WHICH WAY, PART IIAA?

On 20 December 2006, the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* commenced, and with it Part IIAA, incorporating key provisions of the Australian Model Criminal Code (MCC). Then Attorney-General Toyne announced that the process of converting Northern Territory criminal offences to bring them within the operation of Part IIAA would take about five years. In the more than 7 years since this enactment, however, only about 35 of the estimated 250 offences on the Northern Territory statute books have been converted.

Having reminded at least the last three Attorneys-General that this issue required urgent attention, CLANT was grateful for the opportunity to participate in a Forum on this issue convened on 21 May 2013 by Attorney-General Elferink. In attendance were representatives of the profession and the judiciary, who considered and debated the following four options:

1. Continue (or to be more accurate, resume) the process of converting offences to the MCC format as embodied in Part IIAA of the *Criminal Code*.
2. Repeal Part IIAA and revert to a Griffith Code model, with modifications to the pre-2006 Code.
3. Revert to the pre-2006 Code without modification.
4. Abandon the Code altogether and revert to the common law.

In his introduction, the Attorney stated that it would be useful if the Forum could come up with a 'substantial majority' view as to a preferred model for the principles of criminal responsibility.

Solicitor-General Michael Grant QC chaired the Forum, and before proceeding to canvas the views of participants, he adverted to two reasons for the failure of other jurisdictions to adopt the MCC: the loss of a century of Griffith Code jurisprudence, and the MCC's unduly formulaic rigidity.

Nevertheless, the first option (continued MCC-conversion) was strongly supported by a clear majority of the Forum participants who expressed a view on the issue: Austin Asche AC QC (Northern Territory Law Reform Committee), Deputy Chief Magistrate Dr John Lowndes, Sue Oliver SM, Megan Lawton (LSNT), Russell Goldflam (CLANT),[1] Ian Read SC (NTLAC), Jonathan Hunyor (CAALAS) and Mark O'Reilly (CAALAS).[2]

Jack Karczewski QC, Director of Public Prosecutions, took a different view. He favoured the second option, a position supported by Assistant Police Commissioner Reece Kershaw. The Director contended that Part IIAA was an extraordinarily difficult new trick for old dogs to learn. He asserted that the acknowledged defects in the pre-2006 Code could be effectively remedied by discrete amendments ('tinkering', as Solicitor-General Michael Grant QC put it), which led to robust discussion. John Lowndes, for example, maintained that 'drastic reconstruction' would be required to rectify the 'idiosyncratic' and 'half-baked' criminal responsibility provisions of the pre-2006 Code.

There were also some important areas of apparent unanimity:

- The current 'hybrid' Code must be replaced, and the sooner the better.
- If the conversion process is to continue, then priority should be given to converting those offences (predominantly but not entirely, offences against the person) which are commonly charged on indictments in conjunction with, or are available as alternatives to current Part IIAA offences.
- It is a matter of policy as to whether criminal responsibility should be assessed by reference to objective standards (as for example is effected by Part IIAA) or subjective standards (as for example is effected by s31).
- The voluntary intoxication provisions of the pre-2006 Code allow substantially more scope to raise a defence under s31 than is available under Part IIAA.
- Section 154 should not be resurrected.

[1] CLANT's written submission circulated to forum participants is reproduced at the conclusion of this column.

[2] John Lawrence SC indicated that as opinions on the issue amongst his members were divided, the NT Bar Association abstained from expressing a view.

- There is no support for either the third option (revert to the pre-2006 Code) or the fourth option (revert to the common law)

Refreshingly, discussion at the Forum was based on considerations of principle and practice, rather than politics and partisanship. The three legal aid agencies represented all supported the Part IIAA conversion process, while acknowledging that to date this has produced a higher rate of convictions for manslaughter and rape, and correspondingly lengthier sentences for their clients. On the other hand, and in spite of this, the DPP and police advocated for a return to a system resembling the pre-2006 Code.

CLANT welcomes this initiative by the Attorney-General to consult with the profession on an issue which for far too long has languished in the too-hard basket. It is indeed a hard task, but it is one which must be addressed, and the Attorney is to be commended for taking it on.

CLANT SUBMISSION TO MODEL CRIMINAL CODE FORUM 21 MAY 2013

CLANT supports and encourages the extension of the Model Criminal Code principles for criminal responsibility (as enacted in Part IIAA of the *Criminal Code* (NT)) to cover all Northern Territory criminal offences.

The current hybrid scheme is unsatisfactorily confusing and complex. It causes particular difficulties in jury trials involving alternative verdicts which involve a mixture of non-Schedule 1 and Schedule 1 offences (eg s181 'Serious harm' and s174E 'Negligently causing serious harm'). As a result, the directions to juries in these cases are currently undesirably complicated, lengthy and difficult to follow and apply.

To address this specific problem, the conversion of all indictable offences against the person to Schedule 1 offences should be accorded priority.

A return to the former Griffith Code principles of criminal responsibility (as enacted in Part II of the *Criminal Code* (NT)) would be a retrograde step. Those provisions were the subject of significant and repeated judicial and academic criticism, in particular in relation to the now repealed offence of 'Dangerous Act' (Section 154 of the *Code*).[3]

The flaws of Section 154 were summarised by Professor Paul Fairall as follows:[4]

- Very serious harm is dealt with too leniently.
- Potentially harmful conduct is dealt with too severely.
- It ranges too widely encompassing an infinite range of human activity and does not observe the principle of offence specificity.
- Sentencing is problematic.
- It is potentially confusing for juries, especially in the context of bodily violence causing harm, due to the overlap with other offences, eg assault.
- Section 154(5) has created difficulties, particularly when its correlation with s 31(3) of the Code is considered.

Serious difficulties have also arisen in relation to the construction, application and scope of Section 31.[5]

CLANT generally supports the harmonisation of the law across Australian jurisdictions because this promotes consistency, efficiency and transparency in the administration of

[3] See, for example, *Baumer v The Queen* (1988) 166 CLR 51; *Hofschuster* (1992) 65 A Crim R 167; *Sanby v The Queen* (1993) 117 FLR 218; J Blokland, "Dangerous Acts: A Critical Appraisal of Section 154 of the Northern Territory Criminal Code", (1995) 19 Crim LJ, 74

[4] *Review of Aspects of the Criminal Code of the Northern* Territory (2004)

[5] See S Gray and J Blokland, *Criminal Laws Northern Territory* (2nd Edition 2012) pp 102-105

justice. The Model Criminal Code project is one such endeavour, even if the current prospects of achieving national harmonisation are remote.

Harmonisation of law across Australian jurisdictions is of particular benefit in a small jurisdiction such as the Northern Territory because:

- Judicial consideration of equivalent provisions by courts in other jurisdictions is of guidance to Northern Territory practitioners and courts in the development of Northern Territory jurisprudence (as exemplified by the *Evidence (National Uniform Legislation Act 2012* (NT)).

- Interstate practitioners who relocate to the Northern Territory or are briefed to appear in the Northern Territory will be familiar with the relevant principles.

- The 'heavy lifting' involved in drafting, refining, settling[6] and providing scholarly commentary[7] on the relevant principles has been and continues to be undertaken by well-resourced and authoritative interstate law reform bodies, courts, academics and expert practitioners.

A further benefit of applying the Model Criminal Code to Northern Territory criminal law is that Northern Territory courts concurrently administer Federal criminal law, which embodies the Model Criminal Code principles. Moreover, criminal courts in every Australian jurisdiction administer Federal criminal law, which means that the associated jurisprudence is under constant nation-wide development.

Although the conversion project has been frustratingly slow and regrettably inconsistent, the achievements to date have been significant. In particular, the re-codification of offences covering cases of homicide, sexual intercourse without consent and endangerment of life represents a substantial reform which deals with a high proportion of the most common serious criminal offences. There has been detailed and careful scrutiny of Part IIAA by the Northern Territory Court of Criminal Appeal,[8] and both judicial officers and counsel have become familiar with the application of the model criminal code principles of criminal responsibility.

Parliaments and courts throughout the English-speaking world have long struggled to grapple with the challenge of simplifying, codifying, clarifying and explaining the principles of criminal responsibility. This is because criminal responsibility is a complex and vexed topic which is not susceptible to simple codification. CLANT recognises that the model criminal code is neither simple nor succinct. However, in CLANT's view it represents current best thinking and best practice in this intrinsically difficult area of the law.

Russell Goldflam
23 May 2013

[6] See, for example: *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) ("the Gibbs Committee report"); Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility, Final Report* (1992) ("the MCCOC report")

[7] See, for example, I Leader-Elliott, *The Commonwealth Criminal Code; A Guide for Practitioners* (2002); S Odgers, *Principles of Federal Criminal Law* (2007)

[8] See *Ladd v The Queen* (2009) 27 NTLR 1; *Blacker v The Queen* (2011) 30 NTLR 65