Draconian overreach in organised crime control

Professor Brent Fisse of the University of Sydney and Director of the University's Institute of Criminology spoke at the 4th Annual Law Society Criminal Law Dinner of the vices of the Proceeds of Crime Act 1987

DISTINGUISHED colleagues in crime, my choice of topic might confirm all your worst fears about academic irrelevance but I have chosen it because I believe that the recent Commonwealth prohibitions on money-laundering are unparalleled in their departure from basic principles of criminal liability. The so-called war against organised crime has generated a new despotism in criminal legislation, a new despotism wherein serious offences are defined in such scattershot terms that the scope of liability depends very little on law and very much on administrative discretion. This despotism is not only ethically indefensible but has gone to the extent of exposing lawyers, accountants, stock-brokers and financial institutions to an unwarranted risk of prosecution in their everyday professional or business lives. The dangers of the recent legislation seem to have passed without critical comment, and since those dangers may impinge on the ability or willingness of lawyers to act for persons accused of crime, I have taken it as my brief to discuss them tonight.

The legislation in question is the *Proceeds of Crime Act 1987,* the acronym for which is *POC.* Essentially, *POC* seeks to combat organised crime by focusing on the money trail, and while there is much to be said in favour of this approach, undue focus has led to extremes. I refer in particular to two new crimes on the Australian scene, money-laundering under s.81, and, under s.82, receiving or possessing money or property reasonably suspected to be the proceeds of crime.

The money-laundering offence under s.81 represents a species of the offence of receiving stolen goods but differs in a number of important respects:

1. the maximum penalty is much higher (for individuals, $200,000 and/or jail for up to 20 years; cf. receiving under *Crimes Act* (NSW), s.188 — 10 years);
2. the metal element under s.81 requires that D know or *ought reasonably to know* that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity (cf. knowledge or belief under e.g. *Crimes Act* (NSW), s.188; *Raad* [1983] 3 NSWLR 344);
3. it appears that there is no defence of claim of right nor any defence of intent to return money or property to the police or the rightful owner; and
4. "proceeds of crime" may be derived directly or indirectly (even if the proceeds are not traceable at equity) from a wider range of offences than theft or offences against property.

The offence of receipt or possession of suspected proceeds of crime under s.82 is roughly akin to the offence of being in custody of something reasonably suspected to be stolen (cf. *Crimes Act* (NSW), s.527C) but again there are significant differences:

1. the maximum penalty is higher (2 years, cf. 6 months);
2. under s.82 there must be reason to suspect that the money or property amounts to proceeds of crime whereas under *Crimes Act* (NSW), s.527C there must be reasonable suspicion that the thing in D's custody is itself stolen *(Grant [1981] 147 CLR 503)*; and
3. under s.82 there is no requirement of unlawfulness or acting without lawful or reasonable excuse (cf. *Crimes Act* (NSW), s.527C, which requires that D's custody of the suspected item be unlawful).

It should also be mentioned that, under s.85, corporations and individual persons are vicariously and hence strictly liable for the conduct or mental states of agents acting within the scope of their authority. Section

85 closely resembles s.84 of the *Trade Practices Act* but it should be noticed that, unlike the offences under the *Proceeds of Crime Act,* the offences and violations under the *Trade Practices Act* do not expose defendants to jail sentences.

The ethical and practical implications of the offences under ss.81 and 82 are profoundly disturbing. So broad is the definition of the actus reus and the mental element and so limited the range of defences and exemptions that the legislation proscribes much conduct that is relatively harmless or even completely innocent.

Take the case of a solicitor or barrister representing an accused charged with a major tax fraud. If the solicitor or barrister accepts a fee from the accused he or she may easily be in jeopardy of committing an offence against s.81 or s.82. The money handed over may well amount to "proceeds of crime", as widely defined under s.4, and receiving such proceeds is plainly a prohibited transaction. Whether an offence is committed will then depend on whether the solicitor or barrister ought reasonably to have known that the money was of illicit derivation or, under s.82, on whether it is possible to prove on the balance of probabilities that there was no reason for him or her to suspect that the money came from some form of unlawful activity. These objective tests of reason to know and reason to suspect are very far-reaching and may all too easily catch the lawyer who does not go to considerable lengths to try to ensure that his or her fees come from a legitimate original source. By contrast, the offence of receiving stolen goods requires knowledge or belief that the items received were stolen, and in practice this requirement of knowledge or belief largely precludes the risk of lawyers committing the offence of receiving by accepting fees for acting on behalf of great train robbers and others of similar ilk.

Consider next the effect of the vicarious liability provisions under s.85 of *POC.* If for example one partner of a law firm commits an offence against s.81 or s.82 then by virtue of s.85 all partners in the firm are vicariously and hence strictly liable for the same offence. This extension of vicarious liability to individual persons for offences punishable by lengthy jail terms is virtually unprecedented in the Western world.

Perhaps even more remarkable is the absence of any provision for those who, in dealing with the proceeds of crime, should be regarded as acting with lawful authority or reasonable excuse (cf. *Customs Act (Cth)* s.233B). Assume that a bank innocently receives money from a client only later to discover that the money represents the proceeds of crime. If the bank then continues to possess the money but notifies the A.F.P. it nonetheless seems to contravene s.82 because, unlike the position under s.527C of the *Crimes Act* (NSW), there is no requirement under s.82 that the possession be unlawful. And if the bank gives the money to the A.F.P. there is seemingly a money-laundering transaction within the wording of the prohibition under s.81.

The last-mentioned absurdities might possibly be avoided by means of a benign application of s.15AA of the *Acts Interpretation Act,* but the objective tests of reason to know or reason to suspect imposed under ss.81 and 82, together with the imposition of vicarious liability under s.85, are much more difficult to overcome in that way. Doubtless, the wise exercise of prosecutorial discretion will do much to minimise the risk of injustice, but belief in the infallibility of Mr Temby and his officers is no substitute for the guarantees provided by rule of law.

Why have our legislators gone to the extremes we see in ss.81 and 82, and s.85? The approach taken flies in the face of the emphasis on subjective tests of liability for serious offences which has been taken in a long line of High Court decisions, from *Parker [1963] 111 CLR 610,* to *Crabbe [1985] 156 CLR 249,* to *He Kaw Teh [1985] 157 CLR 523* and *Giorgianni [1983] 156 CLR 473.* Moreover, the offence under s.82, although claimed to be similar to that under s.527C of the *Crimes Act* (NSW), is much more broadly defined and is quite inconsistent with the policy concerns expressed by Sir Harry Gibbs, Lionel Murphy and other members of the High Court in *Grant [1981] 147 CLR 503* in 1981. It should also be realised that ss.81, 82 and 85 go far beyond the scope of the money-laundering offences enacted under US law in 1986; for instance, under the US provisions knowledge is the minimal mental element required. The NSW legislation (the *Crimes (Confiscation of Profits) Act*), I am glad to say, does not contain any offences of money-laundering or possession of illicit proceeds of crime.

Few would deny that the money trail is highly significant in combating organised crookery but under the *Proceeds of Crime Act* our legislators, aided and abetted by the National Crime Authority, appear to have embarked on a militaristic crusade. The money trail has become the Ho Chi Minh Trail in the war against organised crime, with indiscriminate bombing now administered not by B52 but by s.81 and s.82. This martial artistry reflects little credit on the politicians who introduced the *Proceeds of Crime Bill* into the Australian Parliament; the legislation was rushed through with little apparent effort to attract or allow public comment.

To conclude, the real dirt in money-laundering lies not so much in the perceived practices of criminals and their laundries as in the actual abuse of principle by those responsible for the *Proceeds of Crime Act.* In the cleansing words of Felix Frankfurter:
"[The criminal process] should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practised on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were . . . hot-water . . "

Speaking of hot water, I have no fear of washing this topic in public; there is a protest to be registered and acted upon by abolishing or substantially redefining the offences which I have criticised. □

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