

***Burn* Community Legal Education and Crime Prevention Program on Group Offending – Background Paper**

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The short film *Burn* was created as part of a major Community Legal Education and Crime Prevention initiative on group offending.

The purpose of this paper is to provide background material and a detailed analysis of the legal and crime prevention issues addressed in the film. This will assist trainers & presenters involved in the delivery of *Burn* workshops, and should be read in conjunction with the *Burn Study Guide* which outlines suggested workshop formats as well as a range of discussion questions and activities on each of the key learning areas.

PART ONE – INTRODUCTION AND OVERVIEW

The group offending initiative started in 2006 as a response to the problem of young people getting involved in serious group offences, such as robberies or group assaults. It was initiated by Legal Aid lawyers working in the Children's Court, in response to the observation that many young people did not understand the seriousness of these offences at law or the way that the criminal law ascribes responsibility in a group crime situation.

These observations led to the initiation of a major workshop series in high schools, youth centres and refuges throughout 2007, involving approximately 3500 young people and youth workers.

The main focus of the workshop series was juvenile robbery offending. The core objectives were to explain to young people that the crime commonly referred to as 'rolling' was in fact robbery, that these were serious offences and that they can be charged for merely remaining present during these offences under the laws of Joint Criminal Enterprise.

The workshop series also touched on serious group assaults and what happens when one crime escalates to another. This involved an exploration of the penalties for offences of

violence, the concept that the penalties increase significantly depending on the severity of the injury, and more importantly, that under the laws of Joint Criminal Enterprise and Common Purpose everyone involved in a group assault can be held criminally responsible for those injuries, irrespective of whether they physically 'caused' them.

Through the conduct of the workshops, it became evident that the deficit in understanding around complicity, robbery offending and group violence was significant. It was also apparent, however, that there were deeper criminological issues around group behaviour, far broader than just the specific problems relating to complicity.

Group behaviour and criminal responsibility

Many of the young people who participated in workshops were initially reluctant to accept the broader values reflected in the laws of complicity. The principles and values around group responsibility embedded in the relevant legal doctrines were perceived as unfair, counter-intuitive and quite contrary to the values of the young participants.

Many participants expressed individualistic notions of responsibility, and a clear moral conviction that they should only be held responsible for their own physical acts, not the acts of others. These perceptions translate to other areas of offending, and cause similar misunderstandings.

Example 1 - In relation to the offence related to riding as a passenger in a stolen car², many young people believed that if they didn't steal the car themselves, they should not be held criminally responsible.

Example 2 – In relation to the offence of having Goods in Custody³, many young participants expressed a belief

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² *S154A CRIMES ACT NSW 1900* - Taking a conveyance without consent of owner

³ *S527C CRIMES ACT NSW 1900* - Persons unlawfully in possession of property

that they could not be charged unless there was proof of direct involvement in stealing (or unlawfully obtaining) the goods.

Assault, weapons and self defence

Several other core themes emerged around offences of violence, including misunderstandings about the law of self defence and what an 'assault' actually is. In relation to self defence, many young people believed that it was legal to hit someone if they hit you first. This reflected a conceptual confusion regarding the principles of provocation and self defence, and believing the former to be a legal defence to any crime of violence. Similarly, many young people asked whether they were allowed to carry weapons for self defence – a concerning question in light of the highly publicised and tough laws surrounding possession of knives. In relation to assaults, many young people did not realise that raising a fist at someone, or threatening to hit someone, was an assault. Similarly, they did not understand that spitting on someone was an assault. Many young people believe that you can only be charged with assault if you cause an injury to the victim.

Peer loyalty and group behaviour

Core themes also emerged around peer loyalty and group behaviour, and the sense amongst many young people that you should "back up your mates" no matter what, and never "snitch". These sometimes misconceived ideas around friendship cause a major barrier when trying to work with young people to develop exit strategies from group offence situations.

Misperceptions about the Children's Court

One of the other issues which emerged very clearly in workshops was the perception that the Children's Court is universally lenient and the penalties for juveniles are *always* lighter. We specifically addressed this by talking about the parameters of the Children's Court jurisdiction and explaining the concept of Serious Children's Indictable Offences⁴.

Young people need to understand that if they cross a certain line, their offences are dealt with in the higher courts, at law, and they

⁴ Section 3 & Regulation 4 Children (Criminal Proceedings) Act 1987(NSW) outline the definition of a Serious Children's Indictable Offence

potentially face the same penalties as adults. This is particularly important in the context of robbery offending and group assaults, where the severity of injuries to the victim will often tip the offence over that line into the SCIO category, and increasingly, prosecution applications are being made to have serious non-SCIO matters such as robberies committed to the District Court. It is also the case that the number of young people in custody in NSW detention centres is increasing⁵. Although this is not necessarily linked to any shift in Children's Court Sentencing patterns⁶, it dispels the myth about the Children's Court being a soft option.

The term 'group offending'

The term 'group offending' has been used throughout the workshop series to discuss offences which involve more than one offender. This is not a legal term, nor does it carry any automatic legal connotation⁷. The term was useful initially simply to allow for generic discussions about how complicity principles apply.

The term was also used to facilitate discussion around juvenile group dynamics and co-offending, and provide a deliberate (and less weighted) alternative to the language of 'gangs', which dominates the literature on juvenile group crime.

In contrast to the notion of a 'gang', which suggests an amalgamation of groups for the purpose of committing crime, by using the term 'group offending' we are describing primarily social amalgamations where there is no formulated or communicated intent to commit crime as a group, yet if one is instigated or triggered, group dynamics dictate that other people present are at a high risk of somehow getting involved.

What we are seeing with young people at court is that group dynamics do appear to be a contributing, causal or fuelling factor in crime.

It is an equally complex and "difficult to solve" problem, which needs to be clearly distinguished as a separate area of

⁵ Department of Juvenile Justice Annual Report 2006-07, page 18 'Daily figures in custody' indicates a steady increase over the last 5 years.

⁶ Increases in detention centre numbers may be associated with increases in the numbers of young people on *remand*, rather than those sentenced to periods of *detention*.

⁷ The existence of numerous offenders is in some instances an element of an offence or an aggravating feature, however this was not the purpose or the context of the use of the term.

criminology. In summary there is a clear need for proper criminological study on juvenile co-offending and how group dynamics contribute to juvenile crime.

Similarly, there is a need for a doctrinal analysis of the way that the laws of complicity apply, and the fairness of their application, in the context of typically unplanned juvenile group offending where offenders have significantly varied levels of criminal intent.

Survey results – young people, group violence and complicity

Aside from the observations outlined above, as part of the 2007 workshop series we surveyed approximately 600 young people on the law of complicity and robbery offending. In summary:

- Approximately 79% of young people surveyed believed a Common Assault was more serious legally than a Robbery in Company.
- Only 22% of young people understood that each person present and willing to assist during the commission of a robbery offence would be charged as a principal.
- Perhaps of greatest concern, when given a typical group assault scenario where a victim later dies as a result of an injury inflicted by one member of the group, 55% of young people were certain that only the individual who caused that injury would be charged with murder, and the others were only guilty of an 'assault'.

These results confirmed a serious deficit in understanding about these areas of criminal law. Given the prevalence of robbery offending amongst juveniles, and the tough penalties, these survey results were of major concern.

Issues around robbery offending arose not only in relation to misperceptions about relative seriousness, but also around definitions and offence criteria. Very few young people, at the start of these workshops, knew that the offence which they describe as 'rolling' was in fact robbery.

When asked to describe an Armed Robbery, most young people described an armed hold up of a commercial premises, such as a bank or store. When given a typical Robbery in Company scenario, and asked to name the offence, the vast majority of school participants would name offences such as 'stealing', or 'stealing' plus 'intimidation'. In fact, young people typically mixed up the offences of

stealing, break and enter, and robbery and often used the terms interchangeably.

The level of criminality that the participants ascribed to these various offences related primarily to (i) the value of the property that was taken, and (ii) whether the crime involved any 'actual violence' or physical harm to the victim. In line with this rationale, many believed that the typical Robbery in Company, which involved standing over someone for small items such as mobile phones, was fairly low on the criminal calendar.

Some of these perceptions and observations appear to be linked to an exaggerated distinction between threats as opposed to actual violence. In the context of robbery offences, those which involve so-called 'mere threats' rather than actual violence were broadly regarded as property crimes *not* crimes of violence. Underlying this is a lack of understanding around the impact of threats on victims. Many young people seemed to link their assessment of victim impact quite heavily (in fact, too heavily) to the subjective qualities of the victim. Many would concede that the impact, for example, on an elderly person could be severe, but were reluctant to accept that a threat could cause any psychological harm to another young male. This is an interesting observation as robbery offending is an area where the demographics of the offenders almost precisely matches the demographics of the victims (i.e. – predominately young males).

The commission of the film *Burn*

As a result of the clear need for education in these areas, Legal Aid NSW invested in the production of a film and multimedia / web resource to educate young people and correct these misconceptions.

The intent is to use the film as a vehicle to explore the relevant crime prevention issues, and create a fictitious scenario to illustrate the application of the laws of complicity. Rather than the more conventional didactic forms of education, young people can learn experientially through characters and a storyline which they can relate to.

The film is to be hosted on an interactive website, and delivered to young people in schools, youth centres and juvenile justice facilities as part of a workshop package.

Legal Education and Crime Prevention – the dual objectives of *Burn* and how they are linked

The dual objectives of the *Burn* project, in line with the preceding workshop series, are *legal education* and *crime prevention*. These objectives are clearly linked, yet they remain quite distinct, and the film has a stand-alone value in each area.

In terms of how these objectives are linked, the *Burn* project identifies and addresses areas where we believe a *lack of understanding of the law may be directly contributing to offending behaviour*.

The primary purpose of the film *Burn* is to correct misperceptions amongst young people around (i) how the criminal law ascribes responsibility in a group situation, and (ii) the seriousness of robbery offending. The fictitious scenario depicted in the film is purpose-built to illustrate the application of the laws of complicity to a typical juvenile robbery offence with trademark juvenile co-offending dynamics. This is essentially a community legal education initiative with a secondary crime prevention purpose. We believe that if young people properly understand the legal consequences of their behaviour this may influence their decision making and reduce the risk of offending.

The second way that legal education and crime prevention are linked is that the workshops not only explain the criminal law, but also explain and explore the *underlying principles and values* which are reflected in those laws.

Example 1 - Explaining the legal principles of Joint Criminal Enterprise should include an exploration of *why* those principles exist. What values do they reflect? Why should non-active members in a group offence situation (such as a lookout) be held legally responsible? This involves some re-education on notions of responsibility.

Example 2 - In relation to robbery offending, an explanation of the seriousness of these offences at law must be followed with some discussion of *why* they are regarded so seriously. This would involve an exploration of the victim impact of robbery offences and threats of violence. Part of the reason young

people do not accept the seriousness of robbery offending is that they believe that offences which do not involve actual violence are not particularly harmful. There is also a denial, or a refusal to connect-the-dots, regarding the implicit threat in the act of standing over someone. There is a need to educate on the fact that standing over someone is a threat, and that this can have a real impact on victims.

Aside from trying to achieve a reduction in offending through legal education, the film has a 'stand-alone' crime prevention utility as well. *Burn* provides a vehicle for discussion on a range of issues around situational risk factors associated with crime and the sort of chaotic offending dynamics which quickly spiral and leave little space for active decision making. In general terms, the film provides a great forum for discussion about negative peer associations, drug and alcohol use, choices and responsibility.

PART TWO – OBJECTIVES AND LEARNING OUTCOMES

The core learning outcomes and objectives for the film *Burn* are outlined below. The *Burn Study Guide* outlines a range of activities and discussion questions which have been devised specifically to address these core learning areas. Most of these objectives are directly linked to the issues outlined in the preceding section, which arose from the group offending workshop program.

1. To educate young people that 'rolling' is a robbery offence and that **robbery offences are serious crimes**.
2. To educate young people that being present and willing to assist during a robbery offence will *usually* result in being charged as a principal offender under the laws of **Joint Criminal Enterprise**.
3. To illustrate the application of the legal principles of **Common Purpose**, where one offence escalates to another.
4. To illustrate the application of the principles of complicity to the various 'others' who may end up roped in, or provide some form of **assistance in the commission of an offence**. For example:

- The person who is asked to stay in the car and “keep watch”.
- The person who swaps clothes or drives the offenders from the scene.
- The person who owns the vehicle, and then is charged for declining to give particulars of the nominated driver / passengers.

Whilst not directly addressed in the film, there is also the issue of the person to whom an offender confides in about the crime, who is then liable for prosecution for Conceal Serious Offence.

The film explores the criminal liability and precarious situation of persons who end up in these roles, and the fact that young people sometimes agree to act in these more peripheral roles (as a lookout for example) to keep themselves out of the offence.

5. To explore and deconstruct some of the complex and chaotic **group dynamics** which often underlie juvenile offending, including:

- Peer influence and the dynamics between leaders and followers.
- Misguided notions of loyalty and the almost universal value amongst young males that you should always “back up your mates”.
- The concept of ‘slippery values’, or how perceptions of right and wrong can slide in group situations.

6. To explore the **poor choices** or complete **absence of active decision making** which often leads to participation in this sort of crime. To depict the various points where a choice, or lack of a choice, has directly contributed to participation in the offence. Young people should be able to identify where the characters have made critical mistakes, or could have done things differently.

7. To explore the **lack of control** over both the *situation* and the *consequences* with this sort of group offending. For example, the lack of control over who might walk past, whether the victim will fight back, whether someone else may get involved, whether you will get caught, what the co-offenders may do, what the person holding the weapon may do, whether there are CCTV cameras in the area, what specific harm (physical or psychological) may be inflicted on the victim, how the victim’s subjective qualities and vulnerabilities may increase the level of impact.

8. To illustrate the **seriousness of the consequences** of this sort of crime for the victim, the unknown ‘others’ (the family, girlfriend, unborn child, witness who is traumatised etc.) and the community.

9. To identify and explore some of the typical **risk factors** which often precede these offences. In particular, alcohol and other drugs, being in groups with known offenders, being in groups with people who carry weapons.

10. To explore the **underlying reasons and motives** behind offending through the film’s characters:

- Identity issues and peer influence.
- The thrill factor, adrenalin, boredom, just for the experience or “to see what it’s like”.
- ‘Need’ or ‘want’ as a driving factor to wanting to take people’s property.
- Where there is no clear reason or involvement fuelled by passive decision making (as depicted in the character of Tee).

PART THREE - SUMMARY OF THE ISSUES ADDRESSED IN ‘BURN’ SCENE BY SCENE

Burn is centred around a typical juvenile robbery offence that escalates into a far more serious act of violence.

It depicts a typical night in the lives of four teenage boys, cruising aimlessly around the suburbs in a car which they have borrowed from a cousin for the evening. Whilst consuming drugs and alcohol, they get into a series of random ‘near-miss’ type incidents which culminate when they spot a potential victim who they corner and ‘roll’ at knife point. One offender instigates the offence, the other two ‘back him up’, directing the fourth young boy (who has unwittingly tagged along for the night) to wait in the car and “keep watch”. The offence goes pear-shaped when the armed offender drops the knife, and another co-offender picks it up off the ground and stabs the victim.

In summary, the film depicts a typical juvenile ‘rolling’ offence characterised by the following features:

- A lack of planning (or communication of a plan to all members of the group).
- Where not all of the offenders know each other well and one offender is a ‘wildcard’.

- Where at least one member is a non-active participant (i.e.- merely present).
- Where at least one member has never committed a robbery before.
- Where someone acts as a lookout (and possibly offers to do this as an 'out', or a way of avoiding involvement in the offence).

The characters and offending profiles

The offence is carefully constructed so that each member has a very different level of physical involvement in the commission of the crime and a different level of knowledge regarding the elements of the offence. In order of highest to lowest level of criminal intent, their roles are as follows:

Dan – Identifies the victim at ATM; directs Kass to pull over and wait in the back alley; asks Tee for his hooded jacket; instigates the offence by tracking the victim into back alley; assaults the victim; picks up the knife after it is dropped by Nella and stabs the victim.

Nella – Assists in the instigation of the offence from the other side of the back alley; holds the knife; assaults the victim; demands the victim's property; drops the knife in the scuffle; and, takes property from the victim as he lies on the ground.

Kassem – Pulls over car, as directed by Dan; waits in back alley, as directed by Dan; gets out of the car ready to jump into the laneway, as directed by Nella; becomes aware of the knife just moments prior to the offence; asks Nella to put it away (a request which Nella ignores); and, jumps in anyway. Kassem remains present, clearly involved but fairly 'non-active'. He essentially stands over the victim and encourages them all to flee the scene when the witnesses walk in.

Tee – Has no knowledge or insight of an intention to commit an offence at the outset; loans his hooded jacket to Dan just prior to the offence in suspicious circumstances; agrees to "keep watch" as directed by Kassem; runs into the laneway to alert offenders to incoming witnesses; sees

the victim injured on the ground and blood on co-offenders' clothing yet still drives the boys from the scene.

The two offenders upon whom the story is focused, Kassem and Tee, reflect our target audience and the sort of offending profiles that we are trying to address through the workshops.

Leila loaning her car to Kassem

The inclusion of this in the storyline was to illustrate yet another way that young people sometimes rope other people into a crime situation, inadvertently.

It is not suggested in the film that Kassem has planned to commit a crime in Leila's car. In fact there is a strong inference to the contrary – it is highly unlikely that he would set out with this intention. He shows a high level of care and respect for both Leila and her boyfriend, Sonny.

The point we wish to highlight with this scene is the inherent risks and dangers of loaning your car to people – there are a significant number of risks, and it is a very common thing for young people to do.

We would hope that after watching the film, anyone in Leila's situation would think twice about handing over the keys, and anyone in Kassem's situation would think twice before asking. There is a great deal of responsibility and trust involved in borrowing someone's car, and many young people do not realise the risks.

Some of the other risks associated with loaning vehicles are:

- That it will be driven by someone who is not licensed, or has been drinking alcohol or taking drugs. In these circumstances, if they have an accident, the car's insurance may be void. Further to this, because of the fines enforcement system in NSW, many young people are not even aware that their licences may have been cancelled through standard administrative procedure for non-payment of fines.
- The complex civil liability status, even if the driver is licensed, if the car is involved in an accident.
- The risks of fines (parking, speeding etc.) and demerit points being accrued against the owner.

The car scene & the inclusion of drug and alcohol use

The reason for the inclusion of the car scene was that all of the research we have done suggests that drugs and alcohol are major risk factors for this sort of offending. Even lower level drug and alcohol abuse, like that which is depicted in the film, contributes to this offending directly through:

- The significant impairment of decision making capacity.
- Increase in aggression levels and risks of violence.
- False confidence or lack of appreciation of the risks of getting caught.

The film demonstrates the enormous risks of consuming drugs in these sorts of circumstances. It shows how one thing can quickly lead to another, and that anyone who gets into a car with a group of boys like this, in circumstances of drug and alcohol use, could end up in a very serious and unplanned group crime situation.

The upbeat nature of this scene also suggests a complete lack of formulated intention to commit any particular crime. This is again consistent with the criminology of juvenile robbery offending – often unplanned, opportunistic and often fuelled by some degree of intoxication.

The service station scene

This scene has a high level of stand-alone educational value – it demonstrates how a stupid argument about cigarettes can escalate into a very volatile and high risk situation.

Its primary purpose is to show the risks of associating with someone like Dan. He placed the other members of the group at risk without any warning. Most young people will perceive him as a wildcard, a loose cannon and a liability.

There is a secondary utility to this scene. As things escalate at the front of the store, Dan actually struggles with the attendant to grab the cigarettes. Most young people would not realise that this was actually an attempted robbery offence.

This relates to a lack of understanding of what the offence of 'robbery' is and a lack of understanding of the penalty leap between Larceny (an offence carrying a maximum of 5

years imprisonment) and Robbery in Company (an offence carrying a maximum of 20 years imprisonment) simply associated with the use of threats or violence to obtain the property.

The inclusion of this scene addresses the problem we are seeing in the Children's Court of offences escalating into a robbery without any specific intent. For example, where shoplifting, or lower level stealing or property offences escalate to a robbery because force is suddenly used or conversely, where an assault suddenly becomes a robbery because property is taken from the victim as almost an afterthought or as a further act of aggression towards the victim.

The boys may also have been charged with Affray, Assault (Dan), Malicious Damage (Dan and Nella), Larceny (Nella and Kassem) and Offensive Language (Kassem and Dan). This scene allows for discussion about those charges – in particular, Affray. Many young people do not know what Affray is and it is an increasingly common offence in the Children's Court.

The scene exemplifies the sort of unplanned 'near misses' which may occur when young people are out in groups, intoxicated, with no clear intent about what they are doing, and in company with people like Dan.

The scene also proves to be critical in the evidentiary identification trail which leads to their apprehension. The cross linking of this incident to the robbery which occurs later on helps depict the forensic sophistication of police investigations of serious crimes. This is an important ongoing theme throughout the film. Many young people will be shocked to realise how quickly the police can obtain CCTV footage and mobile phone records, and how they use that evidence to link people together and to the scene of a crime.

The offence

At every step of this scene it is evident that there has been no coherent plan between the boys – by the end each of them appears to have an instinct about what is going to happen, but none of them are certain or appear to know what the others' intentions are. In summary:

Dan's direction to pull over:

Right from the start, Dan's initial direction to Kass to pull over is ambiguous. There is

something clearly suspicious about it and whilst Kass queries it, he still pulls over without asking for any explanation as to why.

The clothes swap:

Tee is asked by Dan to “pass the hoodie”. There is a high level of ambiguity as to why Dan is asking. There is a plausible innocent explanation - that he is cold. It appears that the other boys should have been alert to the significance of this request, and yet if they are, it is not communicated. Tee appears to be oblivious.

This is quite typical. Many young people swap clothing to assist offenders before and after an offence without clearly understanding what they are doing or the legal significance. One of the outcomes of this film should be that young people understand that swapping clothes is rendering assistance and will generally attract criminal liability.

In the case of Tee, this clothes swap is important because he is on CCTV footage wearing the distinctive jumper in the service station car park, and witnesses would describe it as being worn by the main offender at the scene of the robbery. It is recovered from Tee's home and is covered in what appears to be blood. This is one of the key factors which lead to him being charged as a principal offender.

Risk factors for victims of robbery offending

The film illustrates certain behaviours which increase the likelihood of becoming a victim of this sort of offence. This was not one of the objectives of the film, though it is certainly a useful point for discussion.

The location and time of the offence is typical – back alleys, laneways, pedestrian tunnels, footpaths, low lighting, late at night, low density vehicle or pedestrian traffic.

The conduct and demeanour of the victim is also high risk – talking on a phone, head down, not aware of surroundings, particularly after having departed an ATM.

The demographics of the victim are also typical – most victims of robberies are young males.

The initiation of the offence and the knife

Nella jumps out and signals for Kassem to join him. Whilst they are standing in the laneway, Nella presents the knife. There is a brief argument where Kassem tells him to put it away. It all moves very quickly at this point, the knife is still out and Kassem still jumps in. This is another example of poor, or passive decision making. Kassem identified the alarm bell but ignored his own intuition.

Kassem's knowledge of the knife is critical - it makes him criminally liable for prosecution under the laws of Joint Criminal Enterprise / Common Purpose for both Armed Robbery and the stabbing. The foreseeability of the death of the victim is linked to the knowledge of the knife. Whether the police could prove knowledge of the knife is another issue. Whether a defence exists or would be successful should not be the central theme. Kassem's legal predicament is dire, and linked with his knowledge and immediate proximity at every stage of this offence.

The lookout

The way that Tee is asked “keep watch” is ambiguous. His acceptance of this role makes him potentially criminally liable for everything that follows, yet he doesn't even ask what they are doing, or what exactly he is keeping watch for.

Kassem's intentions in asking Tee are most likely to keep him *out* of the scene. Neither would realise that this actually ropes him in.

It is typical for young people to agree to act as lookouts to keep out of the offence and avoid being part of it. This suggests a complete lack of understanding of the legal significance of acting as a lookout.

The actual offence

Consistent with the complete lack of planning, each offender has a different understanding of what they are doing, and there is no formulated or joint group intent.

With respect to every aspect of the offence, Kassem's role is essentially non-active. This was carefully constructed to illustrate the application of the laws of Joint Criminal Enterprise. He does not touch the knife or assault the victim. He does not demand or take the property. He does not make any verbal threats. He is, however, clearly part of

the offence. He is standing over the victim, he is shouting directions and admits in his interview a knowledge of the specific elements of Armed Robbery and a willingness to assist.

Driving from the scene

Tee drives the boys from the scene. This is the third way in which he participates in this crime remembering that he has already participated in a clothes swap and acted as a look out.

Most people in Tee's situation, at this stage, would do the same thing. His intention may not be to "assist in the commission of the crime" (the assumption at law) but rather just to get away, or avoid being apprehended by the police whilst in company with a group of people who just robbed and stabbed someone.

We want to send a clear message that once you are in this situation – waiting in a back alley while a group of 'friends' commit some unknown crime - it will be very difficult to get out. Young people need to identify the earlier alarm bells and make active choices to extract themselves at that earlier stage.

Talking about the crime the next day & the crime of concealing

The film depicts Kassem talking on the phone the following day to his friends, presumably outlining the events of the evening before.

There was also a scene shot (but not included in the film) where Tee confides in his best friend JD.

Whilst some of these scenes were not ultimately included, their purpose was to illustrate yet another way that others can be roped in and made potentially criminally liable. In particular, if any of the characters confided in a friend they are setting them up for potential prosecution for concealing⁸.

Police contact with Leila and car owners' liability to 'disclose driver particulars'

If you are the owner of a vehicle that is involved in a serious crime, and you were not the person driving it, you have a duty in NSW to disclose the details of the driver *and* the

passengers of the vehicle.⁹ The only defence is where you have a reasonable excuse.

It is a criminal offence to refuse to disclose their identities,¹⁰ punishable by up to 12 months imprisonment.

Leila is in a *very* difficult situation. She does nominate Kassem, but does not nominate the passengers so may be liable for prosecution.

See the *Burn Fact Sheet* on 'Loaning Your Car' for further information.

Police interview - Kassem

Kassem participates in a police interview, or ERISP (Electronically Recorded Interview with Suspected Person).

Kassem was not legally obliged to do this. He is waiving his right to silence, and by doing so, he significantly inculpatates himself and Tee.

In summary:

- At the beginning of his interview he puts a false alibi on record, that he was "most probably asleep" at the time of the offence. This is a fact police know to be incorrect and will affect his credibility in any later legal proceedings.
- He selectively answers questions and gives clearly dishonest answers to others. As above, this affects his general credibility and can have serious consequences later on.
- He legally identifies himself in the CCTV stills without realising the evidentiary significance of this.
- He later confirms his presence at the scene of the robbery.
- He confirms that the mobile phone he is shown is his number. This admission essentially links Tee to Kassem, and confirms that Tee was in fact the fourth "young Islander male". This is the first piece of clear evidence to place Tee in company with Kassem on the evening of the offence, and hence, link him to the crime.
- Kassem in the end confirms Tee's identity. He then attempts to exculpate Tee yet doesn't realise that what he is in fact doing is confirming his presence. He tells police that Tee "was there, but he never got out

⁸ S316 Crimes Act NSW 1900 – Conceal Serious Indictable Offence

⁹ S14 Law Enforcement (Powers and Responsibilities) Act (LEPRA) NSW 2002 – Power of a police officer to request disclosure of driver and passenger identity

¹⁰ S17 Enforcement (Powers and Responsibilities) Act (LEPRA) NSW 2002 – Failure of owner to disclose identity

of the car all night”, a statement which they know to be incorrect.

The critical point is that it is really important that young people who watch this film realise that Kassem did not have to do this interview, that he had a right to silence, and he really should have obtained legal advice before making a decision about whether or not to be interviewed.

It is a useful inclusion in the film because it shows the danger of not getting legal advice, or ignoring legal advice, and attempting an exculpatory interview for a serious offence.

Attempts at exculpatory interviews are a very common problem amongst juveniles, particularly offences being prosecuted under the laws of Joint Criminal Enterprise, because young people who were essentially non-active participants often do not realise that they may be guilty.

In terms of procedure, somewhere prior to the commencement of this ERISP Kassem would have been offered the opportunity to get legal advice and then asked if he was willing to partake in an interview. At the start of the interview he would be cautioned again about his right to silence and that anything said in the interview could be used as evidence against him¹¹.

If Kassem had spoken to a lawyer, they would have advised him strongly against doing an interview.

Kassem's Liability

Kassem is initially told that he will be charged with Armed Robbery and Wounding¹². However, upon the victim's death the charges would be upgraded to Murder¹³ and Armed Robbery¹⁴. He would face some difficulty defending these charges.

He admits that he was present and admits knowledge of the fact that what was occurring was an armed robbery. Kass admits that he jumped in "to back up" the other boys. If each of these facts were proven, he would be found guilty of both offences in accordance with the

¹¹ Part 9 – Law Enforcement (Powers and responsibilities) Act 2002 (NSW) summarises the rights of accused persons in police custody.

¹² Section 98 Crimes Act 1900 (NSW)

¹³ Section 18 Crimes Act 1900 (NSW)

¹⁴ Section 97(1) Crimes Act 1900 (NSW)

laws of Joint Criminal Enterprise and Common Purpose.

It may be difficult to prove Kass's knowledge of the knife. He does have specific knowledge of the knife, though makes no admission of this in his ERISP. However, when running workshops the clear message should be that he would be charged with both offences and runs a high risk of being found guilty of each. It is preferable to avoid discussion in workshops about technical defences as it sends a mixed and dangerous message.

Tee's custody scenes

There is important reference in the film to some of the various rights that young people have in police custody.

While Tee is being entered into custody it is made clear that he is a juvenile. He is offered an opportunity to call his mother. He elects instead to call a youth worker. This relates to his right to a support person in police custody.¹⁵

Tee's custody scenes can be used as the basis of some discussion and to outline the core rights in custody, namely:

- The right to silence (already mentioned re: Kassem).
- The right to get legal advice.
- The availability of the Legal Aid Youth Hotline for under 18s.
- The right to a support person.
- The requirement that juveniles can only be interviewed in the presence of a support person.
- 4 hour limit to custody time for investigation (not allowing for time out exclusions or extensions by warrant).

Tee's liability

Tee is charged as a co-principal for both Murder and Armed Robbery, on the basis that police believe that

- he was present,
- acted as a lookout,
- drove the car from the scene, and
- possibly swapped clothing with the unknown male co-accused who stabbed the victim just prior to the offence.

It is clear during the interview scene with Kassem that the police are aware that there

¹⁵ S13 Children (Criminal Proceedings) Act 1987 (NSW)

are two further male co-accused, and that police know that it was one of those other two males who actually stabbed the victim. In short, the police do not believe that Tee stabbed the victim. Yet he is still charged.

Overall, we would hope that it can be *very clearly inferred* that all four boys would be charged as co-principals for Murder and Armed Robbery. It is important to address Tee's liability to ensure that young people do not (mistakenly) assume that Tee is being charged because they believe he was Dan (because of the jacket).

Regarding the hooded jacket, the fact that Tee is found in possession of the blood stained jacket at the point of arrest is strong circumstantial evidence of his presence and a willingness to assist.

In terms of whether police could prove there was a clothes swap, recall that Tee is wearing the jacket in the footage at the service station. Witness descriptions would describe it as being worn by the smaller male of Anglo appearance who actually participated in the attack on the victim. This provides a circumstantial case that Tee was involved in a clothes swap.

Even if a clothes swap was not proven, the secondary inference of assistance might be that he concealed the jumper for the co-offender post offence.

The reason for inclusion of a clothes swap scene was that it is a major issue amongst

young people. It is very common for young people to assist offenders in these sorts of ways (clothes swaps, concealing etc.) in very ambiguous circumstances, without asking questions, or even knowing what the crime is.

PART 4 – EXPLAINING THE LAW OF COMPLICITY: FURTHER READING MATERIAL AND REFERENCES

One of the core requirements for facilitating *legal* workshops on *Burn* is a thorough grasp of the core principles of complicity.

Young people often ask difficult hypothetical questions about how the principles work in different scenarios.

It is critical to explain the core principles in a way that young people will understand and keep the message simple. This is a genuine challenge in such a complex area of law. It is better to give a core outline of the principles, and then illustrate how they work through case studies, role plays and examples. The appropriate level of detail for outlining the basic principles is outlined in the sample materials below.

There are numerous factsheets on the *Burn* website (www.burn-movie.com.au) on *Joint Criminal Enterprise, Common Purpose, Assisting in the Commission of an Offence and Group Offending*. These are useful tools to CLE delivery, and provide good age-appropriate explanations of the core legal principles.

Joint Criminal Enterprise – sample CLE materials

If a person is present as part of a group, and a crime is committed by members of the group, they risk being charged with that crime, even if they did not play any active role in the commission of the offence.

This is an area of law known as Joint Criminal Enterprise.

This law is commonly used to prosecute young people for group offences in the Children's Court, in particular for robbery offences, break and enters and serious group assaults.

The test for whether someone was part of a Joint Criminal Enterprise to commit a certain crime is:

- if they were *present* during the commission of the offence,
- that they knew what was going on, and
- there was an *agreement* or *understanding* between members of the group to commit the offence.

If they are found to have acted as part of a Joint Criminal Enterprise, all members of the group are liable to be charged with the same offence and liable for the same penalty.

The lesser level of involvement *does not* necessarily mean they get a lesser penalty or lesser charge.

Presence = presence in the immediate proximity of the offence at the time of the offence.

Agreement or understanding = any form of communication between the parties, verbal or non verbal, which would make everybody aware of their intention to commit the crime.

Common Purpose or “Extended” Joint Criminal Enterprise – sample CLE materials

What happens if a group of people agree to commit a certain crime and during the commission of that offence, things escalate and a further offence is committed?

Who is responsible? Are all members of the group accountable if one person takes things too far?

If there is

- an agreement between a group to commit a certain offence (a Joint Criminal Enterprise), and
 - a further offence arises out of the original offence, and
 - that further offence was a *foreseeable* consequence of the original offence
- each member of the group risks being charged for this further offence as well as the original one.

This area of law is known as Common Purpose or “Extended” Joint Criminal Enterprise.

Further reading for lawyers

The following resources provide good overviews of the law of Joint Criminal Enterprise and Common Purpose as well as doctrines relating to accessorial liability, aiding and abetting, and the distinctions between principles in first and second degree.

- ‘*Complicity and Common Purpose – A Practical Guide to common problems involving young offenders*’ (Children’s Legal Service Bulletin, Issue 6, Aug 2007)
- Public Defender Bank contains various papers on complicity by Peter Zahra SC and Dina Yehia. Website: <http://www.lawlink.nsw.gov.au/lawlink/pdo>
- The Criminal Trial Courts Bench Books provide one of the most useful and regularly updated summaries of this area of law. Click on *Trial Instructions A-G* and then *Complicity*. The Suggested Jury Directions are really useful as they distil the complex principles into very direct and easy to understand language. This resource can be accessed via the Judicial Commission of NSW site <http://www.judcom.nsw.gov.au>
- There is a large volume of case law on complicity, and excellent summaries of critical cases on the Public Defender’s ‘Casebase’. However, the critical cases which are particularly useful to read and be familiar with are the key cases on Joint Criminal Enterprise and Common Purpose at the cases of *R v Taufahema* [2007] HCA 11; (2007) 234 ALR 1; 81 ALJR 800 (21 March 2007), *McAuliffe* (1995) 183 CLR 108 and *Tangye* (1997) 92 A Crim R 545.

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