campaign by students. It is also known that this campaign was quickly over-shadowed by the announced intention of a number of young men to refuse to register for National Service.[6] The focus of activity moved from encouraging the general public to fill in false registration forms to exhorting nineteen and twenty year olds to refuse to register. Both these activities, that is, filling in false registration forms, and failure to register, involve the commission of offences against the National Service Act. Those who try to persuade others to commit these offences, therefore, find themselves involved not only with the National Service Act, but also with the Commonwealth Crimes Act 1914-1960.

The relevant provisions of that Act are as follows:

> S.5. 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 any law of the Commonwealth or of a Territory, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly.
>
> S.7A(1) If any person—
>
> (a) incites to, urges, aids or encourages; or
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> (b) prints or publishes any writing which incites to, urges, aids or encourages, the commission of offences against any law of the Commonwealth or of a Territory or the carrying on of any operations for or by the commission of such offences, he shall be guilty of an offence. Penalty: Two hundred dollars or imprisonment for twelve months or both.

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4 The limits of this section have not been explored. What, for instance, is a "material particular"? Because the "confrontation" campaign moved swiftly from filling in false forms to not registering at all, this section has not been, to my knowledge, the subject of judicial examination.

5 Evidence of officers of the Department of Labour and National Service, *Edney* v. *Rider and Tully,* Hobart Magistrates' Court, 1st April 1969, (unreported).

6 There is now a significant number of young men who have expressed this intention. See the lists of names in "Peacemaker" June, 1970, and following issues. (The "Peacemaker" is the journal of the Federal Pacifist Council, and has a reputation for accuracy in the presentation of this kind of information—see my remarks, 43 A.L.J. 318, n.19).

Section 5 was one of the provisions of the first Commonwealth Crimes Act in 1914. There have been minor amendments,[7] but it has remained basically unchanged, as has s.7A, which was introduced in 1920 by the Commonwealth War Precautions Act Repeal Act, s.11. The public encouragement of offences against the National Service Act has resulted in a number of prosecutions being brought, some by the Commonwealth, some by private persons, based on the terms of s.7A.

I

The first arrests were made in Melbourne on January 25th, 1969,[8] during the course of a demonstration on the footpath outside the Melbourne Post Office. Copies of a pamphlet entitled "Why Register for National Service" had been distributed to the public. The charges laid were of "inciting" to the commission of offences against the National Service Act, contrary to s.7A(1)(a) of the Crimes Act, and publishing a writing "inciting" to the commission of such offences, contrary to s.7A(1)(b). A similar demonstration, at the same place and involving the same pamphlet, took place on February 1st, 1969; more arrests were made and further charges under s.7A were laid. All those charges were heard at the Melbourne Court of Petty Sessions on March 25th, 1969, and all were dismissed.[9]

In the course of dismissing the charges, the Magistrate, Mr. Griffin, made three rulings on matters relevant to s.7A. First, he held that he was bound to follow the decision of the New Zealand Supreme Court in *Leveridge* v. *McCann*,[10] and therefore attribute to the word "publish" in s.7A(1)(b) a meaning that did not include public distribution.[11] Second, insufficient evidence had been produced to show that witnesses who had been handed pamphlets had obligations under the National Service Act. Third, he found that the pamphlet did incite persons to commit an offence. Yet when the same pamphlet was distributed in Sydney on February 1st, 1969, police refused to take action, indicating their opinion to be that the pamphlet did not constitute an offence under s.7A. Similarly, in Hobart, on March

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7 Crimes Act (1926) s.5; Crimes Act 1960 s.6. Section 7A was amended by Crimes Act 1960 s.9.

8 The first person to be arrested was a student from Tasmania, Nicholas Beams, and the second was a student from N.S.W., Michael Jones.

9 The factual information contained in this article comes from a variety of sources. Some of it is to be found in reported and unreported court decisions. The files of major newspapers covering the period have been used extensively; the "Australian", "Sydney Morning Herald", Melbourne "Age" and "Herald", Hobart "Mercury". The student press contains some information, but it is sometimes unreliable, and vague on matters of detail. Further facts have been obtained by attending court hearings, and by a series of personal interviews with participants—demonstrators, policemen, lawyers. It is not intended to footnote sources of information unless the source is reasonably accessible.

10 [1951] N.Z.L.R. 855.

11 This point was taken on appeal: see *Sullivan* v. *Hamel-Green* [1970] V.R. 156; (1970) 16 F.L.R.1. For discussion of this issue see Part II.

19th, 1969, Commonwealth police were not prepared to take action. How is it that the same document was capable of producing these two opposite responses?

The pamphlet in question is as follows:[12]

"YOU HAVE A CHOICE . . . WHY REGISTER FOR NATIONAL SERVICE? IF YOU ARE OPPOSED TO ANY OF THE FOLLOWING:

* Australia's participation in the Vietnam war, on political or humanitarian grounds.
* The use of conscripts to fight that war, or any other war.
* The kind of selective conscription we have.
* The National Service Act and conscription for military purposes.
* Any kind of war, and hence a standing army.

IF YOU ARE FOR:

* Australia finding its own peaceful and constructive role in Asia and the world.
* The United Nations' Charter and Declaration of Human Rights.
* The right of each nation to choose its own way of life.
* The right of each individual to follow his own conscience.

THEN YOU HAVE THESE ALTERNATIVES . . .

* You can conpromise — forget your principles, take your chances, and accept military conscription . . .
* You can apply for exemption from combatant duties on the grounds of a conscientious objection to killing. This seems better than the first alternative, but you should realise that non-combatants—cooks, medical orderlies, etc., help the troops to kill more effectively and free others for combatant duty.
* You can apply for complete exemption from all forms of military service as a Conscientious Objector. Application forms for exemption are available at Commonwealth Employment Offices and can be obtained with your National Service Registration Form, or any time thereafter. Before submitting your application, seek advice!
* Some people cannot take advantage of this legal provision for exemption because their objection is not to all war, but only to a particular war, e.g. Vietnam. Such objectors may challenge this by appeals to the higher courts, but so far the Government does not regard this kind of objection as sufficient grounds for exemption.

12 It is necessary to set it out in full. There are so few cases on s.7A that it is only by comparison of documents, statements, etc. that any approach to an interpretation of s.7A may be made.

HOWEVER

* Others, believing the whole National Service Act to be unjust, feel they cannot in conscience recognize its validity in any way. They are not willing to take advantage of an escape clause for the individual: They believe that the Government has no right to conscript anyone for military purposes.

FOLLOW THE PRINCIPLES WHICH HAVE GUIDED JESUS, GANDHI, MARTIN LUTHER KING, AND DR BENJAMIN SPOCK

in

DISOBEDIENCE FOR CONSCIENCE
REFUSE TO REGISTER FOR NATIONAL SERVICE

The consequences:

* A fine of 40-200 dollars for failing to register.
* A fine of 40-200 dollars for refusing to attend a medical.
* An additional fine of up to 200 dollars for failing to obey a call-up notice (remitted if gaoled).
* Imprisonment without probation for 2 years if you persist in refusing to obey.

What will you achieve?

You will . . .

* demonstrate your moral responsibility to mankind and maintain your own integrity.
* increase pressure on the Government to repeal the National Service Act.
* show your concern for the Vietnamese people by refusing to become an accomplice to the suffering and destruction being inflicted on them.
* encourage others in the community to start thinking about the consequences of war and conscription.

ABSOLUTE NON-CO-OPERATION WITH UNJUST LAWS IS THE WAY THEY WILL BE CHANGED.

* If you intend not to register, there are people and groups who will actively support you".

The general tenor of the pamphlet is to indicate refusal to register as the only fit and proper response to the obligations imposed by the National Service Act; but it does put forward arguments in support of this, a statement of the penalties which would be involved, and, more important, a list of possible alternative courses of action, which do not involve offences against the Act. It was the placing of refusal to register in the context of a number of lawful alternatives that led

to the police response in N.S.W. and Tasmania.[13] On the other hand, it was the emphasis placed on refusal to register as a viable alternative, and the clear statement "Refuse to register for National Service" which caused Mr Griffin S.M. to hold that the pamphlet constituted an incitement.[14]

The demonstration in Hobart on March 19th 1969[15] was not the first—three arrests had been made on January 28th 1969. Again, the demonstration had taken the form of the public distribution of a pamphlet outside the Hobart office of the Department of Labour and National Service. The pamphlet in question was entitled "Don't Register for National Service", and the following description of its contents is taken from the ruling by Mr Wood S.M.[16]

> "For my purpose, I have divided the pamphlet into three sections. Its general title is 'Don't Register for National Service'. The first section is an argument by the authors of the pamphlet as to why young men should not register for National Service as required, and is also an argument against the present policy of the Commonwealth Government in relation to the war in South Vietnam . . . The second section of the pamphlet suggests three courses of action to persons who may be persuaded by the arguments contained in the first part. One suggested course of action is to bring political pressure to bear to effect a change in the law . . . The second method which the pamphlet advocates is the filling in of false registration forms . . . The third method advocated is for support to an organization which the pamphlet refers to as the 'National Underground' . . . The third section of the pamphlet, which appears on the back of it, sets out the provisions of s.7A of the Crimes Act and bears the names of a substantial number of people who oppose the invocation of s.7A of the Crimes Act in relation to pamphlets such as this".

Mr Wood S.M. held the pamphlet to be capable of constituting an offence under s.7A by its urging the filling in of false registration forms, and to a lesser extent by the general exhortation of its title "Don't Register for National Service". Although the cases in Melbourne were not referred to Mr Wood S.M. in argument on this point, he and Mr Griffin S.M. can be seen to have adopted the same approach—advocacy of an unlawful course of action, even if presented within a context of lawful alternatives, is capable of infringing s.7A. Yet on

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13 This was further emphasised by subsequent events in Hobart on March 19th 1969. About an hour after the demonstration began, copies of a second pamphlet were stapled to the first. This second pamphlet contained no mention of lawful alternatives, was explicit in its urging of the filling in of false registration forms, and, as a consequence, a number of arrests were made. The double pamphlet was given out again in Hobart on March 21st 1969, a further arrest was made, and a number of names were taken by police.

14 The significance of this will be discussed in Part II.

15 See n.13.

16 Hobart Magistrates' Court, April 28th 1969, unreported.

May 29th 1969[17] he held, discussing the pamphlet "Why Register for National Service", that the only statement it contained which advocated unlawful conduct, the words "Refuse to Register for National Service", was a "bland, blank statement unsupported by advice as to how to go about it", and ruled that it did not contravene s.7A. In both series of cases, Mr Wood S.M. found the offences proved,[18] but declined to do more than record the conviction.[19]

There were no further Commonwealth prosecutions until September 14th 1970, when Mr Carl Ingleby was sentenced, in the Melbourne Magistrates' Court by Mr K. J. O'Connor S.M., to a month's gaol. He had been charged with advocating the filling in of false National Service Registration forms in a speech made outside the Melbourne G.P.O. on July 25th 1970. During the period from May 1969 to June 1970 there had been a number of prosecutions brought under s.7A, but by private persons.[20] Most of these prosecutions were brought as a result of arrangements between the informants and the defendants, and were described by the participants as "friendly". An exception to this type of arrangement was the prosecution of the Rev. D. A. Trathen, which was heard on October 29th 1970 in the Central Court, Sydney, before Mr V. MacMullen S.M. The Rev. Trathen had published a letter in the "Sydney Morning Herald" on June 17th 1970, which stated in part:

> "As an ex-serviceman, a private citizen and a man of law and Law, I publicly encourage twenty-year olds, in good conscience and in loyalty to God rather than Caesar, to defy the National Service Act".

On December 7th 1970, he was found guilty of an offence against s.7A (1) (b), and placed on a twelve-month good behaviour bond.

Two successful prosecutions by the Commonwealth, heard by Melbourne Courts, complete the picture for 1970. On December 9th, at the Hawthorn Court of Petty Sessions, Mr N. M. Hunter was found guilty, by Mr Proposch S.M., of urging the commission of offences against the National Service Act. Hunter, a lecturer in mathematics at the Swinburne College of Technology, had signed a document which read in material terms as follows:

> "We the undersigned, being members of the staff of the Swinburne College of Technology, hereby urge, encourage and incite all students of the College due to register for National Service to

17 When charges arising out of the demonstration referred to in n.13 were heard.

18 With one exception. Charges against one of the defendants at the May 29th hearing were dismissed.

19 His general remarks on these two occasions have some significance. He described the first set of prosecutions as a "storm in a tea-cup"; and, in giving judgment on the second set, indicated extreme displeasure with the bringing of serious Crimes Act prosecutions against people who were simply distributing pamphlets in the street. Clearly, he had a less serious view of the contents of these pamphlets than did the Commonwealth.

20 These will be discussed in a further article.

> refuse to comply with the Act by: (a) refusal to register for National Service, (b) disregard any call-up notices, (c) generally impeding the enforcement of the Act. We do this realising it is in direct contravention of section 7A of the Commonwealth Crimes Act".[21]

A number of other members of the staff of the Swinburne College, it is alleged, had also signed the document, and its contents, accompanied by their names, had been published in the student newspaper "Scrag". This issue of that paper was dated July 17th 1970, and would therefore have appeared immediately prior to the commencement of the second National Service registration period of 1970, which began on July 20th.[22] Hunter had been charged, not only with the "urging" offence under s.7A(1)(a), but also with an attempted "urging" offence, under s.7A(1)(a) in conjunction with s.7, and fined $50. An appeal is pending against this decision, and it is therefore possible that the hearing of prosecutions against the other alleged signatories will be held over until that appeal is determined.

A few days later, on December 17th, two charges against Mr J. Crew, managing director of the Melbourne newspaper "Sunday Observer", were heard by Mr R. W. Smith S.M. in the Port Melbourne Court of Petty Sessions. He was charged with two offences under s.7A(1)(b), publishing a writing which incited the commission of offences against the National Service Act, arising from two editorials which appeared in the "Sunday Observer" on June 21st 1970, and November 1st 1970. The relevant parts of these editorials read as follows:

> "The Government, he said, was likely to repeal the Crimes Act clause which made it an offence to incite youths to disobey National Service laws.
>
> A grand attitude: Never hit anyone who is likely to hit back.
>
> After all who is doing the inciting? Powerful people like Dr Jim Cairns and the Victorian ALP executive. Powerful enough to strike back.
>
> It would be embarrassing to put them in jail. But it's so easy to lock up a few 20-year-olds?
>
> Strike back yourselves, young men. The only way to defeat conscription, apart from a change of Government, is for enough of you to defy it".[23]

> "REFUSE
> TO BE
> DRAFTED
>
> 'Strike back yourselves, young men. The only way to defeat conscription, apart from a change in Government, is for enough of you to defy it'.

21 *Corfield* v. *Hunter,* transcript p. 3.
22 Commonwealth Gazette, July 9th 1970.
23 "Sunday Observer", June 21st 1970, p. 2.

> Four months ago the *Sunday Observer* said this in an editorial. We meant, of course, that young men should refuse to register for National Service.
>
> This call has been echoed throughout the nation. People of conscience have urged an end to the immoral law that has been sending Australia's young men to be killed or mutilated in an obscene, worthless war.
>
> So what does the Government do to those who defy the law which says you can't urge people to refuse to be conscripted?"[24]

In finding Crew guilty of the charge relating to the editorial of June 21st, Mr Smith S.M. rejected a suggestion that it had been worded in a way that made it too general to be capable of referring specifically to the National Service Act. But he regarded the editorial of November 1st as a reporting of past incitements, and therefore not within the terms of s.7A(1)(b). Mr Crew has also indicated his intention to appeal from this decision.

Any attempt to understand the nature of the offences contained in s.7A must look, not only at those activities which have led to prosecution,[25] but at those which have not.[26] During 1969, private prosecutions were initiated against a number of people in Sydney and Canberra by members of an organisation named the Committee in Defiance of the National Service Act. All those prosecuted had signed a document entitled "Statement of Defiance", and had agreed to the prosecution. The Government had refused to prosecute the signatories to this document,[27] which read, in part:

> "We thus declare our support for young men who, in conscience, decide not to register under the National Service Act and we are prepared to take such action as may be necessary to assist and support them".[28]

On June 14th 1970, the delegates[29] attending the State Conference of the Victorian branch of the Australian Labour Party, unanimously passed a resolution which read in part:

> "Conference expresses its warm approval and supports and encourages all young Australians to refuse to be conscripted to fight in a dirty war in Vietnam".

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24 "Sunday Observer", November 1st 1970, p. 6.

25 I cannot, of course, guarantee that I have been able to uncover every case heard over the last two years. However, I doubt if there are any of legal significance not covered in my review.

26 There have been numerous instances of activities which might have come within the sphere of S.7A. See, for an early example, "Australian", February 6th 1969, for the report of an allegation by the Queensland Minister for Education that pamphlets urging conscientious objectors not to register had been distributed in Queensland schools.

27 See the statement by the Commonwealth Attorney-General, Commonwealth Hansard (H.R.) August 26th 1969, p. 643.

28 From the text of an advertisement, "Australian", July 3rd 1969, inserted by the Committee in Defiance of the National Service Act.

29 Estimated to be from 350 ("Herald" June 15th 1970) to 400 ("Mercury" June 15th 1970) in number.

The delegates later signed a declaration confirming their intention of "defying" the Crimes Act by encouraging young men to "flout" the National Service Act. Although it was reported[30] that the Attorney-General's Department had recommended prosecution, no action was taken.[31]

Following this a number of A.L.P. Members of Parliament (both Federal and Victorian) were alleged to have signed (along with other persons) a statement which appeared in an issue of "Resist"[32] dated October 7th 1970. The statement read:

> "In full knowledge and acceptance of the penalties involved, we the undersigned, pledge sanctuary in the form of shelter, work and sustenance to all young men who courageously defy the National Service Act".

On December 11th, the Attorney-General announced[33] that no action would be taken, indicating in his statement that Commonwealth police had been unable to obtain the evidence necessary for prosecutions to be commenced.[34]

II

The development of the crime of incitement, as a general principle applicable to all crimes, is of comparatively recent origin.[35] It is usually regarded[36] as commencing with the case of *Higgins* in

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30 See e.g. "Mercury", June 18th 1970.

31 The precise reasons for this are unclear. Some remarks made by the Prime Minister, Mr Gorton, at a press conference on June 18th 1970 (reported in all newspapers on June 19th) could be interpreted to indicate that the decision was based on non-legal grounds.

32 "Resist" is an irregular newspaper, published by a Melbourne group, entitled Draft Resisters Union.

33 "Australian" December 12th 1970.

34 Although there was some press speculation (see "Mercury" November 30th 1970) that police had gathered sufficient evidence, it is possible that the statement would not come within the ambit of s.7A. This will be discussed in Part II. The obtaining of evidence in cases, involving the publishing of a statement accompanied by names which are alleged to be those of signatories to the statement, is not an easy task. The police have to produce evidence that the names were in fact signatures to the original document, and were authorised to be published. It is their normal practice (see e.g. *Corfield* v. *Hunter* transcript, pp 8-9, examination of Commonwealth Police Senior Constable Corfield) to ask the persons they interview whether they actually signed the document, and whether they authorised their names to be published. Any admission is given in evidence in any subsequent proceedings. If the interviewed person refuses to answer their questions, the police must then obtain this evidence in other ways. The obvious method would seem to be to obtain the original document. However, such documents seem to have a high casualty rate.

35 Williams, Criminal Law: The General Part, 2nd ed., (1961) p. 609 n.3, is of opinion that this is perhaps not correct. But see the reference to Hall in n.37, infra.

36 See generally: Carter, Criminal Law of Queensland, 3rd ed. (1969) p. 109; Garrow and Spence, Criminal Law, 4th ed. (1962) p. 269; Adams, Criminal Law and Practice in New Zealand (1964) pp. 139, 288; Cross and Jones, An Introduction to Criminal Law 6th ed, (1968) p. 109; Turner (ed), Kenny's Outlines of Criminal Law 19th ed, (1966) p. 100; Turner (ed), Russell on Crime, 12th ed, (1964) Vol. 1 p. 196; Smith and Hogan, Criminal Law, 2nd ed, (1969) p. 148; Gordon, Criminal Law of Scotland (1967) p. 188; Williams, Criminal Law: The General Part, 2nd ed, (1961) ch. 13; Hall, General Principles of Criminal Law, 2nd ed, (1960) p. 571.

1801.[37] Higgins had been convicted at Quarter Sessions of soliciting and inciting a servant "to take, embezzle and steal a quantity of twist . . . of the goods and chattels of his masters"; the case had been taken to the Court of King's Bench on a writ of error, based on the claim that the indictment did not reveal a punishable offence. It was argued on his behalf that, leaving aside specific offences created by statute,[38] there was no general offence of incitement; that he had done no more than indicate a wish or desire to do an evil act; that as the incitement had not been acted upon, it was nothing more than a "fruitless ineffectual temptation," and that the law did not punish intention save, in some circumstances, where it was accompanied by an overt act. None of these arguments was accepted by the Court.[39] The clearest refutation was given by Grose J.[40]

> " . . . an attempt to commit a felony is in many cases at least a misdemeanor . . . an attempt to commit even a misdemeanor has been shown in many cases to be itself a misdemeanor. Then if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a robbery were actually committed the inciter would be a felon. The incitement, however, is the offence, though differing in its consequences, according as the offence solicited (if it be felony) is committed or not".

This is the foundation for the view that incitement developed out of attempt.[41] What Grose J. has done is to classify an incitement as an attempt to become an accessory before the fact.[42] As an accessory before the fact to a felony is treated in the same manner as the principal felon (Higgins had been charged with inciting a felony), the incitement must therefore be classified as an attempt to commit a felony. And as an attempt to commit a felony is punishable as a misdemeanor, so incitement must be punished as a misdemeanor.

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37 *The King* v. *Higgins* 2 East 5, 102 E.R. 269. The historical development is traced by Hall, op. cit. p. 573, n.81. "(1) Talk, unless the harm urged is effected, is not criminal. (2) But as regards the King, treason was deemed to require no such discrimination. Here talk alone is enough to merit torture and execution. (3) Next, as to bribery of officials, subornation of witnesses and the like talk is criminal. But here the talk is thought of independently, and not, as with solicitation, related to other criminality. So, also, conspiracy is regarded exceptionally . . . Also, the interests involved concern public justice—hence, in principle, the King . . . (4) Then in *Scofield's Case* (1784) overt behaviour is held a criminal attempt though purely individual interests are involved. (5) Finally, *The King* v. *Higgins*, dealing with like interests, established the criminality not of overt behaviour but of talk—solicitation here subsumed under attempt".

38 Such an incitement to a soldier to mutiny, offering of bribes to certain persons and officials, suborning of witnesses. In all these instances, specific statutory provision had declared these *particular* incitements to be crimes.

39 Lord Kenyon C.J., Grose, Lawrence and Le Blanc J.J.

40 At 2 East pp. 18-19, 102 E.R. pp. 274-5.

41 Thus tracing its lineage back to the Star Chamber. See n.36, supra.

42 And if the test laid down in *Reg.* v. *Eagleton* (1855) Dears 515, 169 ER 826 were to be used, we would certainly have to agree.

From this, one may take the extension of the ambit of attempt to include attempts to commit misdemeanours as a model for the similar extension of excitement. It was not necessary to take this further step in *Higgins,* but the judgments provide the logical basis for doing so.

The argument that the law punished acts, and not a man's intention, was dealt with by Lord Kenyon C.J.[43] He said:

> "But it is argued, that a mere intent to commit evil is not indictable, without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicition is an act . . ."

As the indictment indicated only that the solicitation was verbal, Lord Kenyon has clearly removed "talk" from the sphere of intention to that of action. He thus retains the validity of the claim that the law does not punish intention by limiting the boundaries of the claim. Verbalisation of intention now pertains to the nature of act, rather than the interior quality of intention.[44]

The corpus of decided cases on the law of incitement is not large.[45] Many of the situations from which prosecutions might have been laid for incitement were swept up by the development of the principles relating to accessories before the fact, or were made the subject of conspiracy charges.[46] The provisions of s.7A have arisen for direct decision in only one Australian case, *Walsh* v. *Sainsbury.*[47] The appellant Walsh had been convicted on two charges, "one alleging that he did unlawfully urge Morris, a person bound by an award of the Arbitration Court, to do something in the nature of a strike: the other that he unlawfully incited O'Neill to counsel the Waterside Workers Federation, an organisation bound by an award of the Arbitration Court, to do something in the nature of a strike. The first information was based upon the Crimes Act 1914-1915, S.7A, coupled with S.6A of the Arbitration Act, and the second information was based upon the same Act combined with SS. 6A and 87 of the Arbitration Act".[48] The nature of S.7A was not dealt with in argument, and the major concern of the case was interpretation of the Arbitration Act. Of the

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43 At 2 East p. 17; 102 E.R. p. 274.

44 Does not this mean that the court of King's Bench in 1801 laid the corner-stone for modern linguistic philosophy?

45 A quick look at the digests will indicate this. The Australian Digest, 2nd ed, vol. 7 has less than half a page (cols 285, 286); while the English and Empire Digest, Blue Band ed, which covers cases on this topic from England, Scotland, Ireland, India, Canada, South Africa and Australia, has just under three pages (Vol. 14 pp. 119-121).

46 The potentialities inherent in conspiracy charges in dealing with encouragement of draft resistance are enormous. An excellent example (albeit from another jurisdiction) is the trial of the Boston Five, discussed in Mitford, The Trial of Dr Spock (1969).

47 (1925) 36 C.L.R. 464.

48 Per Knox C.J. and Starke J., (1925) 36 C.L.R. at pp. 469-470.

five judges, only Isaacs J. dealt with the matters raised by S.7A, and then not in very great detail.[49]

> "Sec. 7A of the *Crimes Act* creates a new and substantive offence. The mere fact that A 'incites to' or 'urges' the commission of an offence or offences against a Commonwealth law is enough to constitute A an offender. He may 'incite' or 'urge' a particular person or generally, but the 'incitement' or the 'urging' once proved, the offence is complete. Withdrawal does not obliterate it, though no doubt it may affect the measure of punishment. But to be itself an offence the 'incitement' or the 'urging' must be to the commission of some 'offence'. If, for instance, A 'incites to' or 'urges' a direct breach of sec. 6 or sec. 6A of the Conciliation and Arbitration Act he would be guilty of an offence whether his incitement or urging were adopted or rejected. That is because what he 'incited to' or 'urged' would, if done, be necessarily an 'offence against a law of the Commonwealth' ".[50]

In this passage, Isaacs J. is indicating a number of questions that must be affirmatively answered before a conviction under S.7A can be obtained. There must, of course, be an incitement or an urging. He makes no attempt to define these terms, (save for the indirect limitations on meaning deriving from the context in which they are used) but it is of note that he seems to be using them as synonyms, rather than as two words expressing two different meanings. Second, that the incitement or urging may be made to a particular person, or to all persons generally; and third, once that is done, the offence is complete, no matter what the subsequent conduct of either party. These are the basic questions that must be asked in any incitement case, but they are by no means the only ones. As has been stated, *Welsh* v. *Sainsbury* is the only case to have considered S.7A,[51] but support for Isaacs J.'s propositions may be drawn from two areas—from a comparison of S.7A with S.5 of the Commonwealth Crimes Act, and from those decisions following on from *Higgins*, dealing with the common law.

However, it will be better to examine this support, not in tracing the development in a chronological way, but by adopting the method used by Isaacs J. himself. That is, the posing of a series of questions which must be answered in any S.7A case. And as I am considering the operation of that section in the context of "National Service Offences", I shall also put those questions which have special application to that type of case.

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49 The headnote to the case indicates Isaacs and Higgins JJ. as dissenting, but this requires some clarification. All five judges were in favour of setting aside the conviction on the second information; Isaacs and Higgins JJ. would have set aside the first as well.

50 (1925) 36 C.L.R. at p. 476.

51 Provisions virtually identical with S.7A are to be found in SS. 2 and 3, Crimes Prevention Act 1916 (N.S.W.).

The questions which must be asked are as follows:

A. To what extent is a S.7A offence independent of the commission of other offences?

B. What are the meanings of the terms used in S.7A to describe the conduct which is forbidden?

C. What degree of communication is involved, and are there any special problems when dealing with National Service cases?

D. What is the nature of the offence in S.7A(1)(b)?

A. *The Independent Nature of the S.7A Offence.*

A charge laid under S.7A must always involve not only S.7A itself, but also some other offence-creating provision of Commonwealth law. Thus, in the cases I am considering, the charge will refer to and incorporate the provisions of S.48 or S.48A of the National Service Act. The acts of the accused are directed towards procuring the commission of an offence by someone else; are those acts alone sufficient?

Isaacs J. himself drew attention to the distinction between S.7A and S.5 of the Commonwealth Crimes Act.[52]

> "That section [S.5], 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".

S.5 refers to persons being "deemed to have committed *that* offence" and being "punishable accordingly",[53] while S.7A refers to being "guilty of *an* offence" and specifies its own penalty. In *Howell* v. *Doyle,*[54] Herring C.J. pointed out that when a person is charged with an offence against S.5, his guilt or innocence of that charge must necessarily depend on the action or inaction of some other person even in situations where that action or inaction is motivated by reasons entirely separate from the counselling which forms the basis of the charge. In *The King* v. *Goldie; ex parte Picklum,* Dixon J. said,[55] speaking of S.5: "It is not a provision dealing with mere incitement independently of the commission of the offence incited".

There is one further consideration. S.5 is concerned with "Any person who aids, abets, counsels or procures . . . ", S.7A with "any person who incites to, urges, aids or encourages". The one word

52 *Walsh* v. *Sainsbury* (1925) 36 C.L.R. at p. 476.

53 As to 'punishable accordingly', see the judgment of Evatt J. in *The King* v. *Goldie, ex parte Picklum* (1937-1938) 59 C.L.R. 254 at p. 271 et. seq.

54 [1952] V.L.R. 128.

55 (1937-1938) C.L.R. 254 at p. 268.

common to both these sets of description of activity is 'aids'; yet in *Howell* v. *Doyle*, Herring C.J. referred[56] several times to 'counselling and encouraging' in such a way as to indicate that he drew no distinction of meaning between these two words. In answering question B I hope to show that the words 'aids, . . . counsels or procures' encompass all those activities which may be described as 'incites to, urges, aids or encourages'. Assuming that this is so, then S.7A will be tautologous and redundant unless it operates in an area sharply distinguished from that of S.5. That distinction must be: S.5 operates only where an offence has been committed, and in *all* such cases, while S.7A can only operate where the offence encouraged etc. has *not* been committed.

The force of this distinction may have significant practical consequences. In a public letter[57] concerning the private prosecutions mentioned in Part 1,[58] Mr A. R. Blackshield stated: 'As it happened, the Court proceedings have also provided a clear-cut answer to the question of whether we infringed the law—though Mr Reaburn is right to point out that convictions based on a plea of guilty would not necessarily settle the question. At the hearing the prosecution produced a witness prepared to testify that he had unlawfully refused to register, and that he had been influenced in his decision by the Statement of Defiance. The point is not that this evidence was available, but that the magistrate refused to hear it. It was unnecessary, he said; it was clear to him that in law (and not merely as a technical result of the plea of guilty) we had committed an offence'.[59]

Yet surely the knowledge that evidence of this sort existed should have led the magistrate to consider it? If the prosecutor could have shown a link between the commission of an offence and the 'Statement of Defiance', would this not point to an infringement of S.5 rather than of S.7A? Would it be an adequate defence to a charge laid under S.7A that someone had been persuaded by you to commit an offence? And if so, how would a prosecutor show that no-one had in fact acted in accordance with your 'incitement'?[60] But of course, these questions are only relevant to the type of fact situation that

56 *Ibid.* at p. 134.

57 'Sydney Morning Herald', November 19th, 1969.

58 Text at notes 27 and 28.

59 Mr Blackshield was at that time Senior Lecturer in Jurisprudence and International Law at the University of Sydney Law School, and one of those who had pleaded guilty to a private prosecution of an offence under S.7A.

60 A considerable number of alleged 'incitements' are made in a way which attracts considerable publicity. Often, such actions are reported in newspapers all over Australia. Would a prosecutor be obliged to take this kind of dissemination into account? Or would this be regarded, by analogy with the *Crew* case (see text at note 24), as a reporting of an 'incitement' rather than an actual 'incitement' in itself? And would this be realistic when one considers that one of the prime motives behind such actions is the achieving of publicity and 'spreading the message' as widely as possible.

usually raises the problem of whether a prosecution should be brought under S.7A or S.5. When only two people are involved, or two small groups of people who have acted in unison, it is vital to discover if an incitement has been acted upon. In such a situation it would be a defence to a charge under S.7A to show that the incitee had in fact been persuaded to commit an offence.[61] It is possible that there is a degree of particularity required by S.5, both as to the specific criminal action to be undertaken, and the person, or group of persons, to be involved,[62] which would preclude the operation of that section in a situation where an accused, say, made a general speech to a crowd. In that type of situation what is important is that there are people who did not act upon the incitement; it would be possible for an offence under S.7A to have been committed if the prosecutor could find only one person who had not so acted. In the 'Statement of Defiance' case the evidence that the magistrate refused to hear would have shown a breach of S.5 *in addition* to a breach of S.7A.

The problem of the relationship between S.7A and S.5 gives rise to a further consideration, one that is inherent in the facts of *Corfield* v. *Hunter*.[63] Hunter was charged with an offence under S.7A(1)(a) ('urging'), and with an offence under S.7, in conjunction with S.7A(1)(a) ('attempting to urge'). The facts were given as follows: 'A bunch of students come into the staff room and said "sign this", several of the lecturers including myself did so'.[64] Now, it is well established that an inciter need not be the initiator,[65] and the signing in that situation could be an inciting or urging of the students who came into the staff room. As Hunter was not charged with any offence which involved the publication of the document (i.e., an offence under S.7A(1)(b)) it is difficult to comprehend the basis of the attempt charge. The magistrate, Mr Proposch S.M., considered it an alternative charge, and it was ultimately struck out.[66] But the facts might well have produced a third result. It could be argued that the students were organizing the commission of an offence under S.7A(1)(b), i.e., the publishing of the document. This offence would only be committed if they received sufficient support; Hunter was part of that support.[67] His offence, therefore, is one of encouraging, not offences against the National Service Act, but offences against S.7A itself. S.7A refers to encouraging, etc., 'the commission of offences against any law of the Commonwealth'. S.7A itself is such a law; therefore, a charge, under S.7A, of encouraging etc. an offence against

61 See *R.* v. *Welham* (1845) 1 Cox C.C. 192.

62 See the discussion in Williams, op. cit. n.36, pp. 362-365; Kenny, op. cit. n.36, pp. 116-119. See also *Lenzi* v. *Miller* [1965] S.A.S.R. 1.

63 See text at notes 21 and 22.

64 *Corfield* v. *Hunter,* transcript, p. 9.

65 *R.* v. *Crichton* [1915] S.A.L.R. 1.

66 *Corfield* v. *Hunter,* transcript, p. 7a.

67 His own statements indicate that he assumed that the document was to be distributed in some way: see transcript, p. 9.

S.7A, is possible.[68] If such a charge were proved, the accused would have committed an offence against a law of the Commonwealth.[69] Hunter might well have been charged on this basis; as might others who sign statements intended to be published by persons who are not signatories.

B. *The Meanings of the Terms used in S.7A.*

In *R.* v. *Higgins*[70] all the judges referred to an 'incitement' as a 'solicitation'. In *The Queen* v. *Forgione*[71] the South Australian Supreme Court was considering S.12(b) of the Criminal Law Consolidation Act 1935-1966 (S.A.), which deals with soliciting, encouraging or endeavouring to persuade to murder. The trial judge had instructed the jury that 'soliciting in its dictionary meaning means no more than urge'.[72] The court was of opinion that this direction may 'have been too favourable to the appellant because the word "urge" might seem to possess an element of vehemence, which in our view is not a necessary ingredient of the word "solicit" '; and then quoted a passage from the judgment of Huddleston B. in *R.* v. *Most.*[73] 'The largest words possible have been used—"solicit"—that is defined to be, to importune, to entreat, to implore, to ask, to attempt to try to obtain; "encourage" which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; "persuade", which is to bring to any particular opinion, to influence by argument or expostulation, to inculcate by argument; "endeavour", and then, as if there might be some class of cases that would not come within those words, the remarkable words are used, "or shall propose to", that is to say, make merely a bare proposition, an offer for consideration'.

It is of note that 'encourage' is defined as 'to incite to'. In *Young* v. *Cassells,*[74] 'incite' is defined as 'to rouse; to stimulate; to urge or spur on; to stir up; to animate', and the authority cited is 'Oxford Dictionary'.[75] Again, it is of note that 'incite' is defined as 'to urge'. An examination of the law dictionaries takes us little further; most are content to indicate simply that incitement is a common law crime

68 A similar situation exists at common law with regard to accessories before the fact: see *Macdaniel,* (1755) 19 St. Tr. 745, Foster 121, 168 E.R. 60; *Rex* v. *Cooper and Wicks* (1833) 5 C. & P. 535, 172 E.R. 1087.

69 At this point the argument moves over into fantasy. Imagine an infinite line of inciters, each one inciting the next in line to incite the next in line to incite the next in line ad infinitum. Provided that at all times all the inciters intended that, if there were to be a last person on the line, he would incite breaches of the National Service Act, then all would be guilty of an offence under S.7A. See also *R.* v. *Bentley* [1928] 1 K.B. 403.

70 (1801) 2 East 5, 102 E.R. 269.

71 [1969] S.A.S.R. 248. Bray C.J., Chamberlain J., and Zelling A.J.

72 Quoted at p. 250.

73 (1881) 7 Q.B.D. 244, at p. 258; quoted at pp. 251-252.

74 (1914) 33 N.Z.L.R. 852, per Stout C.J. at p. 854.

75 The Shorter Oxford English Dictionary, 3rd ed, 1964, vol. 1, defines 'incite' as 'to urge or spur on; to stir up, to instigate, stimulate'.

without defining the term.[76] *Words and Phrases Legally Defined*[77] does no more than quote the passages from *R.* v. *Higgins* and *Young* v. *Cassells* already mentioned. The American dictionary, Radin,[78] defines 'incite' as 'to induce a person to commit a crime' or 'to work on his emotions so that he may commit a crime'. In this, he does the American cases an injustice; the U.S. *Words and Phrases* shows that 'incite' has been defined as 'rouse to action'[79] 'spur or urge on'[80] 'move to action, to stir up',[81] and 'arouse, stir up, urge, provoke, encourage, spur on, goad'.[82] The learned editors of *Hamilton and Addison*[83] indicate that S.7A creates four different groups of offences, based on whether one incites *or* urges *or* aids *or* encourages; while the prosecutions in Hobart[84] were based, with one exception, on a complaint that listed all four activities in the one charge.

There is probably little profit in speculating whether S.7A creates four groups of offences or one; it is of more value to accept that the form of the section clearly points to four groups, and then to ask whether the words involved have separate meanings. If we put aside the word 'aid' for the moment, we can see that the other three ('incite', 'urge' and 'encourage') are all defined in terms of each other. And we may further see that each of the words is as good as the others when it comes to a prosecution; and that none of them (particularly 'incite') has any limited technical meaning. The definition given by Radin seems to be more applicable to 'counsel and procure' than to 'incite'; but, with one qualification, this basic idea seems to be right—some activity which might persuade someone else to commit a crime. The qualification is this: from which point of view do we assess the persuasiveness of the activity? We might find considerable difficulty in using the point of view of the incitee, for surely the best test of persuasiveness would be whether he had committed the crime (and so moved the whole situation over to S.5). Of course, we could ask him, would you have been persuaded were it not for other circumstances (e.g. 'it is a good argument but I am a law-abiding citizen')? But it is the essence of the crime that the inciting need produce *no reaction* at all.[85] If we look back to *R.* v. *Higgins*, we can see that incitement arose from a failed 'counsel and procure', and,

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76 See for example, Jowett, Dictionary of English Law, 1959, Vol. 1; Osborne, Concise Law Dictionary, 5th ed, 1964.

77 2nd ed, 1969, vol. 3.

78 Radin, Law Dictionary, 1955.

79 *State* v. *Diamond* (1921) 202 P. 988.

80 *Commonwealth* v. *Almeida* (1949) 68 A 2d 595.

81 *U.S.* v. *Ault* (1920) 263 F 800.

82 *Commonwealth* v. *Egan* (1934) 173 A 764.

83 Hamilton and Addison, Criminal Law and Procedure (N.S.W.), 6th ed, 1956, at p. 677.

84 See text at notes 15 to 19.

85 *Reg.* v. *Quail* (1866) 4 F. and F. 1076, 176 E.R. 914.

inevitably, most of the subsequent cases involve a similar situation.[86] And even those that do not would involve, surely, some sort of desire on the part of the incitor to persuade someone of something? So, can we not say that it does not matter whether the incitement was persuasive, or might reasonably be persuasive, or might conceivably be persuasive; what matters is whether the incitor intended it to be persuasive? There is no need for him to have any personal connection with or interest in the offence he incites,[87] but he must either intend to persuade or be reckless to the possibility that he might.[88] What cases there are do not approach the question directly. In *R.* v. *Brown*,[89] the defendants advertised in a newspaper for the sale of drugs to procure abortion, and were prosecuted for inciting an offence against S.58 of the Offences Against the Person Act 1861 (U.K.). It was held that if they knew that the drugs were not capable of procuring an abortion, they could not be guilty of incitement. Yet, because of the terms of S.58, a woman who took the drugs because she believed the advertisement, would be guilty of an offence.[90] So the incitor must intend not only to persuade, but to urge an action which he knows will be criminal.[91]

Considerable light is shed on the nature of the offences under S.7A when the idea of an intended persuasion as the basis for incitement is joined with the definitions of 'incite to . . . urge or encourage'. It is an assumption made by many that the word 'incite' has a limited technical meaning. Thus, "Do the four verbs refer to four different offences, or are they a typical lawyers' string of synonyms for one single concept? As soon as we admit that "inciting" is something much stronger than "urging" or "encouraging" (and something quite different from "aiding"), this question becomes important. If four different offences are involved, then quite mild "encouragement" is enough to constitute one of them. If the four words describe one single offence, then each word "takes color from its associates", and "incitement" becomes the key word. In that event, the prosecution has a harder case to prove".[92]

The assumption is that incitement involves a direct request to commit a particular crime or offence, and is reinforced by the knowledge that this is usually the case. So a promise to become an accessory after the fact to certain kinds of offences (as is the statement

86 But not all. The 'National Service' cases under discussion, and *Reg.* v. *Most* (1881) 7 Q.B.D. 244, are examples of different situations.

87 See the discussion by Parsons in 23 Can B. R. 568 on a lawyer's liability for "counselling" crime under the Canadian Criminal Code.

88 See the discussion by Williams, op. cit. n.36 p. 611.

89 (1899) 63 J.P. 790.

90 Williams, op. cit. n.88, discusses a South African case, *R.* v. *Wolff* [1930] T.P.D. 821, which reached a similar conclusion.

91 See also *R.* v. *Welham* (1845) 1 Cox C.C. 192. This proposition is well established in aiding and abetting cases.

92 A. R. Blackshield, "Sunday Review" 8th November, 1970.

published in "Resist", referred to in Part I[93]) would not be regarded as an incitement because it makes no direct persuasive reference to the commission of the offences. But the definitions show that what *cannot* be done is admit that "inciting" is something much stronger than "urging" or "encouraging", that there is no technical limited meaning; and that, as the statement in 'Resist' could be shown to have 'persuasive intention', it is capable of constituting an offence under S.7A. That statement promised that the signatories would do something unlawful, i.e., be accessories after the fact; in the right context it would be possible to commit an offence under S.7A by promising something which was not unlawful.[94]

The use of the word 'aid' in S.7A poses a particular problem. 'Aid' has a clear technical meaning, and is so used in S.5; it covers persons either present at the time of the crime, and persons, whether present or not, who assist at the time of the crime.[95] If an accused has aided the 'commission of offences against any law of the Commonwealth or of a Territory', then he is an aidor and abettor, and is punishable under S.5. It could be argued that 'aid' covers a person who aids the carrying out of an incitement, without actually doing the inciting himself; and in the light of what I have said about S.7A being itself a law of the Commonwealth,[96] this would be possible.[97] But a better explanation might be that the word 'aid' refers only to 'the carrying on of any operations for or by the commission of such offences'. This allows 'aid' to apply to some physical activity, and is in accordance with the technical meaning of the word. Further, there is some difficulty in applying 'incite to, . . . urge or encourage' to this part of S.7A. If the 'operations' are not sufficiently proximate to an offence to constitute an attempt, then there has been no offence 'against any law of the Commonwealth or of a Territory', and therefore no offence under S.7A.[98] If the operations are sufficient to constitute the *actus reus* of attempt, then either the incitor has urged the commission of the full offence, or he has urged activities which lack the *mens rea* to constitute attempt. So, it would seem, only the word 'aid' can

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93 Text at notes 32-33.

94 Further, it is probably enough for the incitor to simply hint at, or refer obliquely to, the crime he has in mind, provided the context of his actions makes it clear what is intended. In the South African case of *R. v. O'Brien* [1914] T.P.D. 287, it was held an incitement to "geweld" (disturbing the peace and security of other persons) for the accused to say, during a railway strike "As long as a man has a right arm to break a plate glass window he need not starve. I won't starve, anyhow".

95 Williams, op. cit. n.36, p. 353; Howard, Australian Criminal Law, 2nd ed, 1970, pp 256-257.

96 See text at n.69.

97 Perhaps this would cover people who rent halls, provide loudspeakers and other services, chair meetings, organise distribution of handbills, and so on: provided they were aware that an incitement was to be made.

98 Save for the possibility of conspiracy: see S.86, Commonwealth Crimes Act 1914-1960. This would involve an incitement to conspire, and therefore "the commission of offences", etc.

apply to 'the carrying on of operations'. The nature of this offence would seem to be analogous to aiding and abetting an attempt, but with one important qualification. If the 'operations' were sufficient to constitute attempt, and as S.7 creates a separate offence (in the same way as does S.7A), the 'aiding' would be a S.5 matter. Therefore, it seems to be possible to use 'aid' the 'carrying on of any operations' in an 'attempt-type' situation in order to avoid the application of the proximity rule.

C. *The Degree of Communication Necessary.*

The essence of the crime of incitement is communication. Thus, '[O]ne may incite persons generally, as in a newspaper article; and the person incited need not be known. Since incitement relates to incompleted conduct, it is immaterial that the words had no effect on the person solicited; but they must have reached his mind. If they do not, there may be a conviction for attempt to incite'.[99] In the normal case the problem is simply one of showing the communication to have existed; different considerations are involved when the act being incited to is one that may be committed by only a limited class of persons. In the first cases referred to in Part I,[100] the Magistrate ruled that it had not been proved that the persons alleged, by the prosecutor, to have been incited had obligations under the National Service Act, and that this was sufficient reason to dismiss the charges. Other aspects of the decision were appealed from,[101] but not that one. The reasons for this would seem to be: before a charge under S.7A(1)(a) could succeed it would have to be shown that the persons incited were persons who were obliged (by S.10 of the National Service Act) to register, under pain of penalty (S.48(1)(a) of the National Service Act) if they did not do so; that this involved proof of the age of such persons, that they were ordinarily resident in Australia, and that they were not exempt in any way from the liability to register. This is complicated by a further problem: a registration period of two weeks duration occurs twice a year (S.10 and S.11, National Service Act), and, apart from certain special cases, liability to register is limited to those periods. The handling of the case seemed to indicate an attitude on the part of the Commonwealth that an offence against S.7A(1)(a) (involving S.48(1)(a) of the National Service Act) could only be committed during these periods.

There are considerable arguments against this attitude; but if we assume that it is correct, there is still one question—would it preclude the possibility of a charge of attempted incitement? The cases which deal with such a charge invariably involve situations where the communication failed to reach its intended recipient. In *Reg.* v. *Rans-*

99 Williams, op. cit. n.36, p. 612.
100 Text at notes 8-12.
101 *Sullivan* v. *Hamel-Green* [1970] V. R. 156; (1970) 16 F.L.R. 1.

ford[102] the accused had written a letter to a schoolboy inciting him to commit an unnatural offence, and the boy handed it unread to the school authorities. It was held that the count in the indictment charging attempted incitement was good. Similarly, in *R.* v. *Krause,*[103] where a letter was not delivered, a count of incitement was struck out, and the case went forward on a count of attempted incitement. Lord Alverstone C.J. offered the tentative opinion that 'communication in a foreign language or communication to a deaf man might not be sufficient'.[104] The common thread in all these situations is that the *physical* aspects of completed communication are missing. What happens when they are present, but for some reason the person incited cannot commit the crime? If the reasoning in *R.* v. *Brown*[105] were applied, an incitor who did not know that the incitee was in a class of persons who could not commit the crime, would be guilty of attempted incitement.

There are several cases involving incitement to commit a crime which could not be committed at the time of the incitement, but could be committed at a later date. In *Parker's Case,*[106] the accused was not an incitor but an accessory before the fact. He 'maliciously and feloniously counselled, commanded, procured and abetted' the murder of a child, before the child was born. It was held that the 'procurement before the birth holden felony continued after the birth, and until the murder was perpetrated by reason of that procurement'. In *Reg.* v. *Banks,*[107] it was held that a conspiracy to murder a child could exist before the child was born, and the jury were directed that the accused could be guilty of incitement to murder on the basis of letters written before the birth. The judge, Quain J. offered to reserve the question of incitement, but the point was not pressed. The issue came before the Court of Criminal Appeal in 1919 in *R.* v. *Shephard.*[108] The incitement was contained in a letter written and delivered during the first trimester of the incitee's pregnancy; and the accused was charged with an offence under S.4 of the Offences Against the Person Act 1861 (U.K.), which required that the incitement should be 'to murder any other person'. It was argued that, at the time of the incitement, there was no 'other person' and therefore no offence had been committed. The Court did not accept this argument.

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102 (1874) 13 Cox C.C. 9.

103 (1902) 18 T.L.R. 238; and in *Reg.* v. *Fox,* an Irish case cited in *Krause* at p. 243, where a letter was delivered by mistake to the wrong person. See also *Reg.* v. *Banks* (1873) 12 Cox C.C. 393.

104 Ibid. at p. 243. The case of *Horton* v. *Mead* [1913] 1 K.B. 154, which is sometimes advanced as authority for the proposition that a solicitation need not reach the mind of the person to whom it is addressed, seems really to be based on a refusal by the Court to accept that this situation existed in fact: see, especially, the judgment of Phillimore J. at p. 158.

105 (1899) 63 J.P. 790.

106 (1560) 2 Dyer 186 a, 73 E.R. 410.

107 (1873) 12 Cox C.C. 393.

108 [1919] 2 K.B. 125.

> 'We must look at the matter from a common-sense point of view . . . All that is essential to bring a case within the section is that there should be a person capable of being murdered at the time when the act of murder is to be committed. If there is such a person then in existence, it is quite immaterial that that person was not in existence at the date of the incitement. Here the child was in fact born alive, so that the event happened upon which the act was to be done.'[109]

The 'event' to which the Court referred was, of course, a *physical* event. Further, all the cases discussed have concerned crimes which any person may commit, behaviour which is prohibited for all persons, prohibitions which are not limited to a restricted class of persons. In *Ex parte Kearney,*[110] the New South Wales Supreme Court considered a charge of incitement to commit a crime which could only be committed by persons who were members of the class 'public officers'. Kearney was prosecuted under the Crimes Prevention Act 1916 (N.S.W.)[111] 'that he did unlawfully incite to commission of crime in that he did incite . . . [H, W and B] . . . who then were and still are public officers . . . to neglect their duty . . .' He was convicted by a Magistrate, and sought a writ of Prohibition. The Full Court unanimously held that H, W and B were not public officers, and thus there was no evidence to support the information. The Court did not consider the possibility that Kearney may have thought H, W and B to be public officers. It can be argued that *Ex parte Kearney* supports the proposition that an offence under S.7A(1)(a) involving an incitement to not register for National Service can only be committed during a registration period, that is, during those times when nineteen and twenty year old young men belong to the class 'liable to register'. This would be to adopt a rigorous 'present tense' approach to the problem.[112] But if it were decided that there is no difference between an 'event' which is physical in nature and an 'event' which involves change in class, the situation would be different. It can be argued that H, W and B would not *progress* into the class 'public officer', but that a young man under the age of twenty will *progress* (by the passage of time) into the class 'liable to register' (unless the National Service Act is repealed). Then we have an 'event' happening 'upon which the act was to be done', as indicated in *R.* v. *Shephard.* Thus, it could be argued that to try to persuade an eighteen year old to not register would be an offence under S.7A, but no offence would be committed in trying to persuade a twenty-one year old. And is this not more in keeping

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109 per Bray, Lawrence and Shearman JJ., ibid. at p. 126.

110 (1917) 17 S.R.N.S.W. 578.

111 See n.51.

112 A similar approach is taken to the question of conscientious objection under S.29A, National Service Act 1951-1968 (Cth). See, Reaburn *Conscientious Objection and the Particular War,* (1969) 43 A.L.J. 317 at p. 324 et. seq.

with the obvious aim of S.7A: prohibit persuasions to break the law in order to prevent breaches that might not otherwise occur.

D. *The Nature of the Offence in S.A7(1)(b).*

The second part of S.7A prohibits the printing or publishing of any writing which incites to, urges, aids or encourages the commission of offences, etc. In tort law, the word publish is defined as 'the making known of the defamatory matter after it had been written, to some person other than the person of whom it was written',[113] and several cases have considered whether the same wide meaning should be given to the use of the word in S.7A. There are several factors which point to the need for such a consideration. First, S.7A itself links publishing to printing by the phrase 'prints or publishes'. Second, S.30F of the Commonwealth Crimes Act[114] refers to 'prints, publishes, sells or exposes for sale or circulates or distributes', which would seem to indicate that the Commonwealth Parliament in 1926 did not regard printing or publishing as involving sale or distribution. The third factor is the New Zealand case of *Leveridge* v. *McCann.*[115] McCann had been charged with publishing a pamphlet likely to encourage the continuance of a declared strike, contrary to Reg. 4(d) of the Waterfront Strike Emergency Regulations 1951 (N.Z.), which declared it an offence if any person 'prints or publishes any statement . . . or other matter . . . likely to encourage . . . the continuance of a declared strike'. The evidence showed that McCann had distributed pamphlets; the Magistrate ruled that distribution was not "publishing" and dismissed the information. After the date of the dismissal, but before the informant's appeal was heard, the Regulation was amended by the addition of the words "or distributes or delivers to the public or to any person or persons or causes to be printed or published or distributed or delivered as aforesaid". In his judgement of the appeal, Fell J. ruled that he should regard the amendment as an "extension of the scope" of the original Regulation, which should therefore be interpreted as not covering distribution. "If distributing also was to be an offence, in my opinion the Regulation should have expressly said so".[116]

It was not argued before Fell J. that the amendment, far from being an "extension of the scope" of the Regulation, was an indication of the legislating body's original intention, an intention which had been thwarted by the Magistrate's decision. *Leveridge* v. *McCann* has been considered by two of the "National Service" cases under discussion, and in neither was it followed. *In Edney* v. *Rider and Tulley,*[117] Mr Wood S.M. ruled that he was bound by *Crowe* v.

113 per Lord Esher M.R. in *Pullman* v. *Hill* [1891] 1 Q.B. at p. 527, quoted in Gatley on Libel and Slander, 6th ed, 1967, p. 111.

114 Which was introduced six years after S.7A, in 1926.

115 [1951] N.Z.L.R. 855.

116 Ibid., at p. 859.

117 Unreported decision, Hobart Magistrates Court, 28th April 1969.

Graham,[118] and that "publish" must include distribution. In *Sullivan* v.*Hamel-Green,*[119] Starke J. ruled that the word "publish" in S.7A(1)(b) was not ambiguous, that it must therefore be given its plain, ordinary, grammatical meaning, and that that meaning was "to make public". He further ruled that S.30F of the Commonwealth Crimes Act could only be relevant to the interpretation of S.7A if that section could be shown to be ambiguous. The likelihood of the ruling in *Leveridge* v. *McCann* being adopted by an Australian court is low. The word "publish" is invariably regarded as including distribution, and Starke J's judgement would seem to preclude any possibility that S.7A (1)(b) was somehow an exception.

In *Edney* v. *Rider and Tulley,* Mr Wood S.M. raised a further factor in the operation of S.7A(1)(b).

> "I do not think that it can be fairly said that the mere fact of handing out this pamphlet to members of the public incites to, urges, aids or encourages the commission of an offence against the law of the Commonwealth. The handing out of the pamphlets by each defendant was done in a quiet and orderly way, unaccompanied by any words of persuasion or exhortation, and, consequently, the effectiveness of the defendants' actions as incitements or encouragements to break the law would depend entirely upon whether the recipient of a pamphlet read it. When one considers the kind of civil liberties we are accustomed to enjoy, I do not think that S.7A(1)(a) can properly be invoked in relation to such a passive action. S.7A of the Crimes Act was inserted into the Act in 1920, and I can find no reported case to indicate that the quiet and orderly distribution of a pamphlet is a breach of S.7A(1)(a) albeit that that pamphlet may contain words inciting to a breach of the laws of the Commonwealth. This may well be the reason why S.7A(1)(b) makes it an offence merely to print or publish any writing which incites to, urges, aids or encourages the commission of offences against any law of the Commonwealth".[120]

The consequence of this is that the offence is complete upon communication of a physical object (leaflet, newspaper, etc.), provided the object contains a written content which would be an offence against S.7A(1)(a) if it were, for example, read aloud. Further, the moment the recipient reads the content, another offence, one against S.7A(1)(a), is completed.

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118 (1968) A.L.R. 524, [1967-68] 41 A.L.J.R. 402; a High Court case concerning an indecent publication. It is of interest to note that the statutory provision under consideration, S.16 of the Obscene and Indecent Publications Act 1901-1955 (N.S.W.), expressly declares that "publishing" is distribution or public exhibition.

119 [1970] V.R. 156; (1970) 16 F.L.R. 1.

120 Op. cit. n.117, pp. 3-4.

There are several cases which decide that if a publication, containing "inciting content", is distributed in such a way as to be likely to come into the hands of those who are capable (i.e. in the class) of committing the crime incited to, then no further proof is necessary to show the offence. The courts seem prepared to assume that the content will have been read by at least some of those for whom it was intended. In *Reg.* v. *Most,*[121] the accused was charged with an offence under S.4 of the Offences Against the Person Act 1861 (U.K.), in that he encouraged and endeavoured to persuade to murder by means of an article written by him and published by him, in London, in a German language newspaper, "Freiheit". The article "exulted" in the murder of the Czar of Russia, and commended it as an example to revolutionaries throughout the world. There was evidence that this particular issue of the paper had been circulated to about 1,200 subscribers. The Court of Crown Cases Reserved had no hesitation in declaring the evidence sufficient to show the offence.

> "There is ample evidence here, not only of circulation to a number of persons, each of whom might be affected, but there is evidence in this case that one person was actually proved to have received the publication . . . I do not think proof of such receipt by a particular person necessary, but if it be necessary, there is evidence of it".[122]

The article "was an encouragement to the public—a solicitation and encouragement to any person who chooses to adopt it".[123] The facts in *R.* v. *Antonelli and Barberi*[124] were almost identical, the only difference being that the incitement to murder the crowned heads of Europe was contained in a pamphlet, not a newspaper. In *R.* v. *Diamond,*[125] a newspaper was again involved. It was "The London Catholic Herald" and the incitement, understandably, was to the murder of the Viceroy of Ireland. In both cases the accused were found guilty.

III

This discussion has been primarily concerned with the law relating to incitement as developed by the common law, and as set out in S.7A of the Commonwealth Crimes Act 1914-1960. Similar law is to be found in each of the State jurisdictions.[126] As has been seen, there are few decided cases, and much of the discussion is necessarily

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121 (1881) 7 Q.B.D. 244.

122 per Grove J. at p. 255.

123 per Huddleston B. at p. 259.

124 (1905) 70 J.P. 4.

125 (1920) 84 J.P. 211.

126 As well as the N.S.W. and S.A. provisions already mentioned (n.51 and text at n.71) see: Tasmanian Criminal Code, S.298; S.4, Crimes Act 1958 (Vic.). In Queensland and Western Australia the equivalent offence would be "attempting to procure" . . . Queensland Criminal Code, S.539; W.A. Criminal Code, S.556. Victoria and South Australia are, of course, common law States.

speculative. But this speculation, I think, raises a particular question, one of policy. The range of activities which might be capable of constituting this crime is very wide; is it too wide? Could incitement be re-defined, and limited to what it is popularly assumed to be—a persuasion involving some direct reference to a specific offence? Could a better reconciliation be arrived at between the public policy aims of laws such as S.7A, and the generally accepted value of freedom of speech? If such a re-defining were to be attempted, could not the Queensland and West Australian offence of "attempting to procure" provide a useful starting point?