



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

1 September 2009

Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

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

I refer to our appearance before the Committee on 28 August 2009 in relation to the Committee's Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (the Bill). Unfortunately, there were issues with the teleconferencing facilities at the end of our hearing which meant that we were unable to raise one final point with the Committee, being our support for the addition of the concept of joint commission into the Code.

As we indicated in our submission, although the concept of joint commission will be new to the Code, it is not a new legal concept and one which was readily available at common law. Unfortunately, following the enactment of the Code the principle of joint commission (or joint enterprise) is no longer available in relation to Commonwealth offences as it is not expressly provided for in the Code.

This was discussed in some detail in the unreported NSW District Court case of R v Pui Man Liu & Sin Chun Wong, a copy of which is attached. In that case two offenders imported 2.8kgs of heroin, each carrying part of the total amount strapped to them. They were charged on a joint indictment containing one offence with the total amount they had brought into the country based upon the concept of joint criminal enterprise. Following legal argument centred on the whether or not joint enterprise had been included in the Code, Justice Keleman concluded that joint enterprise had been abolished from the Code. In light of that finding, the prosecutor withdrew the joint indictment and presented separate indictments charging the offenders with importing the exact amount of heroin discovered on each of their persons respectively.

In considering the absence of joint enterprise in the Code, Justice Keleman commented:

"The troubling situation is that, putting this case to one side, many of the larger importations invariably involve joint enterprise where the Crown, in order to establish a particular person's criminal responsibility, needs to establish the context against which that conduct of the accused occurs and the Crown invariably relies upon joint enterprise to do that." (p 88)

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"It's just that I find this issue very troubling because it is such a well-established implement in the armoury of any prosecuting authority, and I would have thought that the application of the principle – and say this with respect to those who were involved in drafting the legislation – wouldn't have been inconsistent with the terms of the code if it was appropriately drafted, and one would have thought it would have been drafted in terms of those expressed either in Tangye or in Osland without too much trouble." (p 89)

"It seems to me that the matter was overlooked. I really find it hard to believe that anyone who was experienced in the criminal law, and particularly in criminal prosecution and criminal defence, could overlook the significance of such a concept, but stranger things have happened." (p90)

As a result of Justice Keleman's finding in Pui Man Liu & Sin Chun Wong, the CDDP subsequently applied to have a sentence of a similar offender reopened and the offender was resentenced on the basis that he was only liable for the quantity of drug strapped to his body. The New South Wales Court of Appeal reduced the offender's sentence by 3 months. (R v Pha [2004] NSWCCA 445)

We note that submissions have made to the Committee recommending that an amendment to provide for joint commission in the Code should be postponed until the High Court has considered issues concerning conspiracy in R v LK and RK, until the NSW Law Reform Commission has handed down its report on Complicity or until MCLOC has considered joint commission. It is the view of this office that the amendment to provide for joint commission in the Code should not be postponed, but should be enacted as soon as possible in order to return the Commonwealth to the position prior to the enactment of the Code that allowed for criminal liability based on joint commission or joint enterprise. It is not clear whether the High Court's consideration of R v LK and RK will impact on the other extensions of criminal liability in Chapter 2 of the Code other than conspiracy, however if it does, consideration will need to be given as to whether amendment to those provisions is required or appropriate.

In light of the current absence of the principle of joint commission in the Code, the CDDP supports the amendment to the Code by Schedule 4, Part 1 of the Bill to provide for joint commission.

The Committee also asked the CDDP about potential amendments that could be made to the unexplained wealth provisions of the Bill. A paper address a number of potential amendments is attached.

Yours sincerely



Jaala Hinchcliffe
Senior Assistant Director