

CHAPTER 4

JOINT COMMISSION PROVISIONS

Provisions in the Bill

1.1 Part 1 of Schedule 4 of the Bill would amend the *Criminal Code Act 1995* (the Criminal Code) to include a new ground for extending criminal liability where persons jointly commit an offence.¹ The Explanatory Memorandum states that these provisions would introduce to the Criminal Code the common law principle of ‘joint criminal enterprise’.² The aim of these amendments is to:

...target persons who engage in criminal activity as part of a group. The amendments will enable the prosecution to obtain higher penalties for offenders who commit crimes in organised groups by aggregating the conduct of offenders who operate together.³

1.2 Joint commission would apply when:

- a person and at least one other person enter into an agreement to commit an offence; and
- either an offence is committed in accordance with that agreement; or
- an offence is committed in the course of carrying out the agreement.⁴

1.3 The effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group.⁵

1.4 Under proposed subsection 11.2A(5),⁶ an ‘agreement’ can consist of a non-verbal understanding between the members of the group. Furthermore, the agreement may be entered into before, or at the same time as, conduct constituting the physical elements of the joint offence.⁷

1.5 Proposed subsection 11.2A(2) would provide that an offence is committed ‘in accordance with the agreement’ only where the offence that is actually committed is an offence of the same type as the offence agreed to. The Explanatory Memorandum states that:

[This] requirement is broad enough to cover situations where the exact offence agreed to may not have been committed by the parties to the

1 Explanatory Memorandum, p. 132.

2 Explanatory Memorandum, p. 133.

3 Explanatory Memorandum, p. 3.

4 Proposed subsection 11.2A(1); Explanatory Memorandum, p. 134.

5 Proposed subsection 11.2A(1); Explanatory Memorandum, p. 133.

6 References to proposed provisions in this chapter refer to proposed provisions of the Criminal Code.

7 Explanatory Memorandum, p. 137.

agreement, but a joint offence of the same type was committed. This is particularly relevant where people agree to commit a specific drug offence, but the quantity of the drugs, or the type of drug varies from the offence agreed to.⁸

1.6 In addition, proposed subsection 11.2A(2) would provide that an offence is committed ‘in accordance with the agreement’ where the conduct of one or more parties makes up the physical elements of the joint offence.⁹ This provision would therefore allow the prosecution to aggregate the criminal conduct of parties to the agreement. The Explanatory Memorandum argues that the ability to aggregate the conduct of the parties to the agreement would have the following three advantages:

- Firstly, it would enable the prosecution to target groups who divide criminal activity between them. An example would be where one party commits one element of an offence and another party commits other elements so that neither is individually liable for the particular offence.
- Secondly, it would mean that it is not necessary for the prosecution to specify which party to the agreement engaged in particular conduct. This may be helpful in situations where it is difficult to determine with precision the role each party to the agreement has played.
- Finally, it would enable the prosecution to charge criminal groups with more serious offences (for example, where members of the group have all imported quantities of a drug less than a commercial quantity but if aggregated the amount of the drug would be a commercial quantity and its importation would therefore constitute a more serious offence).¹⁰

1.7 Under proposed subsection 11.2A(3) a joint offence will be committed ‘in the course of carrying out the agreement’ where:

- an offence, other than the offence agreed to, was committed by another party to the agreement;
- the offence was committed in the course of carrying out the agreement; and
- the accused was reckless as to the commission of that collateral offence by the other party.¹¹

1.8 An accused will be reckless with respect to the commission of a collateral offence by another party to the agreement, if he or she is aware of a substantial risk that the offence will be committed, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.¹²

8 Explanatory Memorandum, p. 134.

9 Explanatory Memorandum, pp 134-5.

10 Explanatory Memorandum, p. 135.

11 Explanatory Memorandum, p. 136.

12 Section 5.4 of the Criminal Code; Explanatory Memorandum, p. 136.

1.9 The Explanatory Memorandum gives the following example of how proposed subsection 11.2A(3) would operate:

For example, persons A and B agree to commit the Commonwealth offence of people smuggling by bringing two non-citizens into Australia (section 73.1 Criminal Code). In the course of transporting the non-citizens to Australia, person B conceals 500 grams of heroin and imports it into Australia. Here, the collateral offence would be importing a marketable quantity of drugs (section 307.2 Criminal Code).

If the prosecution can prove that person A was aware of a substantial risk that person B would import drugs into Australia and it was unjustifiable to take that risk, then this subsection will apply to extend criminal responsibility for the collateral offence to person A.¹³

1.10 Proposed subsection 11.2A(6) would provide that a person will not be liable under the joint commission provisions if he or she terminated his or her involvement in the agreement and took all reasonable steps to prevent the commission of the offence.¹⁴

Issues raised in submissions

1.11 Dr Andreas Schloenhardt argued that it is doubtful that the proposed amendments relating to the joint commission of offences will assist significantly in the prevention and suppression of serious and organised crime, especially crime associated with criminal organisations such as outlaw motorcycle gangs.¹⁵ Dr Schloenhardt suggested that legislatures should:

- consider introducing a special offence for leaders of criminal organisations who have the intention to exercise this function and have a general knowledge of the nature and purpose of the organisation;
- criminalise deliberately financing criminal organisations, especially where a person seeks to gain material or other benefit in return; and
- explore the creation of offences (or aggravations to offences) that target the involvement of criminal organisations in existing substantive offences (such as selling firearms to a criminal organisation or trafficking drugs on behalf of a criminal organisation).¹⁶

1.12 The Police Associations also considered that the proposed amendments relating to joint commission were very restrictive and would not adequately address organised crime groups and transnational criminal enterprises.¹⁷ The Police Associations proposed that the existing offences in the Criminal Code relating to terrorist organisations should be replicated in relation to transnational and organised

13 Explanatory Memorandum, p. 136.

14 Explanatory Memorandum, p. 137.

15 *Submission 1*, p. 3.

16 *Submission 1*, p. 4.

17 *Submission 3*, p. 27.

crime organisations.¹⁸ In addition, the Police Associations advocated creating offences in relation to participation in criminal groups and recruiting persons to engage in criminal activity.¹⁹

1.13 On the other hand, the Law Council opposed the enactment of the joint commission provisions on the basis that there has been insufficient consultation regarding the provisions and inadequate consideration of the basis upon which the provisions will make a person criminally liable. The Law Council was particularly opposed to proposed subsection 11.2A(3) arguing that:

...it makes [a defendant] liable for an offence which he or she has not agreed should be committed and has not assisted or encouraged in any way. There is not even a requirement that [a defendant] have participated in a criminal venture in which that crime was committed. All that is required for criminal responsibility is agreement that some other offence be committed and, apparently, foresight that the charged offence might be committed in the course of carrying out the agreed criminal venture.²⁰

1.14 Moreover, Mr Stephen Odgers SC of the Law Council argued the amendments go beyond codification of the common law principle of joint criminal enterprise:

It is critically important to understand that the common law does not go as far as these provisions. The common law says that if you participate in a joint criminal venture, then you may be liable for an offence committed during the commission of that venture if you were reckless about it. ...[T]hese provisions do not even require participation. Let us say you have agreed to an assault. You will be liable for murder if that is defined as being of the same type of offence, or you were reckless about it, which ultimately means you are aware of a risk it might occur. It is a major extension of liability. It is not justified under the common law. We are not aware of any other jurisdiction in Australia which goes so far.²¹

1.15 Ms Julie Ayling was generally supportive of the provisions but she raised specific concerns about the scope of the provisions. One of her concerns related to the broad definition given to 'agreement' by proposed subsection 11.2A(5). This provision is intended to ensure that the existence of an agreement can be inferred from all the circumstances, rather than requiring any overt or verbalised expression.²² She argued that this means:

...there is a risk that mere membership of a group that regularly commits crime could be used as a basis to infer an agreement to commit a particular

18 *Submission 3*, p. 28. Division 102 of the Criminal Code allows for an organisation to be specified a 'terrorist organisation' by regulation and creates offences in relation to directing the activities of a terrorist organisation, membership of, and recruiting for, such organisations.

19 *Submission 3*, pp 30-33; Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, p. 26.

20 *Submission 6*, p. 54.

21 *Committee Hansard*, 28 August 2009, p. 4.

22 *Submission 12*, p. 5; Explanatory Memorandum, p. 137.

offence (for example, a drug offence or a murder), and thus make all members of the group presumptively culpable for joint commission.

This risk is exacerbated by the fact that under [subsection] 11.2A(5) the agreement can be inferred to come into existence at the same time as the actual offence. Thus a member of a gang who does not agree with the commission of a particular impulsively committed offence (say, a drive-by shooting) might be inferred to have agreed to it (possibly even if not present)...²³

1.16 Secondly, Ms Ayling expressed concern that proposed subsection 11.2A(6), which provides that a person will not be liable under the joint commission provisions if he or she terminated his or her involvement in the agreement and took all reasonable steps to prevent the commission of the offence, is drafted too narrowly:

...the provision requires that “all” reasonable steps be taken – one may not be enough. This places a large burden on a person who may have already made clear to others that they have withdrawn from an agreement to do much more, perhaps even at a risk to their own safety (subject to reasonableness considerations). This suggests an imbalance in the onus of proof. It appears it will be relatively easy for a person’s involvement in an agreement to be inferred but quite difficult for that person to refute that inference.²⁴

Government response

1.17 Contrary to the view of the Police Associations and Dr Schloenhardt that the joint commission provisions would not be an effective means of targeting criminal organisations, an officer of the AFP told the committee that:

...the proposed joint commission offence will be an additional tool for law enforcement to combat organised crime, augmenting the existing extensions to criminal liability in chapter 2 of the Commonwealth Criminal Code. The joint commission provisions would allow law enforcement and prosecutorial agencies to jointly prosecute offenders who work in concert to commit offences. ...The creation of a joint commission offence will have direct application to organised crime groups, because the Commonwealth will now be able to jointly charge and prosecute offenders who group together to commit an offence or offences.²⁵

1.18 The DPP also supported the amendments to introduce joint commission provisions and argued that the amendments would simply return the Commonwealth to the position prior to the enactment of the Criminal Code ‘that allowed for criminal liability based on joint commission or joint enterprise.’²⁶

23 *Submission 12*, pp 5-6.

24 *Submission 12*, p. 6.

25 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 48.

26 *Submission 5*, p. 6.; *Correspondence regarding public hearing*, 1 September 2009, p. 2.

