IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C3 of 2016

BETWEEN:

THE QUEEN
Appellant

and

AARON JAMES HOLLIDAY
Respondent

APPELLANT'S REPLY

Part I: PUBLICATION

1. The appellant certifies that this reply is in a form suitable for publication on the internet.

Part II: REPLY

What the Crown was required to prove

2. The appellant takes issue with the respondent's contention (respondent's written submissions ("RWS") [6]) that the offence of kidnapping "may be committed in at least two ways under the ACT Code", that is pursuant to s 38 of the *Crimes Act 1900* ("the Crimes Act") or pursuant to s 45(1) of the ACT Code. Rather, the appellant argues, there is only one offence of kidnapping, pursuant to s 38 the Crimes Act. A person who procures another to commit the offence of kidnapping is "taken to have committed" the offence of kidnapping and is punishable accordingly: this accessorial liability is derivative (cf RWS [12]).

3. It was always the Crown case that the respondent urged Powell to procure a third person to commit the offence, Powell at all material times himself being incarcerated. In other words *the respondent's* plan for the kidnapping was that Powell should procure a third person. Powell did not act on the respondent's urging, but that was immaterial: the respondent had already committed the inchoate offence of inciting kidnapping. The mechanism urged by the respondent for the commission of the offence was a matter of evidence, it altered neither the nature of the alleged offence nor the basis of the respondent's liability.

4. The respondent's argument is dependent on it being accepted that there are two ways of committing the offence of kidnapping. It is argued - or rather stated with the argument being assumed - that s 45(3) is "a 'limitation or qualifying condition [semble, provision]' applying to the offence [of kidnapping]" (RWS [26] and also [29]). Then it is argued that s 45(3) applies to the offence of kidnapping because "it is epexegetical of

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what it is to be complicit in the commission of an offence of kidnapping by someone else pursuant to s 45(1)" (RWS [28(d)]). The appellant submits that s 45(3), if it is epexegetical of anything, is epexegetical of what it is for a person to be taken to have committed an offence committed by somebody else. What is not apparent from the respondent's argument or otherwise is how this assists in the interpretation of s 47(5), which relevantly applies any qualifying provision applying to the offence of kidnapping to the offence of incitement of kidnapping.

5. The respondent assumes his own argument during the discussion of the application of the pre-existing law to the Code (e.g. RWS [22] and [25]-[26]). Indeed, repeated use of this assumption means a number of steps in the respondent's argument are left unexplained e.g.: why the pre-existing law dictates the meaning of "urging" an offence (RWS [22] and [25]-[26]); why s 45(3) is to be "properly regarded" as a limitation or qualifying provision (RWS [26]); why s 45(3) is epexegetical of s 45(1) when s 45(1) states a method of proof not an offence (RWS [27](a)); why it matters whether s 45(3) is epexegetical; and why s 45(3) is "picked up" by s 47(5) such that the Crown had to prove the substantive offence was committed (RWS [27](d)). These unexplained steps cannot be reconciled with the text of the Code and demonstrate why the respondent's arguments should be rejected.

6. The appellant takes issue with the respondent's assertion (RWS [10(d)] and [25]) that s 47(5) is epexegetical of what it is to incite within the meaning of s 47(1). No support is found for this proposition in *R v LK*[1], quite the contrary:
   a. The use of "epexegetical" in *R v LK* was limited to matters – stated in s 11.5(2)(a) and (b) the Commonwealth Code – that "ma[de] clear" or "clarify[ied]" the meaning of terms used ("conspire", "agreement") to state the elements of the offence: at [133].[2] This strongly suggests the onus of proving epexegetical matters is on the Crown.
   b. In *R v LK* the plurality also noted the statutory "defence" of withdrawal, stated in s 11.5(5) of the Commonwealth Code. Withdrawal was not referred to as an epexegetical matter: at [136]. Section 11.5(7) was the equivalent provision to s 47(5) ("Any defences, limitations..." etc) and it was not referred to as stating epexegetical matters. Since the ACT Code places an evidentiary onus on the accused when raising a defence (s 58(1)) and a defence is not a clarification of what is needed to prove guilt, it is submitted s 47(5) does not list epexegetical matters.
   c. Further, the respondent never explains why each of the matters in s 47(5) are or should be characterised as epexegetical, nor the consequences of that characterisation. Such a characterisation is contrary to the "fundamental principle" that the Crown must prove all matters which condition guilt, which is not altered by the Code.[3] The Crown is not required to disprove every possible defence, excuse, justification or qualification.[4] Rather, the Code provides for an evidential burden on the accused in relation to defences and qualifying provisions raised pursuant to s 47(5): s 58(3).

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[1] (2010) 241 CLR 177 *("R v LK")*.
[2] An adaptation of this approach was upheld in *Agius v The Queen* (2013) 248 CLR 601 at [32]-[34].
[3] *R v LK* at [141].
[4] Cf *R v Mullen* (1938) 59 CLR 124 at 128-129 (Latham CJ) and 134 (Starke J), cited in *R v LK* at [141].

Pre-existing law

7. The respondent's argument is suffused with references to the "pre-existing law". This is of limited assistance for two reasons:
   a. It is irrelevant for present purposes whether inciting to procure was an offence at common law; and
   b. The "pre-existing law" is not a starting point for the interpretation of the ACT Code.

8. The respondent's assertion (RWS [12]) that "under the pre-existing law" the offence of incitement could not be committed on the basis of inciting to procure is highly contestable. Although exciting the interest of academic commentators (RWS [13]), there is a dearth of judicial authority bar a single Crown Court judgment which acknowledged: "*I have come to the conclusions, despite the lack of authority, that it is not a crime to incite someone to be an accessory before the fact to a crime.*"[5] For the reasons set out in AWS [18], and contrary to the assertion in RWS [15], *Walsh v Sainsbury*[6] is not authority which supports the respondent's proposition.

9. In any event, the real issue is the interpretation of the ACT Code. The approach urged by the respondent (RWS [9], [21], [22], [26], [30]) is that the starting point for interpreting the Code is the pre-existing law. On the contrary, it is well established that a code should be construed according to its natural meaning and without any presumption that it was intended to do no more than re-state the existing law.[7]

10. The respondent's assertion (RWS [9]) that the expression "urges the commission of an offence" should be understood "as fixed by the common law subject to express statutory modification" is belied by the explanatory memorandum to the ACT Code which makes clear how carefully the word "urge" was chosen to avoid ambiguities in the word "incites" arising from the common law.[8]

The Gibbs Committee

11. The respondent's assertion (RWS [16]) that the Gibbs Interim Report at [18.38] – [18.40] "did not challenge the proposition that the incitement offence would not be committed until the perpetrator committed the substantive offence" is a misstatement of the report. To the contrary the Gibbs Interim Report specifically disagreed with the view of the UK Law Commission in its report 177 and recommended that there should be an offence of inciting to procure. Under the heading:

> Should it be made clear that it is an offence to incite a person to assist, encourage or procure (or whatever like expression is used) the commission of an offence?

the committee discussed the UK Law Commission view and noted:

> 18.38 Nevertheless, it is possible to conceive of circumstances where a person is incited to take steps of an active or positive nature to assist or facilitate the commission by another of an offence and the technical ground put forward by the Law Commission that these steps would not represent

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[5] *R v Bodin and Bodin* [1979] Crim LR 176 at 177-178.
[6] (1925) 36 CLR 464.
[7] *R v LK* at [97] per plurality citing *Brennan v The King* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ; see also *Campbell v R* [2008] NSWCCA 214 at [141] per Weinberg AJA..
[8] Criminal Code 2002 (ACT) explanatory memorandum p 26.

> an offence until taken does not seem sufficient reason to refrain from making such incitement subject to criminal sanction.

and the committee concluded:

> 18.40 On balance, the Review Committee recommends that it should be made clear that it is an offence to incite a person to assist, encourage or procure another person to commit an offence.

MCCOC

12. The respondent's argument on MCCOC is confused. The respondent argues that the position taken by MCCOC as to whether there should be an offence of incite to procure is "unclear" RWS [17], then immediately argues that that MCCOC "placed appropriate limitations on the offence of incitement" (RWS [19]). The respondent suggests that the *absence* of any express limitation on inciting a person to be complicit in an offence provides no basis on which it can be concluded that MCCOC took the view that there should be criminal liability for inciting to procure. A more logical argument is that if MCCOC had intended that the offence of incitement could not be committed by aiding, abetting or procuring, this would have been specifically addressed as it was with respect to the prohibition on inciting to incite, inciting to attempt and inciting to conspire.

13. The respondent pursues the distinction drawn by Wigney J,[9] distinguishing between committing the offence of incitement on the one hand, and being "open to conviction" on the other, this later being only possible if the substantive offence has been committed (RWS [18]). The respondent fully accepts the conditional nature of the liability (RWS [22]), arguing that until the substantive offence is committed "the incitement is only to engage in conduct which may or may not turn out to be criminal". This ignores that the very nature of incitement is inchoate: there may never be a substantive offence (as here), and indeed, a substantive offence may not even be possible. It also ignores the issue of when the offence is committed, which is at the time of the urging, whatever subsequently happens or does not happen.

Section 47(5)

14. The respondent criticises the appellant's interpretation of the terms in s 47(5) by reference to the dearth of discussion of those terms in the reports preceding the Model Code (e.g. RWS at [28](b)-(d)), but makes no attempt to explain what any of the terms means.

15. The appellant responds to relevant criticisms as follows:
    a. *Limitation:* If there is another form of "limitation" known to the general law other than a "limitation period" the respondent has not revealed it. Contrarily, it might be thought that the (perhaps inaptly named, on the respondent's approach) *Limitation Act 1623* (Imp) 21 Jac I c 16 and its various successor statutes[10] had made the meaning of "limitation" plain.

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[9] Which is criticised at AWS [40] – [42].

[10] E.g.: *Limitation Act 1985* (ACT); *Limitation Act 1969* (NSW); *Limitation of Actions Act 1958* (Vic); *Limitation of Actions Act 1974* (Qld); *Limitation Act 2005* (WA).

b. *Qualifying provision/qualification:* The respondent does not dispute that a "qualification" has a long history in the general law,[11] rather he disputes whether a "qualifying provision" is a provision stating a "qualification". While the MCCOC did not suggest "any connection" between ss 47(5) and 58(3) (RWS [27](d)) it is submitted that as a matter of ordinary English language and noting the common law authority cited by MCCOC that a qualifying provision is one stating a qualification (see AWS [52]-[53]). The connection is obvious: s 47(5) states what matters applicable to a substantive offence will attach to incitement of that offence, and s 58(3) prescribes how an accused can prove one of those applicable matters. Further, the respondent's interpretation appears to be contrary to the requirement that the "provisions of the Act must be read in the context of the Act as a whole".[12] The respondent's approach introduces uncertainty, e.g. two very similar words would mean different things (for the fairly blithe reason that MCCOC did not comment) and some of the words of s 58(3) would be left with no work to do despite the obvious connection to the similar language of s 47(5).

Notice of contention

16. The appellant responds to the various points made by the respondent as follows:
    a. Whether the respondent's argument is consistent with the law articulated by the England and Wales Law Commission is irrelevant. The view put by the Commission was rejected by the Gibbs Committee[13] and, more importantly, it is a view that is not reflected in text of the Code itself (see AWS at [33]-[34]).
    b. The respondent acknowledges (RWS at [35]) that the MCCOC Discussion Draft and Final Report commentary are against his argument. While the MCCOC reports assist in ascertaining legislative context and purpose, they cannot displace the actual text of the Code.[14] The real difficulty with the respondent's argument on the notice of contention remains that it is contrary to the text of the Code itself; the Code puts no prohibition on inciting an offence taken to have been committed because of s 45(1): cf ss 44(10) and 47(6).

Dated: 20 April 2017

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Jonathan White SC
Director of Public Prosecutions

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Margaret Jones
Deputy Director of Public Prosecutions

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[11] Unsurprisingly, given that the MCCOC cited the common law authority on qualifications in its discussion of the provision (cl 404.3) that became s 47(5): Final Report at pp 115-117 (see AWS at [57]).
[12] *Legislation Act 2001* (ACT) s 140; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382, 385.
[13] Gibbs Committee Interim Report, July 1990, at p 240-241 [18.37]-[18.40].
[14] *Legislation Act 2001* (ACT) ss 141-142; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].