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Senate Standing Committee on Legal and Constitutional Affairs
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Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Dear Mr Hallahan;

dear Committe Member

Thank you for the invitation to make a submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

My expertise and comments, set out on pp 2–4 of this document, are limited to a single aspect of your inquiry, the proposed amendments to the *Criminal Code* (Cth) to include new provisions in relation to persons who jointly commit offences.

Please do not hesitate to contact me to further discuss this submission and any other aspects relating to your inquiry.

Yours sincerely

ANDREAS SCHLOENHARDT PhD (Law)

INQUIRY INTO THE CRIMES LEGISLATION AMENDMENT (SERIOUS AND ORGANISED CRIME) BILL 2009

Schedule 1, Part 4 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

The *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (Cth) proposes to insert a new section 11.2A into the *Criminal Code* (Cth) to extend liability for so-called 'joint commissions'. The proposed provisions are modelled after the concept of 'joint criminal enterprise' that exists at common law.

Context and Rationale

In establishing accessorial liability for a criminal offence there is generally no requirement to show that the accessory acted in agreement with the principal or that the principal acknowledged the support or contribution by the accessory in any way. Accessorial liability may arise even if the principal offender is completely unaware of the accessory's conduct. Thus accessorial liability is established, for the most part, on the basis of the physical collaboration of multiple persons, not on their 'mental' cooperation.

An additional way to extend accessorial responsibility involves liability based on a common purpose that the participants agree upon. This emphasises the agreement made between the participants and 'generates' liability for offences that stem from this agreement. All participants who are part of the original agreement are then liable for any offence committed by one of them in the prosecution of that agreement so long as the offence was a consequence of the prosecution.[1] This type of liability is particularly contentious if the offence committed differs from that originally agreed upon.[2]

In addition to the 'normal' liability for principal offenders and for accessories, the criminal law has developed ways in which to extend liability for incidental crimes that have been committed in addition, in furtherance of, or in lieu of the principal, foundational offence.

The common law has developed the so-called 'doctrine of common purpose' or 'joint criminal enterprise' to extend criminal liability in instances 'where it cannot be established beyond reasonable doubt that the accused was the person who physically committed the offence charged'. The doctrine of common purpose shifts the emphasis of liability away from objective, 'physical' requirements to the subjective element of 'common purpose'. Under this doctrine, liability may arise for any offence that was contemplated as a possible incident of the originally planned venture, even if the accused had little or no physical involvement in its commission: *R v Johns* (1980) 143 CLR 108 at 130–131; *R v Miller* (1980) 32 ALR 321 at 325–326; *R v Chan Wing-Siu* [1984] 3 WLR 677. In *McAuliffe v R* (1995) 183 CLR 108 at 113 the High Court held that:

> The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design […]. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime.[3]

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1 Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (5th edn, 2008) para 20.14.

2 See further Stephen Gray, '"I didn't know, I wasn't there": Common Purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201–217.

3 The case is further discussed in McSherry & Naylor, *Australian Criminal Laws* (2004) 453–455.

Simon Bronitt & Bernadette McSherry summarise the doctrine of common purpose at common law as:

> [A] mode of secondary participation that renders individuals who embark on a joint criminal enterprise or plan to commit an offence (the foundational crime) liable for any further crime (the incidental crime) committed by other group members in the course of that joint criminal enterprise or plan. Common purpose liability at common law is a distinct form of extended secondary liability, imposing accessorial liability in relation to commission of crimes that: (1) fall within the scope of [the] original criminal agreement or alternatively; (2) do not fall within the scope of that agreement but are foreseen as a possible consequence.[4]

Application and Scope

The proposed provisions reflect established and largely uncontroversial common law principles that also exist (albeit in modified form) in those Australian jurisdictions that base their criminal law on a *Criminal Code* (including Queensland, Western Australia, and Tasmania). The proposed amendments are expressed in exceptionally cumbersome ways and are not a model of clarity. The *Explanatory Memorandum*, however, explains and justifies the proposed changes adequately.

It remains doubtful, however, how the proposed amendments will assist significantly in the prevention and suppression of 'serious and organised crime', especially criminal organisations such as outlaw motorcycle gangs, Mafia and cartel-like syndicates, and the like.

First, the concept of 'joint commission', similar to conspiracy-based charges, requires an accused to be party to an agreement (proposed s 11.2A(1) *Criminal Code* (Cth)) — a requirement that many members and associates of criminal organisation do not meet. The proposed provisions cannot be used against persons that are not part of the agreement. Agreement, in the sense of meeting of two or more minds, does not accord with the common experience and how people actually associate in a criminal endeavour',[5] note Michael Levi and Alaster Smith: 'Each defendant […] has to be shown to be party of the same agreement and its terms is usually indirect. It is thus often difficult to distinguish related or sub-conspiracies.'[6] This excludes from liability low ranking members of criminal organisations that are not privy to the agreement and are not involved in the planning of criminal activities.[7] Mere knowledge or recklessness of the agreement does not suffice to establish liability. Furthermore, some criminal organisations engage in a diverse range of illegal transactions that cannot be tied together as a single common agreement.[8]

A second difficulty is created by the fact that at least one of the parties to the agreement be involved in the physical execution of the offence that follows the agreement, proposed s 11.2A(2)(a) *Criminal Code* (Cth). This requirement will make it impossible to target high ranking members of criminal organisations that mastermind and finance the criminal activities, but that are not involved in executing their plans and thus do not engage in any

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4 Bronitt & McSherry, *Principles of Criminal Law* (2nd edn, 2005) 379–380.

5 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 16.

6 Ibid, at 148.

7 Cf Douglas Meagher, *Organised Crime* (1983) 64.

8 See, for example, *US v Elliot* 571 F.2d 880 (5th Cir.1978), as case in which the members of the criminal group engaged in a criminal activity such as murder, fencing of stolen goods, arson, and the sale of illicit drugs. The Fifth Circuit Court argues that conspiracy could not have been used successfully in this case because a single conspiracy, tying all defendants together, could not be established.

overt acts. 'Leaders of organisations create a "corporate veil' to insulate them from liability",[9] notes Christopher Blakesley. Peter Hill remarks:

> Typically, those at the higher end of the hierarchy will attempt to dissociate themselves from direct participation in criminal activity, especially crimes which carry a high risk of arrest. As these higher-echelon figures often receive much of their income from taxes, tribute, or dues paid by their subordinates, they are effectively insulated from indictment.[10]

Recommendation

To better target criminal organisations and their members, Australian jurisdictions should consider introducing offences for 'participating in a criminal organisation' based on the model set out in the *Convention against Transnational Organised Crime*, or similar models currently in operation in Canada or the United States. In 2008, the federal Parliamentary Joint Committee on the Australian Crime Commission launched an *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* that, inter alia, currently explores the question whether it is feasible and necessary to introduce new offences to criminalise organised crime in Australia. This inquiry is also reviewing legislation recently introduced in South Australia and New South Wales to target criminal organisation.

Pending the outcome of this inquiry, insofar as the specific offences relating to organised crime are concerned, it is advisable to create a set of provisions that differentiate between different types and levels of involvement in a criminal group. Separate offences should be designed to distinguish the various roles and duties a person may have within a criminal organisation. The offences should also recognise any intention or special knowledge an accused may have. Specifically, the legislature should consider introducing a special offence for organisers, leaders, and directors of criminal organisations who have the intention to exercise this function and have a general knowledge of the nature and purpose of the organisation. Furthermore, it is suggested that legislatures should criminalise persons who deliberately finance criminal organisations, especially if they seek to gain material or other benefit in return.

Second, legislatures should explore the creation of offences (or aggravations to offences) that target the involvement of criminal organisations in already existing substantive offences. This may include crimes such as 'selling firearms to a criminal organisation', 'trafficking drugs on behalf of a criminal organisation', or 'recruiting victims of human trafficking for a criminal organisation'. Here, the organised crime element operates as an aggravating element to offences commonly associated with organised crime which can justify the imposition of higher penalties.

These mechanisms may target serious and organised crime more effectively than the amendments to the *Criminal Code* (Cth) proposed in the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.*

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9 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 78.

10 Peter Hill, *The Japanese Mafia* (2003) 148–149.