Criminal Lawyers Association of the Northern Territory (CLANT)

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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 Griffiths 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were the subject of significant and repeated judicial and academic criticism, in particular in relation to the now repealed offence of 'Dangerous Act' (Section 154 of the *Code*).[1]

The flaws of Section 154 were summarised by Professor Paul Fairall as follows:[2]

- 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.[3]

CLANT generally supports the harmonisation of the law across Australian jurisdictions because this promotes consistency, efficiency and transparency in the administration of justice. The Model Criminal Code project is one such endeavour, even if the current prospects of achieving national harmonisation are remote.

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[1] 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

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

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

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[4] and providing scholarly commentary[5] 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,[6] 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
On behalf of CLANT
13 May 2013

[4] 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")

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

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