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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

CRIMES AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice, the Hon. Duncan Kerr MP)

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GENERAL OUTLINE

The purpose of the Bill is to amend the *Crimes Act 1914* pave the way for the commencement of the Criminal Code Bill 1994 by applying the common law principles of criminal liability to all Commonwealth offences and introducing much needed reforms in relation to age of criminal responsibility, attempt and conspiracy in the short term pending the application of Chapter 2 of the Criminal Code to other Commonwealth offences. The Criminal Code will not commence in relation to these other offences until 5 years after Royal Assent so that consequential amendments can be made. While some of the statutes containing these offences may apply the Criminal Code general principles before then, many will not.

The application of the common law principles to all offences will mean that all people who are accused of Federal offences will be subject to the same principles of criminal liability. Currently offences other than those under the *Crimes Act 1914* are dealt with in accordance with the law of the State or Territory where the offence occurs. This means that people are treated differently in different parts of Australia for the same offence.

The provision in relation to the minimum age of criminal responsibility provides that a child under the age of 10 years cannot be liable for a Commonwealth offence and children between the ages of 10 and 14 can only be liable for a Commonwealth offence if the prosecution can prove the child knew his or her conduct was wrong. This is an overdue reform.

The law on attempt and conspiracy has been amended to correspond with the Criminal Code Bill 1994. The amendments set out new sections which more accurately define what constitutes attempt and conspiracy and includes appropriate limitations. These reforms are of sufficient importance that it was decided they should be introduced in the short term.

FINANCIAL IMPACT

The amendments are not expected to have anything but a minor financial impact on Government expenditure. There are likely to be some overall benefits accruing in the longer term as the law will be simplified by the Code, but this is not quantifiable.

NOTES ON CLAUSES

Clause 1 - Short title

This clause is formal and provides for the short title of the Bill.

Clause 2 - Commencement

The clause states that the Act will commence on proclamation or at the end of 6 months after it receives Royal Assent.

Clause 3 - Substitution of Section

This clause states that Section 4 of the *Crimes Act 1914* is to be omitted and substituted with the following section.

Proposed Section 4 - Application of the Common Law

Proposed subsection 4(1) provides that, subject to the Act or another Act, the principles of common law with respect to criminal liability apply to all Commonwealth offences. The omitted section 4 had only applied these principles to offences under the *Crimes Act 1914*. Any other offence was dealt with according to the prevailing law of the particular State or Territory where it was committed. So a person committing an offence against such a law in Victoria, a common law jurisdiction, was treated differently to person committing the same offence in Queensland, a Griffith Code jurisdiction.

Proposed subsection 4(2) provides that the section applies despite section 80 of the *Judiciary Act 1903*. Section 80 was the means by which the principles were applied and will no longer operate in that manner with respect to the principles of criminal liability.

Clause 4 - Insertion of new sections

Clause 4 inserts the following sections after section 4L:

Proposed section 4M - Children under 10

The proposed section provides that children under 10 years are not liable for any offence against Commonwealth law. The laws in the States and Territories vary, Tasmania's age of criminal responsibility is 7 years, in the ACT it is 8 years and in the remaining jurisdictions it is 10 years. This means that a 7 year old child from New South Wales on holiday in Tasmania could be convicted of a Federal offence committed during the holiday, when at home he or she would

not be charged for doing the same thing. This is clearly anomalous and requires urgent reform. The provision has the same effect as section 7.1 of the Criminal Code.

Proposed Section 4N - Children over 10 but under 14

Proposed subsection 4N(1) provides that children aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. Subsection 4N(2) provides that the question whether a child knows that his or her conduct is wrong is one of fact to be proved by the prosecution. This mirrors proposed section 7.2 of the Criminal Code.

Clause 5 - Attempt

This clause adds subsections at the end of Section 7 of the *Crimes Act 1914* . Section 7 provides that a person who attempts to commit an offence is guilty of attempting to commit that offence but is to be punished as if the offence attempted had been committed.

Proposed subsection 7(2) provides the test for proximity. For the person to be found guilty of attempting an offence, the person's conduct must be more than merely preparatory and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

The test for determining when a course of conduct has progressed far enough to warrant liability for attempt has been controversial in both Griffith Codes and common law jurisdictions. Tests such as "unequivocality", "substantial act", "acts of perpetration rather than preparation" and "the last act rule" have been debated in the cases and literature. The proposed subsection uses the "more than merely preparatory" test which catches cases where the defendant has the necessary fault element and has taken a step beyond mere preparation towards the perpetration of the offence.

There will be cases where the distinction between preparation and perpetration will be difficult. The best solution to this problem is to leave it to the tribunal of fact. The decision in the case of *Jones* [1990] 1 WLR 1057 is questionable insofar as it implied that a person who, with intent to murder a victim and escape to Spain, was not proximate under the proposed test even where he obtained a gun, shortened it to facilitate concealment, donned a disguise and while armed and carrying Spanish money, lay in wait for his victim to arrive.

The "substantial step" test advocated by, for example, the US Model Penal Code and Professor Glanville Williams, "Wrong Turnings on the Law of Attempt" [1991] *Crim LR* 416 was considered but rejected as too broad because it could

include acts of preparation and was rejected as too broad. Some step towards the perpetration of the offence is essential.

The test adopted follows a number of authorities and law reform bodies: English Law Commission, Criminal Law: *Attempt, and Impossibility in Relation to Attempt*, Report No 102 (1980) at paras 2.48-2.49 and s.1(1) of the Criminal Attempts Act (UK) 1981; Law Reform Commission of Canada, Report No. 31, *Recodifying Criminal Law* (1987) at 45; Gibbs Committee, para 31.12-13, s.7C Draft Bill.

The provision was constructed with an awareness of the difficulties that exist with the Griffith Code definition of attempt, and the artificial distinction drawn: see *Chellingworth* [1954] QWN 35. The formulation used accords with the recommendations of the Murray Code Review and the O'Regan Code Review.

Proposed subsection 7(3) provides that a person may be found guilty even if committing the offence attempted is impossible or the person actually committed the offence attempted.

This follows the Gibbs Committee recommendations. At pages 339-340 of their July 1990 report the Gibbs Committee referred to problems which arose in *Britten -v- Alpogut* (1986) 23 A Crim. R. 254 where the defendant was charged with attempting to import cannabis into Australia. The evidence established that the defendant believed that he was importing such a substance, but the actual substance found in the concealed bottom of a suitcase collected by the defendant was not cannabis - it was a substance which was not prohibited. The Gibbs Committee noted that if the English case of *Smith* [1975] AC 476 were to be followed in Australia, on no possible analysis of the facts could the defendant, under the existing law, be convicted for the attempted importation charge. Yet the defendant .had done all in his power to commit the offence of importing prohibited drugs and was frustrated in this purpose only by the fact that the packages did not contain the drug. It follows that if defendants such as Alpogut were not punished, they might repeat the attempt and next time succeed. Therefore this proposed subsection makes it clear impossibility will not be a bar in this way.

Proposed subsection 7(4) provides that a person who is found guilty of attempting to commit an offence cannot be subsequently charged for the completed offence.

This is called "the doctrine of merger" which says that where the same facts constitute both a felony and a misdemeanour, the misdemeanour "merges" into the felony and hence, for all intents and purposes, disappears.

What authority there is in Australia holds that the doctrine applies in those jurisdictions which retain the felony/misdemeanour distinction (*Welker* [1962]

VR 244). This proposed subsection substantially follows s.422(2) and (3) of the Victorian *Crimes Act*.

Proposed subsection 7(5) provides that any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence. The word "defences" was added to take account of *Beckwith* (1976) 135 CLR 569.

Proposed subsection 7(6) provides that there can be no offence of attempt in relation to Section 5 of the *Crimes Act 1914*, aiding and abetting, or to proposed section 86, conspiracy.

The provisions on attempt mirror proposed section 11.1 of the Criminal Code except they do not prescribe the fault elements contained in subsection 11.1(3) of the Code. This is because the terms "fault elements" and "physical elements" are new to the existing legislation. To attempt to superimpose them on all Commonwealth offences through attempt without consequential amendments could cause difficulties, while developing an alternative formula based on existing terminology could have created further transitional problems - questions as to whether they mean the same thing as proposed subsection 11.1(3). In the end it was decided to leave this question to the common law until the Criminal Code commences. Proposed subsection 11.1(3) reflects the common law position.

Clause 6 - Persons already subject to a non-parole period

This clause amends section 19AD of the *Crimes Act 1914* by substituting the word "superseded" for "superceded" in paragraph (3)(a).

Clause 7 - Persons already subject to a recognisance order

This clause amends section 19AE of the *Crimes Act 1914* by substituting the word "superseded" for "superceded" in paragraphs (3)(a) and 4(a).

Clause 8 - Repeal of Sections 86 and 86A and substitution of new section

Sections 86 and 86A of the *Crimes Act 1914* are repealed by this clause. These are the conspiracy provisions. They have been replaced by a single provision - the new section 86.

Proposed subsection 86(1) provides that a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units ($20,000) or more, is guilty of the offence of conspiracy to commit that offence. It also states that the offence is punishable as if the offence to which the conspiracy relates had been committed.

Given that the crime of conspiracy has been abused on some occasions and attracted criticism from the courts, the limitations were introduced as safeguards.

The first limitation concerns the scope of the offence, particularly in relation to acts which are not criminal themselves. This contrasts with the current section 86 of the *Crimes Act 1914* which includes conspiracy to prevent or defeat the execution or enforcement of a law of the Commonwealth. Section 86 was criticised for this in the Gibbs Committee July 1990 report and that conspiracy offence is not included in the proposed subsection.

It was felt that if this left any gaps in the law, these were of minor significance in light of the principle that a person should not be guilty of a crime merely by reason of an agreement to do something not of itself criminal.

Secondly, it was decided that conspiracy to commit a minor offence should not be an offence. The Government has decided that at the Federal level the more appropriate limit is to offences carrying a penalty of more than 12 months imprisonment or a fine of $20,000 or more. This coincides with the long-standing division between indictable (serious) offences and summary offences which all current penalties are based upon. The monetary limit has been set at that lower level following an examination of these penalties and it reflects a more realistic division between serious and less serious offences.

Because of concern that the charge of conspiracy has been overused, or may be overused, it was felt that there should also be procedural restrictions on conspiracy charges. The charge should be subject to the consent of the DPP (or the equivalent authority); see proposed subsection 86(9).

Additionally proposed subsection 86(7) allows a court to dismiss the conspiracy count if it considers that the interests of justice require it to do so. The most likely use of this provision will arise when the substantive offence could have been used, a criticism repeatedly voiced by the courts (see, for example, *Hoar* (1981) 148 CLR 32).

Proposed subsection 86(2) provides conspiracy to commit an offence against section 29D of the *Crimes Act 1914* (defrauding the Commonwealth) is punishable by a fine of not more than 2,000 penalty units ($200,000) or up to 20 years imprisonment or both. This contrasts with the policy of proposed subsection 11.5(1) of the Criminal Code which provides that the punishment should be as if the offence to which the conspiracy relates had been committed, which follows the recommendations of the Gibbs Committee. The penalty in relation to section 29D is 1000 penalty units and up to 10 years imprisonment. This departure from the policy recognises the history of the provision proposed

section 86 will be replacing (section 86A of the *Crimes Act 1914*). Section 86A was developed following the 'bottom of the harbour' incidents .

It was decided that the principle could not be implemented in relation to conspiracy to commit the section 29D offence until the penalty for that offence had been reviewed. The penalties for fraud offences will be reviewed after the Model Criminal Code Officers Committee produces its report on 'Theft Fraud and Related Offences' which will form Chapter 3 of the Model Criminal Code.

Proposed subsection 86(3) provides that for the person to be guilty, the person must have entered into an agreement with one or more other persons and the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement and the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

Proposed paragraphs 86(3) (a) & (b) were redrafted to more clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement. It was decided that intention was required and that recklessness would not suffice. This is in accordance with the proposals of the Gibbs Committee, (s.7D(1)(c)), and the common law (*Gerakiteys* (1983) 153 CLR 317). The concept of recklessness is foreign to an offence based wholly on agreement.

The requirement of intention to commit the crime which was the object of agreement (proposed paragraph 86(3)(b)) will prevent conviction for conspiracy where, for example, the only parties to the agreement are the accused and an agent provocateur.

Proposed paragraph 86(3)(c) requires that the accused or at least one other party to the agreement committed an overt act pursuant to the agreement. The view is taken that a simple agreement to commit a criminal offence without any further action by any of those party to the agreement is insufficient to warrant the attention of the criminal law. The requirement of overt act is common in American law, see s.5.03(5) US Model Penal Code. The requirement was criticised in some submissions on the basis that it is vague. It is understood that the requirement works well in the American jurisdictions which have it and there is no reason to believe it will not work in Australia.

Proposed paragraph 86(4)(a) provides that a person may be found guilty of conspiracy to commit an offence even if committing the offence is impossible (this is consistent with attempt and incitement).

Proposed paragraph 86(4)(b) provides that the person may be found guilty if the other party to the agreement is a body corporate. It is well established at

common law that a company can be guilty of conspiracy, see *ICR Haulage* [1944] 1 KB 551; *Simmonds* (1967) 51 Cr App R 316.

It was decided that it should be possible for a person to commit a conspiracy even where the only other party to the agreement is a person for whose benefit the offence exists. This is contained in proposed paragraph 86(4)(c). An example would be an agreement between a child under the age of consent and an adult to commit the offence of unlawful sexual intercourse with the child.

Proposed paragraph 86(4)(d) provides that a person may be found guilty even though other parties to the alleged agreement have been acquitted of the conspiracy, unless a finding of guilt would be inconsistent with those acquittals (see proposed paragraph 86(5)(a)). This decision is in accord with *Darby* (1981) 148 CLR 668 and section 321B *Crimes Act* 1958 (Vic). The Gibbs Committee concluded that the courts must not be hindered from examining the merits of what may be a quite complex situation by rules about formal inconsistencies on the face of the record.

On the other hand, under proposed subsection 86(5), it was decided that the Code should provide that a person who is the protective object of an offence cannot be found guilty of a conspiracy to commit that offence.

Proposed subsection 86(6) provides for disassociation from the offence . Consistent with the requirement of an overt act, there should be a defence of withdrawal or disassociation, for there would be time between the agreement and the commission of the overt act for that to take place. Unlike attempt and incitement, the disassociation here comes before there has been a criminal act. In that case, the policy of encouraging people to desist from criminal activity prevails. As for complicity, the requirement was changed from "making a reasonable effort" to taking "all reasonable steps" to prevent the commission of the offence agreed on. Again, what amounts to taking all reasonable steps will vary from case to case. Examples might include informing the other parties of the withdrawal, advising the intended victims and/or giving a timely warning to the appropriate law enforcement agency.

As mentioned above, proposed subsection 86(7) allows a court to dismiss a conspiracy charge in the interests of justice.

Proposed subsection 86(8) permits the use of all defences, principles, limitations or qualifying provisions that apply also to the offence of conspiracy to commit that offence.

Proposed subsection 86(9) requires the consent of the Director of Public Prosecutions to proceedings for an offence of conspiracy.

Proposed section 86 effectively amalgamates s.86 and s.86A and condenses s.86A. Therefore, to avoid the need for a multiplicity of consequential amendments in other laws of the Commonwealth, proposed subsection 86(10) states that references in any law of the Commonwealth to paragraph 86(1)(a) will be taken as a reference to proposed subsection 86(1). Furthermore, references to the application of proposed subsection 86(1) by or because of paragraph 86(1)(a) will be taken as a reference to proposed subsection 86(1) and references to s.86A will be taken as references to proposed subsection 86(2).

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