

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

ALO-BRIDGET NAMOA

APPELLANT

AND

THE QUEEN

RESPONDENT

Namoa v The Queen
[2021] HCA 13
Date of Hearing: 11 March 2021
Date of Judgment: 14 April 2021
S188/2020

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with R W Haddrick and D P Farinha for the appellant
(instructed by Zali Burrows at Law)

S J Free SC with T O Prince and B E M Anniwell for the respondent
(instructed by Commonwealth Director of Public Prosecutions)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Namoa v The Queen

Criminal law (Cth) – Conspiracy – Where s 11.5(1) of *Criminal Code* (Cth) established offence of conspiracy – Where appellant charged with conspiring to do acts in preparation for terrorist act contrary to ss 11.5(1) and 101.6(1) of *Criminal Code* – Whether s 11.5 applies to spouses who agree between themselves, and no other person, to commit offence against Commonwealth law – Whether interpretation of s 11.5 of *Criminal Code* affected by any common law rule that spouses alone cannot conspire – Whether references in s 11.5 of *Criminal Code* to "person" and "another person" include two spouses – Whether meaning of "conspires" and "conspiracy" in s 11.5 of *Criminal Code* incorporates any common law rule that spouses alone cannot conspire.

Words and phrases – "another person", "common law rule", "conspiracy", "conspires", "doctrine of unity", "person", "single legal personality of spouses".

Criminal Code (Cth), s 11.5.

1 KIEFEL CJ. I agree with Gleeson J.

2 GAGELER J. I agree with Gleeson J.

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3 KEANE J. I agree with Gleeson J.

Gordon J

4.

4 GORDON J. I agree with Gleeson J.

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5 EDELMAN J. I agree with Gleeson J.

6 STEWARD J. I agree with Gleeson J.

7 GLEESON J. This appeal concerns the interpretation of s 11.5(1) of the *Criminal Code* (Cth) ("the Code"), which creates a statutory offence of conspiracy, and whether that offence applies to spouses who agree between themselves, and no other person, to commit an offence against a law of the Commonwealth. The appellant was found guilty by a jury of conspiring to do acts in preparation for a terrorist act contrary to ss 11.5(1) and 101.6(1) of the Code. The offence occurred between 8 December 2015 and 25 January 2016. Prior to the trial, the trial judge rejected an application for a permanent stay which had been made on the basis that the appellant and her co-conspirator married on 30 December 2015 and, as husband and wife, could not be guilty of conspiracy under the Code¹.

8 The appellant contends that there is a common law rule that spouses alone cannot conspire; and that this rule affects the meaning of "conspires" and "conspiracy" in s 11.5 of the Code. Although the appellant referred to the rule as an immunity from prosecution in the courts below², that characterisation was not maintained in this Court.

9 For the following reasons, the proper interpretation of s 11.5(1) is not affected by any such common law rule. The Court of Criminal Appeal of the Supreme Court of New South Wales was correct to conclude that, on the clear language of the Code, a husband and wife are each a "person" and can be guilty of conspiring with each other within the meaning of s 11.5³. Accordingly, s 11.5 of the Code applied to the appellant and the appeal must be dismissed.

10 At the relevant time, s 11.5 relevantly provided:

"Conspiracy

- (1) **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 or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.**

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.

1 *R v Bayda [No 3]* (2018) 274 A Crim R 1 at 18 [78]-[79] per Fagan J.

2 *Namoa v Director of Public Prosecutions* (2020) 282 A Crim R 362 at 368 [23], 376 [54] per Payne JA (Johnson J agreeing at 383 [88], Davies J agreeing at 383 [89]).

3 *Namoa v Director of Public Prosecutions* (2020) 282 A Crim R 362 at 383 [85] per Payne JA (Johnson J agreeing at 383 [88], Davies J agreeing at 383 [89]).

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- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
 - (b) 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
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

...

- (3) A person may be found guilty of conspiracy to commit an offence even if:
- (a) committing the offence is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) a person for whose benefit or protection the offence exists; or
 - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
 - (b) he or she is a person for whose benefit or protection the offence exists.

..."

Interpretation of the Code

11 The principles for interpreting a statutory code are well established. A code is to be construed according to its natural meaning and without any presumption that its language was intended to do no more than restate the common law⁴. The common law cannot be used to supply the meaning of a word used in a code except where the word has a well-established technical meaning under the pre-existing law and the code uses that word without definition⁵, or it appears that the relevant provision in a code is ambiguous⁶. The common law cannot be invoked in the interpretation of a code for the purpose of creating an ambiguity⁷.

12 *R v LK* holds that, subject to express statutory modification, the words "conspires" and "conspiracy" in s 11.5 bear their common law meaning⁸. In that case, the plurality said relevantly⁹:

"Spigelman CJ's conclusion that the words 'conspires' and 'conspiracy' in s 11.5(1) are to be understood as fixed by the common law subject to express statutory modification is to be accepted. ... These are words that had an established meaning within the criminal law at the time the Code was enacted. Their use, without definition, in the statement of the Code offence was intended to be understood by reference to that legal

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- 4 *Pickett v Western Australia* (2020) 94 ALJR 629 at 635-636 [22]-[23] per Kiefel CJ, Bell, Keane and Gordon JJ; 379 ALR 471 at 477, quoting *Brennan v The King* (1936) 55 CLR 253 at 263 and *Stuart v The Queen* (1974) 134 CLR 426 at 437. See also *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 309 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
 - 5 *R v LK* (2010) 241 CLR 177 at 220 [97] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
 - 6 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 309 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
 - 7 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 309 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
 - 8 (2010) 241 CLR 177 at 224 [107] per Gummow, Hayne, Crennan, Kiefel and Bell JJ. Affirmed in *Agius v The Queen* (2013) 248 CLR 601 at 615 [54] per Gageler J.
 - 9 *R v LK* (2010) 241 CLR 177 at 224 [107] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; see also at 231 [131].

meaning. On the hearing of the appeals senior counsel for the appellant accepted so much."

Spouses are separate "persons"

13 Whatever may have been the historical position, there is no longer any principle in Australian common law respecting the single legal personality of spouses¹⁰. Senior counsel for the appellant properly acknowledged that the common law rule for which he contends cannot depend upon any proposition that husband and wife form a single person.

14 On its face, s 11.5(1) refers to "[a] person who conspires with another person". "Person" is defined in the Dictionary to the Code as follows:

"**person** includes a Commonwealth authority that is not a body corporate, and **another** has a corresponding meaning.

Note: This definition supplements subsection 2C(1) of the *Acts Interpretation Act 1901*. That subsection provides that **person** includes a body politic or corporate as well as an individual."

15 The references in s 11.5 to a "person" and "another person" are apt to include two spouses. The appellant did not contend otherwise.

Meaning of "conspires" and "conspiracy"

16 In *R v LK*, the plurality explained the meaning of "conspires" and "conspiracy" in s 11.5(1) in the following passages¹¹:

"Spigelman CJ's analysis, that the common law offence of conspiracy requires that an accused person know the facts that make the proposed act or acts unlawful, should be accepted as an accurate statement of the law.

...

Section 11.5(1) makes it an offence to conspire with another person to commit an offence punishable by imprisonment for more than twelve months or by a fine of 200 penalty units or more (a non-trivial offence). It

10 *Magill v Magill* (2006) 226 CLR 551 at 573 [55] per Gummow, Kirby and Crennan JJ. See also *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605 at 615-616 per Dixon CJ, Williams, Webb and Fullagar JJ.

11 (2010) 241 CLR 177 at 227 [114], 231 [131], 232 [133], 235 [141] per Gummow, Hayne, Crennan, Kiefel and Bell JJ (footnotes omitted).

reads naturally as the law creating the offence. It is by the adoption of the word 'conspires', with its established legal meaning, that the drafters of the Code chose to deal with questions that are not otherwise addressed in s 11.5. These may be taken to include the parties to the conspiracy and the sufficiency of their dealings to constitute the agreement. Section 11.5(1) is the specification of a physical element of the offence, namely, conspiring with another person to commit a non-trivial offence. Central to the concept of conspiring is the agreement of the conspirators.

...

Paragraphs (a) and (b) of s 11.5(2) are epexegetical of what it is to 'conspire' with another person to commit an offence within the meaning of s 11.5(1). Section 11.5(2)(b) looks to the time at which the agreement was entered, making clear that for a person to 'conspire' under s 11.5(1) it is necessary that he or she and at least one other party to the agreement 'must have intended' that an offence be committed pursuant to it. Together paras (a) and (b) clarify, first, the two points made in the first sentence of the highlighted passage from the Gibbs Committee Report, extracted at [105] above [concerning the mental element for the crime of conspiracy], and, secondly, that the reach of the Code offence does not extend to an agreement to which the only parties are a single accused person and an agent provocateur. ...

At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the non-trivial offence particularised as being the object of the conspiracy. In charging a jury as to the meaning of 'conspiring' with another person, it is necessary to direct that the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement."

17 These passages say nothing about any common law rule relating to spouses as an aspect of the common law meaning of "conspiracy". *R v LK* did not address that issue and cannot be authority that the meaning of "conspires" and "conspiracy" incorporates such a rule¹². The passages reveal that the common law meaning of

12 *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1016 [28] per Kiefel CJ, Bell, Keane and Gordon JJ; 372 ALR 555 at 562, citing *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79] per McHugh J and *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] per Gleeson CJ, Gummow and Heydon JJ.

"conspires" comprises entering into an agreement to perform the actus reus of an offence with knowledge of facts that make the proposed acts unlawful¹³. In context (including the relevant footnote¹⁴), the observation that the drafters of the Code chose to address "the parties to the conspiracy and the sufficiency of their dealings to constitute the agreement" by adoption of the word "conspires" is not directed to the capacity of particular types of persons to commit the offence.

18 The overseas case law upon which the appellant relied to contend that the language of s 11.5 does not expressly oust the common law position does not assist her case¹⁵ because of the different statutory contexts and the courts' reliance upon the proposition, disavowed by the appellant as part of the common law of Australia, that spouses may constitute a single person. In *R v McKechie*, the New Zealand Court of Appeal held, by majority, that the relevant statute authorised a common law defence to a statutory charge of conspiracy "in accordance with the common law that there should be two persons to constitute a conspiracy"¹⁶. The majority reasoned that "at common law, as regards a charge of conspiracy, husband and wife are not two persons but only one, and there is no indication that that basic rule is reversed"¹⁷.

19 In the Canadian case of *Kowbel v The Queen*, the relevant statutory offence was to the effect that "every one is guilty of an indictable offence, who in any case not otherwise provided for, conspires with any person to commit any indictable offence"¹⁸. The words "every one" were defined to apply only to persons in relation

13 See also *Agius v The Queen* (2013) 248 CLR 601 at 616-617 [59] per Gageler J, quoting *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 361 [34.11].

14 The footnote states: "The agreement of the conspirators need not be attended by any formalities: *R v Orton* [1922] VLR 469 at 473 per Cussen J; *Gerakiteys* (1984) 153 CLR 317. See also Orchard, "Agreement" in *Criminal Conspiracy – I* [1974] *Criminal Law Review* 297."

15 *Director of Public Prosecutions v Blady* [1912] 2 KB 89; *R v Peel* (The Times, 8 March 1922); *R v McKechie* [1926] NZLR 1; *Kowbel v The Queen* [1954] SCR 498; *Mawji v The Queen* [1957] AC 126; *Midland Bank Trust Co Ltd v Green [No 3]* [1979] Ch 496; *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529; *R v Cheung Ka Fai* [1995] 3 HKC 214.

16 [1926] NZLR 1 at 12 per Sim, Reed and Adams JJ.

17 *R v McKechie* [1926] NZLR 1 at 12 per Sim, Reed and Adams JJ.

18 [1954] SCR 498 at 499 per Kerwin and Taschereau JJ (emphasis in original).

to such acts and things as they are capable of doing¹⁹. Kerwin and Taschereau JJ, with whom Estey and Cartwright JJ agreed, concluded that "every one" did not include husbands and wives because they lacked capacity to conspire on the basis of a common law defence "because judicially speaking they form but one person"²⁰.

20 In *Mawji v The Queen*, the Privy Council concluded that the rule of English criminal law that husband and wife cannot be guilty of conspiracy was incorporated into the relevant statutory offence by a provision to the following effect²¹:

"This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed ... except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

21 The offence was in the following terms²²:

"Any person commits a misdemeanour who conspires with any other person to accuse any person falsely of any crime, or to do anything to obstruct, prevent, pervert or defeat the course of justice."

22 Their Lordships identified a rule of English criminal law that²³:

"A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will."

19 *Kowbel v The Queen* [1954] SCR 498 at 500 per Kerwin and Taschereau JJ.

20 *Kowbel v The Queen* [1954] SCR 498 at 499 per Kerwin and Taschereau JJ, 503 per Estey J, 505 per Cartwright J.

21 [1957] AC 126 at 133-134; *Penal Code of Tanganyika*, s 4.

22 *Penal Code of Tanganyika*, s 110(a).

23 *Mawji v The Queen* [1957] AC 126 at 134.

23 Their Lordships accepted that the rule was "an example of the fiction that husband and wife are regarded for certain purposes ... as in law one person"²⁴. In construing the offence provision, their Lordships held²⁵:

"Their Lordships are of opinion that the rule is incorporated into the provisions of section 110(a). The words 'conspires' and 'conspiracy' in English criminal law are not applicable to husband and wife alone; the words 'other person' in section 110(a), if English criminal law is applied to their 'interpretation' or 'meaning,' cannot in this context include a spouse."

24 Finally, the appellant sought to rely on *Midland Bank Trust Co Ltd v Green [No 3]*²⁶. In that case, the Court of Appeal of England and Wales held that the "doctrine of unity" between husband and wife, which applied to the crime of conspiracy, should not be applied to the modern tort of conspiracy²⁷.

25 At first instance, Oliver J found that "a criminal conspiracy did and does require, at common law, and as an essential ingredient of the offence, an agreement between the accused and some person other than his or her spouse"²⁸. His Honour stated that "the common law rule was and is that a husband and wife cannot be convicted of the crime of conspiracy in circumstances in which they are the only parties to the conspiracy alleged"²⁹. Ultimately, however, Oliver J concluded that³⁰:

"the continued existence of the rule, in relation to the crime of conspiracy rests ... not upon a supposed inability to agree as a result of some fictional unity, but upon a public policy which, for the preservation of the sanctity of marriage, accords an *immunity from prosecution to spouses* who have done no more than agree between themselves in circumstances which would lay them open, if unmarried, to a charge of conspiracy." (emphasis added)

24 *Mawji v The Queen* [1957] AC 126 at 135.

25 *Mawji v The Queen* [1957] AC 126 at 134-135.

26 [1982] Ch 529.

27 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 539-540 per Lord Denning MR, 540-542 per Fox LJ, 542-543 per Sir George Baker.

28 *Midland Bank Trust Co Ltd v Green [No 3]* [1979] Ch 496 at 511.

29 *Midland Bank Trust Co Ltd v Green [No 3]* [1979] Ch 496 at 520.

30 *Midland Bank Trust Co Ltd v Green [No 3]* [1979] Ch 496 at 521.

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26 His Honour further concluded that³¹:

"there is no good logical or historical reason for slavishly applying in the law of tort, simply because the tort is called the 'tort of conspiracy,' the primitive and inaccurate maxim that spouses are one person, so as to confer upon them an *immunity from civil liability* not accorded to the unmarried." (emphasis added)

27 On appeal, Oliver J's decision was upheld³². The reasoning of the Court of Appeal does not indicate that the common law meaning of "conspiracy" incorporates a notion that spouses alone cannot "conspire" or be "conspirators". In particular, Lord Denning MR identified as the appellant's argument that the doctrine of unity between husband and wife is an established doctrine in English law. One of the ramifications of that doctrine was said to be that husband and wife cannot be guilty as conspirators together³³. Lord Denning MR noted that "[t]he crime of conspiracy is still based on an agreement to do an unlawful act without more"³⁴. Fox LJ distinguished between a "conspiracy" and the question of whether a husband and wife can be convicted of the crime of conspiracy, saying³⁵:

"It is clear that a husband and wife cannot be convicted of the crime of conspiracy if they are the only parties to the conspiracy alleged. That has long been the law. It was confirmed by the Criminal Law Act 1977. The question is whether the same rule should be applied to the tort. The crime and the tort shared the same definition: an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means."

Sir George Baker identified the statutory exemption from liability for criminal conspiracy as the expression of a "very limited rule" of the legal doctrine of unity of husband and wife³⁶.

28 While the explanations for the special position of spouses in relation to the crime of conspiracy varied, in none of these cases was the court concerned with the meaning of "conspiracy". It follows that, whether there is or was a rule of

31 *Midland Bank Trust Co Ltd v Green [No 3]* [1979] Ch 496 at 525.

32 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 540 per Lord Denning MR, 542 per Fox LJ, 542-543 per Sir George Baker.

33 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 538.

34 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 539.

35 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 540.

36 *Midland Bank Trust Co Ltd v Green [No 3]* [1982] Ch 529 at 542.

Australian common law that there can be no criminal conspiracy if the only two parties to the agreement are spouses, that rule is not incorporated into the offence contained in s 11.5 of the Code by the words "conspires" and "conspiracy".

Contextual and extrinsic material

29 The appellant sought to rely upon s 11.5(3) in support of her construction of s 11.5(1), observing that it does not address explicitly the position of spouses. The respondent accepted that the legislature could have addressed the position of spouses in s 11.5(3). However, as senior counsel for the respondent contended, s 11.5(3) tells against an interpretation of "conspires" and "conspiracy" that incorporates complicated rules as to which types of persons can commit the offence created by s 11.5(1).

30 The relevant extrinsic material includes an interim report, published in July 1990, of a Committee chaired by Sir Harry Gibbs and entitled "Principles of Criminal Responsibility and Other Matters" ("the Gibbs Committee Report")³⁷. Chapter 39 of that report is entitled "Parties to the Conspiracy"³⁸. The chapter

37 See *R v LK* (2010) 241 CLR 177 at 203 [51] per French CJ.

38 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 379-391.

commences by citing s 2(2) of the *Criminal Law Act 1977* (UK)³⁹, referred to in *Midland Bank [No 3]*⁴⁰, and then relevantly states⁴¹:

"At common law there can be no criminal conspiracy if the only two parties to the agreement are husband and wife [citing *Mawji* and *Midland Bank [No 3]*]. This rule originally derived from the doctrine of the unity of husband and wife; it has been criticised as outmoded and there has been a refusal to extend it to the tort of civil conspiracy. ...

Conspiracies to commit offences against Commonwealth laws are of a kind likely to be made between spouses. Conspiracies to import heroin into Australia and conspiracies to defraud the revenue are obvious examples. The Review Committee can see no valid reason of social policy why the rule that there can be no conspiracy between husband and wife should be retained. That rule is based upon a fiction which is unacceptable in modern society. It is anomalous, since a wife may be guilty as an accessory to an offence committed by her husband although she is not capable of conspiring to commit that offence.

...

39 Section 2(2) of the *Criminal Law Act 1977* (UK) provided that:

"A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say –

- (a) his spouse;
- (b) a person under the age of criminal responsibility; and
- (c) an intended victim of that offence or of each of those offences."

40 [1982] Ch 529 at 539 per Lord Denning MR, 540 per Fox LJ, 542 per Sir George Baker.

41 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 380-381 [39.3], [39.4], [39.7] (footnotes omitted).

The Review Committee recommends that the consolidating law should contain a provision to the effect that there may be a conspiracy to which the only parties are spouses."

31 The Code does not include a provision which explicitly addresses the Review Committee's recommendation. However, even assuming that the inclusion of such a provision was intended by the recommendation, its absence in the Code is of little assistance to the appellant where the report identifies the rule upon which the appellant relies as distinct from the common law meaning of "conspiracy".

32 The position of corporations as parties to a conspiracy is also considered in the Gibbs Committee Report. The report refers to uncertainty about whether a company could be criminally liable for conspiracy; whether there could be no conspiracy between a "one man company" and the director who has sole responsibility for its management; and whether there could be conspiracy between a company and the board of directors who controlled it, or between a company and a subsidiary over which the company exercised complete control⁴². In that context, s 11.5(3)(b) would appear to simplify the operation of s 11.5 in relation to corporations and does not relevantly affect the proper interpretation of s 11.5(1).

33 Finally, it is relevant to note that the Code has its origins in a draft Model Code prepared by a Committee established by the Standing Committee of Attorneys-General in 1990, the Criminal Law Officers Committee, subsequently designated the Model Criminal Code Officers Committee⁴³. After setting out the draft offence in relevantly similar terms to s 11.5(1), the Committee stated in its report that⁴⁴:

"Parties issues

Conspiracy raises a number of issues which might be described as issues related to the 'parties' to the agreement.

No protection is provided for spouses. Clearly a husband and wife can be guilty of conspiring with each other. Marital immunity is outdated; any objections to husband/wife conspiracies are objections which go to the nature of the conspiracy offence itself ... Some Griffith Codes are also outdated on this issue: see s 33 Queensland Code (recommended for repeal

42 *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at 388 [39.22].

43 See *R v LK* (2010) 241 CLR 177 at 204 [53] per French CJ.

44 Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2: General Principles of Criminal Responsibility*, Final Report (December 1992) at 103.

19.

by O'Regan, p5) and s 297(2) Tasmanian Code, both taking the common law position."

34 These extrinsic materials further support the conclusion that the statutory offence of conspiracy in s 11.5(1) applies to spouses who agree between themselves, and no other person, to commit an offence against a law of the Commonwealth. It is unnecessary to consider whether the common law includes or included at any relevant time a rule by virtue of which the common law of conspiracy does not apply to spouses.

Conclusion

35 The appeal should be dismissed.