CHAPTER 14

SECONDARY LIABILITY

Parties to an offence

14.1 An accused may have personally performed all the elements of the offence, either acting alone as a sole 'principal' or together with other 'joint principals' who have also each performed all the elements of the offence. Alternatively, joint principals acting together may perform different elements of an offence. For example, in a robbery one person may threaten violence while another person takes the property. They can both be liable as joint principals if they are working to a common design, depending on the scope of the common design and on the participants' foresight as to the possible incidents of carrying out the common design: *Gillard v R* (2003) 219 CLR 1; 202 ALR 202; [2003] HCA 64.

14.2 Sometimes, one person will perform all the elements of an offence with another person assisting or otherwise contributing as, what is variously called, an 'accomplice', 'accessory' or 'secondary party'. The Penal Codes SI/Ki/Tu ss 21-23 set out a framework by which a person may attract criminal liability even though that person did not necessarily perform any of the acts or omissions which constitute the offence. This scheme is the same as that which was originally set out in the Griffith Code, so that authorities from Queensland and Western Australia can assist in its interpretation.

14.3 The Codes recognise several forms of participation in offences. SI s 21 first para; Ki/Tu s 21(1) list certain persons who are 'deemed to have taken part in committing the offence and to be guilty of the offence':

(a) every person who actually does the act or makes the omission which constitutes the offence;
(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) every person who aids or abets another person in committing the offence;
(d) any person who counsels or procures any other person to commit the offence.

Paragraph (a) incorporates joint-principalship where several parties are working together to commit the elements of an offence. Paragraphs (b)-(d) recognise the primary forms of secondary participation. Sections 22-23 then extend liability to cover certain additional offences committed in consequence of carrying out the common design:

- Under the s 22, liability is extended to all parties to an unlawful purpose for an offence committed by any of them that is a probable consequence of carrying out the unlawful purpose.

- Under s 23, a person counselling another to commit an offence is liable for any other offence which is a probable consequence of carrying out the offence counselled.

14.4 Parties to an offence do not include 'accessories after the fact'. An accessory after the fact is someone who, after an offence has been committed, helps the offender to escape punishment: Codes SI s 386; Ki/Tu s 379. An accessory after the fact is not a party to the original offence but commits a separate offence, generally with liability to three years' imprisonment: SI s 387; Ki/Tu s 380.

Charges, verdicts and punishments

14.5 Secondary parties can be charged and convicted as if they were principals. For example, a woman can be charged with the rape of another woman and convicted of the offence on the basis that she assisted the male principal. Alternatively, a particular mode of secondary participation may be charged. The Codes SI/Ki/Tu s 21(2) expressly mention these alternatives with respect to counselling or procuring. The same alternatives are available for the other modes of secondary participation under common law principles.

14.6 Where the charge specifies a particular mode of participation, that mode must be proved. However, where the charge does not specify a mode of participation, the prosecution can argue any mode in the alternative: see, for example, *Beck v R* (1989) 43 A Crim R 135, where the charge was murder and the prosecution argued for liability under aiding and 'common purpose' liability in the alternative. In *R v Jogee* [2016] UKSC 8 at [1], it was said: 'Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other.'

14.7 It has sometimes been suggested that, when the prosecution alleges secondary participation, the particular mode of participation should be indicated in the charge: *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140; *Giorgianni v R* (1985) 156 CLR 473 at 497; 58 ALR 641 at 658. The argument for indicating the mode of participation is that the accused should be given notice of the precise case which will be alleged. However, this can be done in ways other than by specification in the charge. Requiring a mode of participation to be specifically charged would be unfair to the prosecution in a case where it can prove participation but not a particular mode. In *Osland v R* (1998) 197 CLR 316; 59 ALR 170; [1998] HCA 75 at [26], Gaudron and Gummow JJ said it would rarely be necessary to decide whether a person present at the scene of the crime is guilty as a principal or accessory.

14.8 Following conviction, a secondary party is liable to the same punishment as a principal. The Codes expressly provide that a conviction for counselling or procuring entails the same consequences as a conviction for actually committing the offence: SI/Ki/Tu s 21(3) The same

is true under common law principles for the other forms of secondary participation

Forms of aiding

14.9 The Codes recognise two forms of aiding the commission of an offence:

1. SI s 21 first para (b); Ki/Tu s 21(1)(b) deems every person 'who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence' to be a party to the offence.
2. SI s 21 first para (c); Ki/Tu s 21(1)(c) deems every person 'who aids another person in committing the offence' to be a party to the offence.

Paragraph (b) focuses on the purpose of aiding whereas para (c) focuses on the fact of aiding. As long as there was the purpose to enable or aid, para (b) does not require that the offence actually be enabled or aided by the conduct of a secondary party. There can be a conviction under this provision even in cases where an attempt to render aid was ineffective or frustrated, if the offence was nevertheless committed. In contrast, para (c) requires the principal to have actually been aided in the commission of the offence but does not require the purpose to do so. The mental element of para (c) is discussed at **14.14**.

14.10 Aiding under the Codes includes providing not only material assistance but also encouragement or support, as long as this is offered at the scene of the offence: *Beck v R* (1989) 43 A Crim R 135. Encouragement beforehand constitutes counselling under SI s 21 first para (d); Ki/Tu s 21(1)(d). On the other hand, providing material assistance beforehand amounts to aiding under SI s 21 first para (b) or (c); Ki/Tu s 21(1)(b) or (c). The explanation of this anomaly turns on the relationship between the Code provisions and their antecedents at common law. At common law, a distinction was drawn between 'aiding and abetting' at the scene of an offence and 'counselling and procuring' beforehand: *Giorgianni v R* (1985) 156 CLR 473. In *Osland v R* (1998) 197 CLR 316; 59 ALR 170; [1998] HCA 75 at [206], Callinan J noted:

> [T]he distinguishing feature of accessories *at* the fact was their presence at the commission of the crime. Accessories *at* the fact were described as 'aiding and abetting' the commission of the crime. Accessories *before* the fact were referred to as having 'counselled or procured' the crime. Different penalties were typically imposed for the various classifications of participation.

14.11 Passive presence during the commission of an offence does not amount to aiding if the person is merely a spectator. See *R v Manedetea* [2017] SBCA 19 at [22]:

> If a person is present with knowledge that the offence with which he is charged as an accomplice may take place and chooses to remain, it is evidence of encouragement but no more. In order to be guilty as an aider and abettor, he must not only be pre-

sent but at least be concurring in the result.

14.12 There is a reference to aiding by omission in SI s 21 first para (a); Ki/Tu s 21(1)(a). This should, however, be interpreted to mean an omission which makes some positive contribution to the commission of an offence. For example, the entry of thieves into a building may be facilitated by a security guard accomplice who fails to lock a door.

14.13 Although it is well established that mere passive presence does not constitute secondary participation, the application of this rule can cause difficulty. Passive presence must be distinguished from an act of deliberately making oneself present in order to observe an offence, which can amount to aiding by encouragement, or from acting as a look-out or sentry: see *Kilatu v R* [2009] SBCA 20. Passive presence must also be distinguished from presence under circumstances from which intention to encourage or readiness to help if necessary would be inferred: see the discussion in *Beck v R* (1989) 43 A Crim R 135; see also *R v Manedetea* [2017] SBCA 19 at [25].

Fault element of aiding

14.14 There is a mental element to aiding:

- The Codes SI s 21 first para (a); Ki/Tu s 21(1)(a) requires proof of assistance being given for the *purpose* of aiding the commission of the offence.
- Section 7(1)(c) (Qld)/s 7(c) (WA) do not expressly specify any mental element. It has nevertheless been held that 'aids' means 'knowingly aids': see *Beck* (1989) 43 A Crim R 135; *Jervis v R* [1993] 1 Qd R 643; *R v Manedetea* [2017] SBCA 19 at [22]. In *Jervis*, the Queensland Court of Appeal suggested that 'aids' is a word which carries a mental element within itself. Other words which imply a mental element include 'assault' (see **6.17**–**2.21**) and 'possess' (see **8.19**).

14.15 It is sufficient that a secondary party under the Codes s 21 contemplates the kind of crime to be committed by the principal. It is not necessary that its precise details be known: *Ancuta v R* [1991] 2 Qd R 413. In that case, the accused was convicted of unlawful possession of specified motor vehicles on the basis that he had supplied compliance plates for use on stolen vehicles, even though he did not know on which specific vehicles they would be used.

14.16 The precise formulation of the fault element for aiding has been controversial. In *R v Manedetea* [2017] SBCA 18 at [24], the Solomon Islands Court of Appeal endorsed the following passage from the judgment of the English Court of Appeal in *R v Bryce* [2004] EWCA 1231 at [71]:

Thus, the prosecution must prove:

(a) an act done by D which in fact assisted the later commission of the offence;

(b) that D did the act deliberately realising that it was capable of assisting the offence;

(c) that D at the time of doing the act contemplated the commission of the offence by A i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and;

(d) that D when doing the act intended to assist A in what he was doing.

This formulation combines foresight of the risk of an offence being committed with intention to assist the actions of the principal. Recklessness by itself is insufficient. Intention to aid is required, but the required intention is to aid the actions of the principal rather than to aid the commission of the offence.

14.17 The reference to foresight of the risk in *Manedetea* and *Bryce* could, alternatively, be phrased in terms of a conditional intent to aid the commission of an offence. On conditional intention, see *Smith v The Queen; The Queen v Afford* (2017) 259 CLR 291; [2017] HCA 19 at [6]; see also **4.56**. Paragraph (c) would then read: 'that D at the time of doing the act contemplated the commission of the offence by A and intended to aid its commission if A pursued that objective'.

14.18 It has been held that if one person aids another (for example, as a driver), knowing that some offence is to be committed but not knowing which particular one is to be committed, the aider is liable for the commission of any of the alternatives that were actually contemplated: *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140. It has sometimes been suggested that the ruling in *Maxwell* involves imposing liability on the basis of recklessness because the secondary party in such a case is aware that the principal offence may be committed but does not know that it will be committed. However, liability in cases like *Maxwell* can be imposed without invoking the concept of recklessness. It can be said that the secondary party in such a case has a conditional intent to aid whichever of the contemplated offences will actually be committed by the principal. The same analysis can be made of a case such as *Miller v R* (1980) 32 ALR 321, where the secondary party drove the principal on a series of occasions knowing that murders would be committed on some of these occasions but not knowing on which particular occasions the murders would be committed. The driver was not only aware of the risk that his conduct might aid the commission of an offence; he was prepared to help in the event that an offence would be committed.

14.19 The exclusion of mere recklessness as the fault element for aiding is in line with the view taken of the common law of secondary participation by the High Court of Australia: *Giorgianni v R* (1985) 156 CLR 473 at 481–2, 487, 194–5, 500–1, 506–7; 58 ALR 641 at 646–7, 651, 656–7, 661, 665–6. The rationale for insisting on intention may be that, because the

conduct of the secondary party can be relatively innocuous, a high level of culpability should be required for a conviction.

14.20 As a matter of general principle, intention is required for all elements of any offence of aiding, regardless of what kind of mental element is required for the principal offence. The mental element for aiding does not vary for each offence to reflect the mental element of the principal offence. However, there are some exceptions. In cases where there was an intention to aid some offence but a more serious offence resulted, courts have sometimes held there to be an aiding of the more serious offence. For example, in *R v Licciardello* [2017] QCA 286, where the charge was unlawfully doing grievous bodily harm, it was held at [31] to be sufficient that an aider knew that there was or was about to be an assault. The Court in *Licciardello* distinguished between aiding offences requiring 'specific intent' and other offences. In this context, a 'specific intent' appears to mean an intent which is express in the statutory definition of an offence. The Court said at [30]:

> If the principal offender's crime requires a specific intent, then [Criminal Code (Qld)] s 7(1)(b) or s 7(1)(c) requires the aider to know that he is aiding the other to act (or omit to act) with that intent. But if 'the offence' has no ingredient of an intent (or other state of mind) on the part of the person who does the act or makes the omission, all that the aider need know is that the conduct constituting the offence is occurring or will occur.

Thus, in *R v Jeffrey* [2003] 2 Qd R 306, it was held that a person convicted of murder (a crime of specific intent) under the provisions on aiding in the Criminal Code (Qld) had to have known that death or grievous bodily harm was intended by the principal offender. However, for manslaughter all that the aider would need to have knowledge of would be the original assault: *R v Johnson* [2007] QCA 76 at [26], [51]; see also *R v Brown* (2007) 171 A Crim R 345; [2007] QCA 161 at [32]. There is a similar rule respecting manslaughter in Canada: see *Cluett v R* [1985] 2 SCR 216 at 229–30; *R v Jackson* [1993] 4 SCR 573 at [16]–[20]. For Australia, see also *Giorganni v R* (1985) 156 CLR 473; 58 ALR 641. In issue in *Giorganni* was a New South Wales offence of culpable driving causing death. It was said to be sufficient for secondary liability to prove intention to aid only the culpable driving, because there would then be an intention to aid an unlawful act.

14.21 This line of authority appears to reflect what might be called 'the predicate offence principle'. This is a principle that, for offences in which an underlying lesser offence is coupled with aggravating features to create a more serious offence, a fault element is required only for the predicate offence: see the Canadian case of *R v De Sousa* [1992] 2 SCR 944 at [37]. The principle appears well established. It might properly be invoked in the interpretation of SI s 21 first para (c); Ki/Tu s 21(1)(c), where no fault element is express. It is, however, a principle of common law which cannot override a legislative provision to the

contrary. It is therefore of questionable application to cases involving SI s 21 first para (b); Ki/Tu s 21(1)(b). This form of aiding contains its own express mental requirement (a 'specific intent') in the form of *purpose* of aiding the commission of the offence. It would be wrong to require anything less.

Counselling and procuring

14.22 The terms 'counselling' and 'procuring' are used to describe cases where the secondary party does something which encourages or induces the principal to commit the offence rather than something which facilitates its commission. These terms are not defined in the Codes SI s 21 first para (d); Ki/Tu s 21(1)(d) but are generally taken to mean the following:

- 'Counselling' involves encouraging the commission of the offence by word or deed. It has been explained as urging or advising the principal offender to commit an offence: *Stuart v R* (1974) 134 CLR 426 at 445. More than 'suggesting' is required. In *MKP Management Proprietary Ltd v Shire of Kalamunda* [2020] WASCA 130 at [93], it was said: 'However, a person does not 'counsel' another person to commit an offence … if he or she merely 'instigates' the commission of an offence, in the sense of suggesting it, without urging, advising or soliciting the commission of the offence.'
- 'Procuring' involves intentionally causing the commission of the offence. In *Humphry v R* (2003) 138 A Crim R 417; [2003] WASCA 53, the Court of Criminal Appeal approved the trial judge's direction that 'procure' meant to produce by endeavour, and that a person procured a thing by setting out to see that it happened. Offering material inducements for someone to commit an offence is an obvious example of procurement. Mere encouragement is not sufficient, but successful persuasion can amount to procurement: *R v Hawke* [2016] QCA 144 at [59]. In *MKP Management Proprietary Ltd v Shire of Kalamunda* [2020] WASCA 130, it was said:

  > [94] The term 'procure' …connotes 'to produce by endeavour'. A person procures something 'by setting out to see that it happens and taking the appropriate steps to produce that happening'. A person cannot procure another person to commit an offence unless 'there is a causal link between what [the person does] and the commission [by the other person] of the offence'. See *Attorney-General's Reference No 1 of 1975*.
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  > [95] Procurement requires successful persuasion to do something. A person will not procure another person to commit an offence merely by attempting to induce. The person must have induced the other person actually to have committed the offence.

14.23 A person who induces the principal to commit the offence by means of a threat or a

trick is sometimes categorised as a procurer. However, in such instances where the 'principal' may well have a defence, principles of causation (see **3.16**–**3.27**) are sometimes used to establish direct liability for the procurement without resort to liability for secondary participation. Under the Australian Criminal Code (Cth), this is called 'commission by proxy': see s 11.3.

14.24 No fault element is specified for counselling or procuring under the Codes SI s 21 first para (d); Ki/Tu s 21(1)(d). It has been said of the Queensland Criminal Code that the implicit requirement that 'aiding' be done 'knowingly' applies also to counselling and procuring: see *Jervis v R* [1993] 1 Qd R 643. The reasoning in *Jervis* was that the conditions of liability for the various forms of secondary liability should be the same because the Code provisions often overlap in practice. In *R v Hawke* [2016] QCA 144 at [39], the Court confirmed that, similarly to the position with other forms of secondary liability, liability can only be established for counselling or procuring if the party intentionally participated in the principal offences; that is, they must have had knowledge of the essential matters which went to make up the offences rather than just being reckless.

14.25 The Codes SI/Ki/Tu s 23 makes it immaterial:

> … whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

This runs together two provisions:

1. In the first limb, it is said to be immaterial whether the offence committed is the same as that counselled or a different one as long as what occurs is a probable consequence of carrying out that which is counselled. This extends the scope of liability beyond that established by the Codes SI s 21 first para (d); Ki/Tu s 21(1)(d). For example, if X counsels Y to assault Z and Y is a person with a record of violence, X may well be liable not only for assault but also for any bodily harm inflicted by Y. The test for liability is objective not subjective. The further offence must be a probable consequence but it need not be foreseen as such or even foreseen as a possibility by the counsellor. The meaning of 'probable' is discussed below in relation to the common purpose rule: see **14.29**-**14.30**.
2. In the second limb, it is said to be immaterial whether the offence is committed in the way counselled or in a different way as long as what occurs is a probable consequence of carrying out that which is counselled. The law would be the same even without this express provision: see **14.15** regarding the position on aiding. A secondary party need not foresee the precise details of the principal offence.

The common purpose rule

14.26 The Codes SI/Ki/Tu s 22 extends the scope of secondary liability in cases where 'two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another'. The common purpose or plan may have the parties acting as joint principals or one acting as the principal and the other as a secondary party. All participants to the common purpose are liable for an offence committed by any one of them 'of such a nature that its commission was a probable consequence of the prosecution of such purpose'.

14.27 In *R v Keenan* (2009) 236 CLR 397; 252 ALR 198; [2009] HCA 1, Gleeson CJ, Gummow, Heydon and Crennan JJ said at [102]: 'The purpose of [Criminal Code (Qld)] s 8 is to extend the criminal responsibility of the parties to a common purpose to an offence other than that which was intended to be committed.' For example, where a murder is committed in the course of an armed robbery, the common purpose rule may operate to make all the robbers liable for the murder even though murder was an unplanned consequence of the common purpose of robbery.

14.28 The common purpose rule contains both subjective and objective components: the test for a 'common purpose' is subjective; for a 'probable consequence' it is objective. In *Luavex v R* [2007] SBCA 17, the Solomon Islands Court of Appeal said:

> To the extent that a question of 'purpose' is involved, section 22 is subjective in its operation. It depends on formation of an actual intention or purpose to do something unlawful. Otherwise it is objective: *Stuart v The Queen* (1974) 134 CLR 420, 437; in particular, whether or not the offence committed is of such a nature as to be a probable consequence of carrying out or 'prosecuting' the common purpose depends not on what the parties themselves in fact foresaw or contemplated, but on whether or not it was such a consequence.

See also *Ligabutu v R* [2006] SBCA 19; *Bosa v R* [2015] SBCA 21 at [25]. It is therefore immaterial that the participants do not foresee the commission of the consequential offence. Moreover, age and personal characteristics are not relevant in determining what is probable; probability is an entirely objective consideration in this context: *R v AAP* [2013] 1 Qd R 244; [2012] QCA 104.

14.29 In *Darkan v R* (2006) 227 CLR 373; 228 ALR 334; [2006] HCA 34 at [81], the High Court of Australia held that a 'probable consequence' is an outcome that 'could well have happened'. This view has been adopted by the Solomon Islands Court of Appeal: see *Luavex v R* [2007] SBCA 17; *Ligabutu v R* [2015] 21 at [25]. The High Court in *Darkan* at [78] rejected the view that a consequence would be 'probable' if it was just 'a substantial or real chance'.

14.30 The scope of a common purpose may require careful characterisation before an assessment of probable consequences can be made. This will often be a matter of inference. In *Keenan*, it was said at 119-120:

> It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted. However it may be possible to infer what level of harm is intended and from that point to determine whether the actual offence committed was a probable consequence of a purpose so described…An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors.

14.31 In *R v Huston* [2017] QCA 121, murder was an unplanned consequence a robbery. The Court allowed an appeal from the accused's conviction on the basis that the judicial directions were inadequate to require the jury to consider first the level of violence intended by the parties for the robbery before moving on to assess the probable consequences. The Court said, at [77], that this was a case that:

> … required the jury to do more than determine whether there had been a common intention to rob the deceased. … a robbery could involve any level of violence and, indeed, only a threat of violence.

14.32 It has been suggested that, where a plan contemplates contingencies, the issue is simply whether the offence was a probable consequence of carrying out the contingent plan: see *Hind and Harwood v R* (1995) 80 A Crim R 105 at 116–7, 141–2. The likelihood of the contingency eventuating can be discounted.

14.33 Liability under the common unlawful purpose rule generally attaches when one of the parties goes beyond the common unlawful design or plan. If the parties' actions are within the common plan, liability for principal and secondary parties is generally determined by application of the Codes SI/Ki/Tu s 21. However, the common purpose rule has sometimes been invoked where there was a plan to commit some general type of offence and a specific offence was committed in pursuance of that general plan. See, for example, *Keenan*, where a general plan to inflict serious physical harm led to the commission of an offence of intentionally causing grievous bodily harm. In such cases, it seems likely that there would also be liability under s 21.

Joint criminal enterprise

14.34 Joint criminal enterprise is a common law doctrine which applies to two or more

persons who reach an understanding or arrangement to commit a crime. The doctrine attributes liability to all the parties for acts committed by any one of them in effecting the agreement: see *IL v The Queen* (2017) 245 ALR 375; [2017] HCA 2 at [26]–[40]. A person who is a party to the agreement may become liable even though they have no personal involvement in putting the agreement into effect. The doctrine of joint criminal enterprise is therefore distinguishable from the traditional doctrine of joint-principalship, which applies where persons work together to perform the elements of an offence.

14.35 Queensland courts have refused to import principles of joint criminal enterprise liability into the Criminal Code (Qld). In *R v Sherrington* [2001] QCA 105 at [11], McPherson JA said:

> For my part I would prefer to avoid importing into the Code words which do not appear there. Incorporating the expression 'in concert' in s 7(1)(a) involves a reversion to the common law which (unless perhaps all else fails) is considered a form of heresy.

The Queensland position was stated even more clearly by Davies JA in *R v Palmer* [2005] QCA 2 at [17]:

> It is submitted, correctly in my opinion, that the phrase 'joint criminal enterprise' is not used in the *Criminal Code* and adds nothing to the provisions which are there contained. If an accused's conduct comes within the operation of any of the subsections of s 7(1) or within s 8 then she is deemed to have committed the offence whether or not she was a party to a joint criminal enterprise. And if she was a party to a joint criminal enterprise … but her conduct does not come within any of the subsections of s 7(1) or within s 8 then she is not deemed to have committed the offence.

14.36 The same conclusion has been reached in Western Australia, although not without dissent. In *L v State of Western Australia* (2016) 49 WAR 545; [2016] WASCA 101, the appellants L and D were charged with possession of a quantity of crystal methylamphetamine hidden about the home. Drug paraphernalia was allegedly also found. The trial judge directed that the appellants could be convicted if the jury was satisfied that they participated in a joint criminal enterprise and one of them was in possession of the methamphetamine. The trial judge identified the criminal enterprise as dealing in drugs generally. The Court of Appeal (Martin CJ, Mazza JA, Mitchell J) at [5] unanimously quashed the convictions and ordered a retrial.

> … the appellant's criminal responsibility is to be determined by reference to s 7 to s 9 of the Criminal Code (WA) which do not incorporate the common law doctrine and not otherwise.

The contrary view was expressed by some of the judges in *Campbell v State of Western*

Australia (2016) 50 WAR 331; [2016] WASCA 156. However, in *Roberts v State of Western Australia* [2019] WASCA 83 at [57], the Court of Appeal noted that what said in *L* represented the ratio in that case whereas the comments in *Campbell* were *obiter*. The Court therefore concluded that *L* should be followed unless and until it was overruled.

14.37 In light of the lack of textual underpinning for the doctrine of joint criminal enterprise in the Penal Codes, it is likely that courts in Solomon Islands, Kiribati and Tuvalu would rule that the doctrine has no place in the scheme of liability.

The non-responsible principal; the lesser principal; the greater principal

14.38 A secondary party may be convicted even though the principal is not convicted. In some unusual circumstances, there need not even be a person who could be convicted as the principal. Cases can arise where the person who plays the role of the principal has some special defence not available to the secondary party. For example, the person who plays the role of the principal may be insane or under the age of criminal responsibility, or there may be threats from the secondary party which make the defence of compulsion or duress available to the person playing the role of the principal. See, for example, *Pickett v State of Western Australia* [2020] HCA 20. In that case, the High Court upheld convictions of murder on the basis of aiding even though the fatal wound may have been inflicted by a person who did not meet the test for the age of criminal responsibility under Codes s 29(2). The High Court in *Pickett* interpreted the references to the commission of an 'offence' in the Criminal Code (WA) ss 7-9 to mean only the conduct elements of an offence. It is likely that the same interpretation would be given to the Penal Codes SI/Ki/Tu ss 21-23. In addition, the Penal Codes expressly provide that anyone who procures another to do something which would have constituted an offence if done personally is guilty as if it had been done personally: SI/Ki/Tu s 21(4). This provision merely reflects the broad interpretation of 'offence' adopted in *Pickett*.

14.39 The broad interpretation of 'offence' adopted in *Pickett* would also cover a case where the principal does commit some offence but the secondary party has greater culpability and, therefore, commits a more serious offence. For example, a secondary party may procure the infliction of bodily harm or death of a victim; the principal may then attack the victim; but the harm may be inflicted accidentally rather than deliberately or without intention to commit the more serious offence. The secondary party may then be convicted of an offence aggravated by the intent, while the principal commits a lesser offence. There is also a provision in Codes SI s 203(4); Ki/Tu s 196(4) (Qld) s 304A(3) covering cases where two or more persons kill someone and one party has a defence of diminished responsibility to reduce the offence from murder to manslaughter. It is provided that reducing the offence

for one party does not prevent the others being guilty of murder.

14.40 It is possible for a secondary party to be convicted of a lesser offence than that committed by the principal. For example, one person might have knowingly aided an attack upon a victim without realising that the principal intended to kill or to cause grievous bodily harm. If the victim died, the secondary party might be convicted of manslaughter even though the principal committed murder. This was the conclusion of the High Court of Australia in *R v Barlow* (1997) 188 CLR 1; 144 ALR 317, [1997] HCA 19. The Court interpreted the references to being a party to an 'offence' to mean only the conduct elements of an offence: the same interpretation as that later affirmed by the High Court in *Pickett.* The same interpretation should apply to the Codes SI/Ki/Tu ss 21-23.

Exempt parties

14.41 There is some uncertainty about the application of the law of secondary participation to offences involving transactions between more than one party where the express terms of the offence apply only to one of the parties: for example, the offence of supplying drugs. Is the party who is exempt from liability as a principal also exempt from liability as a secondary party? In some cases, the view has been taken that liability under the law of secondary participation would be inconsistent with the exemption from liability as a principal. Thus, in *R v Starr* [1969] QWN 23, it was held that a child was not an accomplice to the commission of an offence of incest upon herself.

Withdrawal

14.42 Unlike the law of inchoate liability (see **13.33**), principles of secondary liability generally permit a defence where the secondary participant has withdrawn from participation. The common law has accepted an exculpatory defence of withdrawal, but subject to the requirement that the contribution must be cancelled out or, according to some looser versions, that at least the secondary party must have done everything that could have reasonably been expected to neutralise the contribution and matters must not have progressed so far that the withdrawal action was incapable of being effective. See *R v Menniti* [1985] 1 Qd R 520, where the majority took the view that common law principles respecting withdrawal could be considered in interpreting the scope of all forms of secondary liability under the Criminal Code (Qld). This general approach is readily applicable to the Penal Codes SI s 21 first para (c); Ki/Tu s 21(1)(c). It can be argued that a material contribution may be later counterbalanced in a way which makes it inappropriate to hold that the offence has been 'aided' within the meaning of this provision.

14.43 There is a difficulty in accepting a withdrawal as relevant in relation to the Codes SI s 21 first para (b); Ki/Tu s 21(1)(b). where the liability of the secondary party depends on having done or omitted something for the purpose of enabling or aiding the commission of the offence. On its face, this provision does not permit what has been done to be undone. In *Menniti*, however, both Thomas and Derrington JJ held that it would be more sensible to give the equivalent provision in the Criminal Code (Qld) an interpretation which would allow withdrawal to negative liability. Thomas J was prepared to accept the looser test of withdrawal at common law where the secondary party need only take such action as is reasonable at a time when withdrawal could conceivably still be effected. Derrington J left open the option of imposing the more stringent requirement that any assistance or encouragement be effectively neutralised.

14.44 In *R v Emelio* (2012) 222 A Crim R 566; [2012] QCA 111 at [15], Dalton J stated that the approach to withdrawal under the common purpose rule ought to be distinct from that under other forms of secondary participation. The approach she adopted for s 8 requires only communication of the withdrawal to negative any common purpose. However, in *Miller v Miller* (2011) 242 CLR 446; 275 ALR 611; [2011] HCA 9, Heydon J suggested that the common law requires for withdrawal from a common purpose that there be both communication and steps to be taken to prevent the commission of the offence. He cited at [128] a United States case in which it was said:

> A withdrawal from a conspiracy cannot be effected by intent alone; it must be accompanied by some affirmative action which is effective. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse.

Heydon J continued at [128]-[129]:

> If conspirators have lit the fuse, an announcement by one of them of withdrawal from the conspiracy is ineffective if it is too late for that person to step on the fuse, or otherwise avert the explosion [at 128].
>
> When two or more persons have formed a common intention to prosecute an unlawful purpose, there cannot be a withdrawal from the prosecution of the unlawful purpose, and there cannot be the taking of reasonable steps to prevent the commission, or further commission, of any offence which is the probable consequence of the prosecution of the purpose, unless the circumstances are such as to give an opportunity for those steps to be taken. There are some enterprises which, once they are embarked on, give no opportunity for instant withdrawal. In relation to enterprises of that kind, a decision to withdraw, even if clearly communicated, cannot have immediate effect.