HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

THE KING

Appellant

-and-

ROHAN (a pseudonym)

Respondent

RESPONDENT'S SUBMISSIONS

Date of document:	4th August 2023
Filed on behalf of:	The Respondent
Prepared by:	**Greg Thomas Barrister and Solicitor**

PART I: INTERNET PUBLICATION CERTIFICATION

1.1 These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUE ON APPEAL

2.1 Is the form of liability created by ss 323 and 324 of the *Crimes Act 1958* ('*Crimes Act*') – and, in particular, s 323(1)(c) – derivative in nature?

2.2 Does a person said to be 'involved' in the commission of an offence under s 323(1)(c) need to know or believe the essential facts of the offence in which he or she is complicit to attract criminal liability?

2.3 Do the references to 'offence' in ss 323 and 324 of the *Crimes Act* refer to the acts or omissions amounting to the conduct or physical element of the offence or to 'the concatenation of elements which constitute a particular offence'.[1]

PART III: NOTICE UNDER S78B OF JUDICIARY ACT 1903 (CTH)

3.1 The Respondent certifies that he has considered whether notice should be given in compliance with s. 78B of the *Judiciary Act 1903* (Cth) and determined that notice is not necessary.

PART IV: STATEMENT OF MATERIAL FACTS

[1] See, eg, *The Queen v Barlow* (1997) 188 CLR 1 ('*Barlow*'), 9-10 (Brennan CJ, Dawson and Toohey JJ)

4.1 The Respondent adopts the 'statement of relevant facts' set out at paras [8]-[18] of the Appellant's submissions[2] and the references therein to the Court's judgment in *Rohan (a pseudonym) v The King* [2022] VSCA 215 ('*Judgment below*').[3]

PART V: STATEMENT OF ARGUMENT

OVERVIEW

5.1 The enactment of Part II, Division 1 of the *Crimes Act* (ss 323-343C) effected fundamental changes to the law of complicity and abolished the doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose).[4]

5.2 Liability under ss 323 and 324 is derivative. So much is the natural result of the statutory text, properly construed.

5.3 The concept of 'involvement' in the commission of an offence utilised by the legislature in s 323(1) gave effect to the recommendations made by the authors of the *Simplification of the Jury Directions Project: A Report to the Jury Directions Advisory Group*[5] ('the Weinberg report') who called for significant reform of the substantive law and proposed a 'new model' for criminal liability and complicity. That new model, in the context of group activity and joint liability, is based upon the law of conspiracy.[6]

5.4 The fault element for s 323(1)(c) is 'in line with that specified for traditional forms of accessorial liability' in *Giorgianni v The Queen*[7] because *inter alia* it is implicit in the terms 'agreement, arrangement or understanding' that there must be a specific degree of

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2 Appellant's submissions p3 -5

3 Core Appeal Book ('CAB') p137

4 See *Crimes Act 1958*, s 324C.

5 Weinberg M J et. *Simplification of the Jury Directions Project: A Report to the Jury Directions Advisory Group, Supreme Court of Victoria* (August 2012), Appellant's Further Materials, p4

6 Judgment below, [67]-[81] CAB p153 - 157; *DPP v Gebregiorgis and Kassa* [2023] VSCA 166 ('*Gebregiorgis'*), [5]-[6] (Emerton P); Weinberg report, [2.279]-[2.280] Appellant's Further Materials p97-98.

7 (1985) 156 CLR 473 ('*Giorgianni'*), 487-88 (Gibbs CJ), 493-94 (Mason J) and 506-07 (Wilson, Deane and Dawson JJ).

knowledge and intent in order to fall within the notion of a (completed) conspiracy.[8]

5.5 Section 323(1)(c) speaks to a criminal agreement, arrangement and understanding. To attract liability, a person involved in the commission of an offence need not realise that he or she is party to a crime[9] but must know the essential facts comprising the offence committed.

5.6 'Offence' in Part II, Division 1 means all the elements and essential facts that constitute the offence, not just the physical conduct or *actus reas* of a given crime.[10]

TEXT AND CONTEXT

5.7 Part II of the *Crimes Act* is headed 'Offenders'. Division 1 is headed 'Abettors, accessories and concealers of offences'. Sub-div (I), headed 'Complicity in commission of offences' was inserted into the *Crimes Act* in September 2014 by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. It included new sections 323 and 324.

5.8 The question at the core of this Appellant's case is the construction of s 323(1)(c). Specifically, the Appellant's claim is that, by enacting Part II, Division 1, the legislature intended to retain the common law distinction between primary and derivative liability and to create, in the form of s 323(1)(c), a species of primary liability. Thus, in order to interpret the nature and scope of the liability created by s 323(1)(c), the Appellant contends that it is to the common law doctrines of concert, joint criminal enterprise and common purpose that one looks, and not to traditional forms of accessorial liability.

5.9 The interpretive task begins and ends with a consideration of the text itself.[11] Context

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8 *Judgment below*, [69]-[81] CAB p154 - 157; *Gebregiorgis*, [7] (Emerton P); Weinberg report, 97-98 [2.280]; cf *The Queen v LK* (2010) 241 CLR 177 ('*LK*'), 206-09 (French CJ), 225 [110] and 217 [114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

9 Section 323(3)(b).

10 *Barlow*, 9 (Brennan CJ, Dawson and Toohey JJ).

11 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [14] (Kiefel CJ and Nettle and Gordon JJ); see also *Northern Territory v Collins* (2008) 235 CLR 619, [99] (Crennan J).

and purpose, at the same time, remain important. But the objective is always to construe the true meaning of the text, not to construe (for example) the secondary material.[12]

5.10 The case for the claim that the legislature intended all liability under ss 323 and 324 to be derivative is compelling. It finds support not just – and most importantly – in the language of the statute, but also in the secondary material.[13]

5.11 *First*, and by s 324C, the legislature explicitly abolished not just the common law as it pertained to complicity but also those doctrines by which offenders had attached to them primary liability for group activity. It discarded the nomenclature of the common law and replaced it with a statutory scheme that employed its own language.

5.12 *Second*, and in the place of those common law doctrines, ss 323(1) and 324(1) make all forms of liability under Part II, Division 1 derivative: a person is taken to have committed an offence 'if an offence (whether indictable or summary) is committed', and that person is 'involved' in its commission. Liability is not primary, arising from a type of agency,[14] but accessorial and in keeping with the conceptual basis of liability under s 323(1)(a). There is no basis in the statutory text to impute to the legislature an intention to preserve a common law distinction between primary and derivative liability which the statute so plainly abolishes. A party to an agreement cannot attract liability by innocently – without knowledge of a crime's essential facts – entering into an agreement, arrangement or understanding to perform only the acts which comprise its physical element or *actus reus*.

5.13 *Third*, s 323(1)(c) must be read in its more immediate and wider statutory context. Sub-s (1)(a) employs the word 'intentionally' in the context of assistance, encouragement, and direction. That was done, consistently with the recommendations of the Weinberg report to ensure, in keeping with *Giorgianni*, that a purposive state of mind is required for

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12 Cf Appellant's Submissions, [34]-[39], p11 - 12.

13 Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 ('Explanatory Memorandum'), pp 12-14; Second Reading Speech to the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014: Victoria, Parliamentary Debates, Legislative Assembly, 20 August 2014 ('Second Reading Speech'), 2834 – 2836

14 Cf *Gebregiorgis*, [58]-[60] (Priest and Kaye JJA); cf [6]-[7] (Emerton P). See, generally, *Mitchell v The Queen* (2023) 407 ALR 587, 599-600 [54]-[55] (Gordon, Edelman and Steward JJ), and the cases cited therein.

complicity.[15] 'Intentional' assistance requires knowledge. It is implicit in the terms 'agreement, arrangement and understanding' that there must be a specific degree of knowledge and intent, in order to fall within their ambit.'[16] Properly construed, ss 323(1)(a) and (c) share the same fault element.

5.14 *Finally*, the meaning given to the term 'offence' in Part II, Division 1 – and more widely throughout the *Crimes Act* – is instructive. Although the term is not defined, s 323(3)(b) provides that a person may be involved in the commission of an offence even if that person does not realise that 'the facts constitute an offence'. The reference in context extends the term's meaning beyond the physical conduct or *actus reas* of the crime in which that person is complicit.[17] It would render the section meaningless if 'offence' meant only its physical or conduct element.[18] Similarly, s 323(3)(a) distinguishes between 'offence', the 'act or omission' that might be performed by a complicit party and the 'element' of an offence committed in his or her absence. A textual analysis of the statutory provisions does not support the claim that, when employing the term 'offence' the legislature intended that the term refer only to those acts or omissions sufficient to make good the physical element or *actus reas* of a crime.[19] The text and its construction point the other way.

5.15 Nor is their support to be found for the Appellant's claim in the meaning of 'offence' in the Code states (Queensland and Western Australia) to which the Appellant has referred.[20] In both Codes (the *Criminal Code (Q)* and the *Criminal Code (WA)*) the term 'offence' is explicitly defined, and appears in statutory provisions which are materially different in their terms and scope to Part II, Division 1.[21] It was in their respective

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15 Weinberg report, [2.276]-[2.27] Appellant's Further Material pp 96-97.

16 Weinberg report, [2.279]-[2.280] Appellant's Further Material 97-98; see also *Gebregiorgis*, [6] (Emerton P); cf [58]-[59] (Priest and Kaye JJA).

17 *Judgment below*, [49] and [58], CAB p150 and p152.

18 Cf Appellant's Submissions, [64], p17.

19 Cf Appellant's Submissions, [67]-[70], p18.

20 Appellant Submissions, [64]-[66], p17 - 18.

21 The Appellant inaccurately calls the Victorian and Code provisions 'comparable'.

statutory contexts that the meaning of 'offence' was determined,[22] including that they appeared in codes.[23] 'Offence' in Part II, Division 1 is be informed by its own statutory context, including the fact that the term is not expressly defined.

5.16 The object of the agreement, arrangement or understanding is 'the offence', and not just its physical or conduct element. And to fix liability to a person said to be complicit in the commission of the offence or crime that person must know of or believe in the essential facts that constitute 'the offence'.

5.17 In the Appellant's trial, that meant that it was necessary that the prosecution prove that he knew the complainants were underage even though the person who 'committed' the offence did not have to know they were underage. That is unremarkable. The proposition that there may be different *mens rea* requirements for principal and complicit offenders depending on the elements of the offence charged is supported by common law principles preserved in the statutory provisions.[24]

THE APPELLANT'S CONSTRUCTION

5.18 A number of the claims advanced by the Appellant in support of its construction of s 323(1)(c) do not withstand scrutiny. At their core is a failure to engage with the text of the statutory scheme. Indeed, the Appellant's case all-but ignores key features of the statutory text and their implications.

5.19 That the doctrines which defined criminal liability for group activity at common law imposed a form of primary liability is uncontroversial.[25] It forms part of the historical

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22 See *The Queen v Barlow* (1997) 188 CLR 1, 4-5 and 9-10 (Brennan CJ, Dawson and Toohey JJ) and 20-21 (McHugh J); and *Pickett v Western Australia* (2020) 270 CLR 323, 338-340 [26]–[34], 346-51 [52]-[66] (Kiefel CJ, Bell, Keane and Gordon JJ); cf 354-59 [52]-[56] and 369-71 [108]-[112] (Nettle J) (dissenting).

23 See, eg, *The Queen v Barlow* (1997) 188 CLR 1, 30-33 (Kirby J).

24 *Judgment below*, [66], CAB p153.

25 See, eg, Appellant's Submissions, [22]-[27] pp6 - 8; citing *McAuliffe v The Queen* (1995) 183 CLR 108, 113-14; *Osland v The Queen* (1998) 197 CLR 316, 341-51 (McHugh J); 383 [174] (Kirby J); 402 [217] (Callinan J); *IL v The Queen* (2017) 262 CLR 268, 283 [3] (Kiefel CJ, Keane and Edelman JJ); and *Mitchell & Ors v The King* (2023) 407 ALR 587, 599-600 [54]-[55] (Gordon, Edelman and Steward JJ).

context against which the provisions in Part II, Division 1 must be construed. But it says little else about how to construe them. It does not decide whether the legislature – by enacting those provisions – intended to retain a model which utilised both primary and derivative liability.

5.20 Relatedly, the historical context in which a statute is enacted must not be permitted to swamp the task of determining what the legislature intended by enacting its provisions. Still less can it be permitted to supplant the statutory text or distort its true meaning.

5.21 The Appellant has also submitted that the dramatic changes to the common law principles of joint criminal enterprise proposed by the authors of the Weinberg report – including the adoption of a model that defined all species of joint and accessorial liability as derivative, and which aligned group liability with the law of conspiracy – were not adopted.[26] It is said that the legislature 'clearly intended' to retain the traditional differences between accessorial liability and primary liability arising from a shared common purpose.[27] But no attempt is made to engage with the statutory text or to reconcile the Appellant's claim that the new provisions retain and employ primary and derivative forms of liability with, in particular, ss 324C and s 324(1).

5.22 Rather, the Appellant looks to the secondary material to make good the claim. It is said that there is no reference in the Explanatory Memorandum or the Second Reading Speech to an intention to depart from the principles of joint criminal enterprise or to adopt for group liability a fault element consistent with *Giorgianni* and with the concept of a 'completed conspiracy'.[28] Those submissions are wrong.

5.23 The Second Reading Speech refers to the need – following the Weinberg report and its recommendations – to 'reform the substantive law'.[29] It was said that the new provisions

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26 Appellant's Submissions, [44] p13.

27 Appellant's Submissions, [39] p12.

28 Appellant's Submissions, [37] p11.

29 Second Reading Speech, p 2836

will have 'a similar scope to the common law doctrines' they replace, but will 'remove confusing and unhelpful distinctions between different types of complicity.'[30]

5.24 The Explanatory Memorandum is clearer still. Division 2, clause 6 states that the new provisions 'will improve the law of complicity by introducing simpler, internally consistent laws and abolishing problematic common law rules.'[31] The Bill 'draws extensively from the recommendations' of the Weinberg report. And '[i]t is clear that liability is derivative, as an offence has to have been committed for a person to be complicit in that offence.'[32]

5.25 The Appellant's argument thereafter descends into little more than a series of submissions by assertion. 'Offence' refers only to the conduct element of an offence because it is 'consistent with a plain reading of the statutory provisions' and with 'the principles that applied at common law'[33] and because it appears in a statutory scheme 'comparable' to those utilised in the Code States.[34] The Court below 'failed to recognise' that the legislature did not adopt the model for s 323(1)(c) proposed by the authors of the Weinberg report[35] and 'unjustifiably removed the primary liability that affixes to an accused who enters into an agreement with another or others to commit the offence or an offence within the scope of the agreement.'[36]

5.26 To the contrary, and whatever may be made of ss 324C and 324(1), and of the passages extracted the Second Reading Speech, they provide a sound basis for the construction at which the Court arrived.

5.27 Finally, the Appellant relies upon 'the perverse effect of removing the primary liability' of those who jointly commit crimes pursuant to an agreement, arrangement or

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30 Ibid.

31 Explanatory Memorandum, p 12

32 Explanatory Memorandum, p 14. See also Weinberg report, [2.288] Appellant's Further Material p99.

33 Appellant's Submission, [67]-[70], p18.

34 Appellant's Submissions, [63]-[66] p17.

35 Appellant's Submissions, [44], p13.

36 Appellant's Submissions, [45], p13.

understanding.[37] It creates 'two different thresholds for criminal liability depending on the role a person played'.[38]

5.28 It is hardly perverse. Nor does it render incongruous or perverse the adoption by the legislature of a statutory scheme making complicity wholly derivative.[39] Although it 'raises the bar' to securing convictions against complicit offenders, that might be said to reflect the derivative nature of their liability.[40] Put another way, there is nothing illogical about demanding that a complicit offender know more than a principal before attaching to him or her criminal liability. It is after all the premise on which s 323(1)(a) was enacted and the foundation of the Weinberg report's recommendations on s 323(1)(c). The relationship of joint criminal enterprise to general concepts of complicity is a contested area of debate.[41] There is nothing unreasonable or perverse about the legislature intending, having regard to the very specific and narrow intent that must be established for accessorial liability under s 323(1)(a), that the position be the same in the case of group activity.[42] The result is the enactment of a statutory scheme predicated wholly on derivative liability, adopting a single, shared fault element for ss 323(1)(a) and 323(1)(c).[43]

5.29 Whatever the true construction of s 323(1)(c), and however one characterises the nature of the liability it imposes, there will be cases which challenge our logic and common sense.[44] On the Appellant's construction a parent who enters into an agreement, arrangement or understanding with her adult son that he may have sex in the house with his girlfriend – not knowing that the girl is only 11 years' old – will have committed the offence created by s 49A *Crimes Act* of which the Respondent was found guilty. A taxi driver who is is asked by a passenger to drive him to a place where he can solicit the services of sex worker and

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37 Appellant's Submissions, [51], p14.

38 Appellant's submissions, [48], p13.

39 *Judgment belo*w, [60]-[66] CAB p152 - 153.

40 *Judgment below,* [60]-[66] CAB p152 - 153.

41 *Miller v Ther Queen* (2016) 259 CLR 380, 397-98 [4].

42 Weinberg report, [2.114] Appellant's Further Materials p 47.

43 Weinberg report, [2.144] Appellant's Further Materials p 47.

44 Weinberg report, [2.141] Appellant's Further Materials p 57-58. And there will always be cases which challenge trial judges in their duty to instruct the jury on the law and the issues at trial.

is taken to a street corner where sex workers are gathered – not knowing or appreciating that some of the girls in the group are underage – will be complicit in the crime committed by the passenger if the customer engages the services of and had sex with one of the girls who are underage.

5.30 No statute – however prescriptive – can avoid the problem of practical results which appear to be or are strange or undesirable. It is *inter alia* the product of choices made between competing policy objectives. That is especially true of statutes enacted to reform and replace areas of the law traditionally defined and developed by reference only to or for the most part by the common law. The significance of the problem for those construing the new law will vary from statute to statute and depending on how offensive are the practical results. But the problem itself is not remarkable. It is inevitable. And it cannot be permitted to hijack the interpretive exercise.

CONCLUSION

5.31 Part II, Division 1 of the *Crimes Act* (ss 323-343C) abolished the common law of complicity and accessorial liability, and abolished the common law doctrines of acting in concert, joint criminal enterprise and common purpose (including extended common purpose): s 323(C).

5.32 Liability under ss 323 and 324 is derivative. Sections 323(1)(a) and (c) share the same fault element.

5.33 To attract liability under s 323(1)(c) a person involved in the commission of an offence need not realise that he or she is party to a crime but must know the essential facts comprising the offence committed.

5.34 The appeal should be dismissed.

PART VI: TIME ESTIMATE FOR ORAL ARGUMENT

6.1 The presentation of the Respondent's oral argument is estimated to occupy two (2) hours.

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ANNEXURE

Pursuant to item 3 of the Practice Direction 1 of 2019, below is a list of each of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions above

No	Description	Version	provision
1	*Crimes Act* 1958 (Vic)	283 (as at 28.10.2018)	Part II; Part II Division 1; ss323 – 343C
2	*Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)	-	ss 1, 6 and 7
3	*Criminal Code Act 1899* (Qld)	9 (7 December 1992 and 23.11.1993) (the version under consideration in *Barlow*) Version at 3 December 2018	ss 2 and 7 and 8
4	*Criminal Code Compilation Act 1913* (WA)	17-l0-00 (the version under consideration in *Pickett*) 19-c0-01 (the version under consideration as at 3 December 2018)	ss2 and 7 and 8