SECTION 154 CRIMINAL CODE - THAT UNUSUAL SECTION UNIQUE TO THE NORTHERN TERRITORY

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SECTION 154 CRIMINAL CODE - THAT UNUSUAL SECTION UNIQUE TO THE NORTHERN TERRITORY

The thesis of this paper is:

The recent retrospective amendment to section 154 of the Criminal Code highlighted the unnecessary difficulties and complexities that attend that section. The inter-relationship of section 154 with the law of homicide in the Northern Territory is such and that reform is desirable by altering the definition of the crime of manslaughter, deletion of section 154 altogether and replacing it with a more simply expressed crime to cover acts of culpable negligence.

On 7 February 1991 a Bill was introduced in the Legislative Assembly of the Northern Territory by the Attorney General seeking to amend again s.154 of the *Criminal Code*. The amendment purported to be retrospective and produced a debate on the desirability of retroactive criminal law. Important as the debate was, the fact that it took place at all, unfortunately, had its roots in the terminology used in the section and the conceptual approach taken by the

drafter of the Code in dealing with alcohol related crime generally and homicide in particular.

The scope of this paper is not to embark upon a critique of the Code as a whole nor to question codification generally. In the context of the Northern Territory *Criminal Code* that has been done elsewhere.[1] However, through an examination of the chequered history of section 154, I seek to draw attention to its poor terminology and its practical impact in the law of homicide. In this paper, I will suggest that the law of homicide has become unnecessarily complex and that the terminology of section 154 may well prove counterproductive in achieving the social ends of a criminal justice system. I will suggest that certain modest reforms to terminology in the existing law of homicide, as expressed in the Code, might serve the Northern Territory populace better. Ultimately, I will suggest that the difficulties caused by section 154 and the unsatisfactory nature of the law of homicide are the products of a code that is conceptually immature and the Northern Territory would profit from subsuming its humble and flawed attempt at codification to a national criminal code perhaps along the lines as postulated by the Review of Commonwealth Law Committee headed by Sir Harry Gibbs.

Section 154 has its background in a well-founded sense of frustration with the over consumption of alcohol in the Northern Territory and the high incidence of alcohol related crime. As the *Criminal Code* was being marketed around

Australia, there were warnings given that the O'Connors of this world would not have their way in any future criminal code. Indeed, political warnings aside, obiter comment of Chief Justice Barwick in R v. O'Connor (1989-80) 146 CLR 64 at p.87 gave some foundation to a statutory provision "which gave to a jury who were driven to the conclusion that an accused, due to the result of self-induced intoxication, was not culpable of the crime with which he is charged ... "

So, concerned with serious social problems of alcohol abuse and alcohol related crime, the government sought to introduce in the Code conceptual measures to ensure intoxication did not somehow lead to avoidance of conviction by reason of lack of intent. Section 154 was part of the armoury introduced to deal with the perceived social evil.

I turn to consider briefly the history of section 154.

As originally enacted section 154 read as follows:-

> "154. DANGEROUS ACTS OR OMISSIONS
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> (1) Any person who does or makes any act or omission that causes serious danger, actual or potential to the lives, health or safety of the public or in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.
>
> (2) If he thereby causes grievous harm to

any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If [illegible] act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) For the purposes of this section voluntary intoxication is relevant only to penalty."

A second reading of that section is worthwhile. By section 31(3) of the Code, the defence of excuse did not apply to section 154; that is, a person could be found guilty under section 154 whether or not the person intended an act, omission or event or that it was foreseen by him as a possible result of his conduct. A diligent, yet objective, reader of this section might be hard pressed to find in any of the codes of Australia a section more challenging to his or her Austinian analytical capacities.

Needless to say, the mischievous subsection 154(5) did not last long. In the first year of section 154's controversial life, sub-section 154(5) was amended by deletion by Amending Act 9 of 1984. In its stead the legislature saw fit to insert a new 154(5). It read as follows:-

"Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section."

The mischievous was replaced by the meaningless! Like Winnie the Pooh's and Piglet's search for the elusive heffalump: the more you looked into this sub-section the more it wasn't there! Further, in s.154(1) the phrase "serious, actual or potential danger" was reworded to become "serious danger, actual or potential", as the then Attorney General pointed out "to avoid further confusion".

Despite the optimism expressed by the then Attorney General, section 154 didn't avoid further confusion. In an atmosphere of pragmatic and knowing silence, practitioners have operated as if section 154(5) didn't exist. The combined subjective and objective elements in section 154 and its potpourri of language were never the stuff of which simple clear expression could be made. They were however the right stuff to confuse juries.

Then, there was the false alarm induced by sub-section 154(4) which was triggered off in the Court of Criminal Appeal in Baumer v. R (1987) 48 NTR 1. In seeking to give meaning to sub-section 4, by a majority, the Court held that the Legislature had introduced "a deliberate and radical departure" from previous legislation. The identification of a separate penalty coupled with the word "further" led the majority to hold that the sentencing authority was to give "separate and serious consideration" to the question of intoxication when fixing an appropriate penalty for an offence, remembering that the offender is liable to a specific further substantial penalty in addition to any other penalty

to which he is liable.

This novel approach to sentencing was short lived. In the appeal by Mr Baumer against the majority decision, the High Court unanimously upheld the appeal, opining:-

> "In applying a section like s.154, the sole criterion relevant to a determination of the upper limit of an upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence.".

In masterly understatement, the High Court said of section 154 that it was "unusual" and s.154(4) was "unique to the Northern Territory".

In the trial of R v. Campbell (1990) 99 FLR 107, Justice Angel alerted the parties and ultimately the Court of Criminal Appeal that the mysteries of section 154's language were not exhausted.

In Campbell the facts alleged by the prosecution were these. The accused had intentionally struck the victim with a coffee mug which shattered on impact and caused injury to her eye. The event occurred in a private dwelling in the course of a social gathering between four people. The accused said that it was an accident. Campbell was charged with unlawfully causing grievous harm to

another (s.181 Code). It might therefore have been open to the jury, if they were not satisfied of an intentional assault, to consider whether the accused had been guilty of an unintentional but dangerous act in circumstances where he should have foreseen the danger and not done the act. Justice Angel held that the section 154 charge was not available to go to the jury on the facts alleged. Inter alia, (at p.110) he gave this ruling for not considering section 154 as being available:-

> "Section 154 speaks of acts in relation to 'the public or to any member of it'. This section does not speak of acts in relation to 'a person' or 'any person'. The section, or so it seems to me, is not directed to actions by an accused directed to a person who is well known to the accused. It is rather directed to protecting the uninvolved public at large or to a particular person who, vis-a-vis the accused's act, is a member of the public. When the victim, vis-a-vis the accused's act, is not a member of the public, it seems to me the section has no application. Here the unfriendly altercation was private and between people describing themselves as friends. It was not a bar room brawl between strangers. Whether the latter is within s.154 may be debatable - I would guard myself against expressing any view in that debate here - but I am firmly of the view that s.154 has no application to the case before me. Of course a person may be a member of the public for one purpose and at the same time not a member of the public for another. For example, if two friends went to the football and one assaulted the other in the course of a private argument about the merits of the umpiring, the assault by one on the other could not, in my view, be said to be an act directed against a member of the public. If on the other hand one of the friends threw a missile indiscriminately into the crowd and hit a stranger that would, in my view, clearly be an act in respect of a member of the public. If the missile were to hit the friend rather than a stranger I can see no reason why that also would not constitute an act in relation to a member of the public. As I have said,

> the accused's act, vis-a-vis a particular victim, must be vis-a-vis the victim as a member of the public."

His Honour's decision was followed subsequently by several Judges of the Court.

Soon thereafter, in the case of R v. Jillian Wurrabadalumba the issue surfaced again in the context of a trial where the female accused was charged with manslaughter of her boyfriend at a private camp site. The trial Judge did not permit the alternative charge under section 154 to go to the jury substantially for the reasons articulated by Angel J.in Campbell.

Pursuant to section 414(2) of the Code the Attorney General referred to the Court of Criminal Appeal this question:-

> "Whether upon an indictment charging a person with manslaughter, an alternative verdict of doing a dangerous act with or without the circumstances of aggravation set out in s.154 of the *Criminal Code* should be left to the jury where the evidence discloses
>
> (1) that the relationship between the accused and his intended victim was that of de facto husband and wife; and
>
> (2) that the actions of the accused giving rise to the charge occurred in such a location or in such a manner that no person other than the intended victim was caused any serious danger actual or potential."

The reference was limited to the question whether an alternative verdict under

section 154 was permitted in the circumstances set out. On 5 December 1990 the Court of Criminal Appeal answered the question raised: "No.".

The essential basis of the Court's decision was founded in the phrase "the public or any member of it" where appearing in section 154. Chief Justice Asche (with whose reasons Gallop J agreed) referred to and, in part, relied upon the passage in Campbell quoted above. He went on to say at p.9 of his reasons:-

> "As Angel J. points out it would have been a simple matter to use the expression "any person" rather than "the public or to any member of it" in s.154. One must assume that the expression was deliberately chosen and the intent is that public acts or omissions of the nature contemplated by s.154 are to come within the scope of the Code but "private" acts of this nature do not.".

Justice Angel was the third member of the Court. In his reasons for decision he explained the domestic nature of the facts referred to in the reference. At page 16 he said:-

> "I think the critical fact here is "that no person other than the intended victim was caused any serious danger actual or potential". To me it is significant that there was an intended victim. It seems to me that fact and that no one else was endangered removes the matter from the ambit of s.154 of the Code.
>
> I agree with other members of the Court that s.154(1) of the Code is not to be read as if the words "of the public or any member of it" mean "a person" or any like expression..."

The decision stirred somewhat of a political furore. It was perceived that a number of persons, otherwise worthy of criminal sanction, might escape punishment by reason of the Court's decision. The result was a further amendment to section 154 in Amending Act No. 1 of 1991. The material provisions read:-

> "DANGEROUS ACTS OR OMISSIONS
>
> Section 154(1) of the Principal Act is amended by omitting "or to any member of it" and substituting "or to any person (whether or not a member of the public)".
>
> INTERPRETATION OF PRINCIPAL ACT AS AMENDED
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> "In interpreting this Act or section 154(1) of the Principal Act as amended by this Act, consideration may be given to the speech made to the Legislative Assembly by the Attorney-General of the moving by the Attorney-General of a motion that the Bill be read a second time in the Assembly, to confirm that the meaning of this Act or the section as amended is the ordinary meaning conveyed by its text or to resolve any perceived ambiguity or doubt.".

In his second reading speech in the Legislative Assembly, the Attorney General moved that the amending Bill be read a second time with words underscoring the failure of the original draftsmanship of the section:

> "The purpose of his Bill is to achieve the Legislature's original intent that section 154 of the *Criminal Code* is to apply where the danger is to persons personally known to the accused, not just to the public. It

> reverses the December 1990 Court of Criminal Appeal decision in Attorney-General v. Wurrabadalumba ... the Bill simply restores section 154 to its former operation before the Court of Criminal Appeal decision."

It did so retrospectively. Hitherto in the Northern Territory it had been accepted without argument that citizens were entitled to be protected from retroactive criminal law.

The principle was nothing new; it had a respectable historical pedigree. Hobbes in his "Leviathan" in 1651 wrote:

> "No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law."

The principle has solid origins in Article 8 of the French Declaration of the Rights of Man of 1789 and remains in the French Code Pénal. The principle was also enshrined in 1789 in Article 1, section 9(3) of the American Constitution which prohibited ex post facto laws. In 1813 Feuerbach is attributed as the author of the Latin maxim "*nullum crimen sine lege, nulla poena sine lege*". And by the turn of the century the principle had wide acceptance in Europe. [2]

The rule of the common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or

obligation unless the language of the statute expressly or impliedly required a retrospective construction: Maxwell v. Murphy (1956-57) 96 CLR 261, 267; Rodway v. R (1990) 64 ALJR 305 at p.36.

Consistent with the common law approach, the Legislative Assembly has itself determined, as a general rule, against a retrospective alteration of existing rights, privileges, obligations in relation to the repeal in whole or in part of legislation. Section 12 of the *Interpretation Act* (inter alia) provides:-

> "The repeal of an Act or part of an Act does not -
>
> (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under an Act or the part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that right, privilege, obligation or liability.
>
> (c) affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed or an investigation, legal proceeding or remedy in respect of that penalty, forfeiture or punishment,
>
> and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made."

Indeed, the Code by its own provisions contemplates that, in the application of the criminal law, a person cannot be retroactively convicted of an offence unless the conduct impugned constituted an offence under the law in force at the time when the conduct occurred. Section 14(1) of the Code (which is

contained in Division 4 of the Code dealing with the application of criminal law) provides:-

> 14. EFFECT OF CHANGES IN LAW
>
> (1) A person cannot be convicted of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct."

As at the time the Attorney General rose in the Assembly to give his second reading speech, the entrenched position in the Northern Territory historically, by common law, in the interpretation of statutes and by the provisions of the Code itself was against the retroactive effect of criminal law in the lives of ordinary people. The character of the amendments clearly affected substantive rights. In light of the Wurrabadalumba decision, the amendments to section 154 altered the content and scope of proscribed criminal conduct. Persons who had been charged under the section and who were awaiting the final disposition of their charges were entitled to conduct their defence in the context of the legal meaning of the section when they were charged.

A further consideration became involved in the introduction of this retrospective amendment, namely, the comity which exists between the executive and judicial branches of government. Whilst the legislature may have the power to repeal in part section 154 and give it retrospective effect, there is a convention that Parliament does not normally enact laws which affect cases

already before the Courts. As the President of the Court of Appeal in New South Wales said recently in Eastgate v. Rozzoli (unreported decision of the NSW Court of Appeal dated 1 June 1990):-

> "Legislation is usually drawn in a way that is scrupulous to preserve from retrospective operation proceedings which are already before the judicial branch of Government.".

There are exceptions: e.g. Mabo v. The State of Queensland & Anor (1988) 166 CLR 186 at 202.

Further, it is interesting to note that the amending Act deems the amendment to section 154 to have come into operation on the date of the commencement of the Code, 1 January 1984. This backdating is, of course, consistent with the exercise of a retrospective power adverted to and approved of by a majority of the High Court in Kidman v. R (1915) 20 CLR 425. However, neither the amending Act nor the second reading speech of the Attorney General refer to or acknowledge the existence of section 14 of the Code, a section which purports to be of general application. Whilst it is probable the amendment achieved its intended purpose, the absence of any reference to section 14 leaves a sense of unease and a residual doubt whether the Legislature achieved constitutionally what it set out to do.

No criticism is made of the lengths to which Government went in obtaining diverging opinions in the course of the debate leading up to the amendments.

It is a matter of record that the Attorney General was careful to canvass all views as to the issue of retrospective amendment to section 154. In noting criticisms that section 154 is couched too wide, the Attorney's concession that the amendment was "a stop gap measure" had the mixed qualities of reassurance on the one hand and doubt on the other: reassurance in that section 154 in its entirety may not always be a permanent figure in the criminal legislation of the Northern Territory and doubt that the stop gap measure may be no more than that and further amendment may be necessary.

The writer's essential objection in the context of this paper goes to the very need to have had to introduce a retrospective amendment at all. One of the virtues put forward by advocates of codification is that it presents in simple and clear language a definitive statement of criminal responsibility and what constitutes crime. The second amendment to section 154 demonstrates the failure of that ideal, just as the language of the section itself harbours an agglomeration of elements capable of confusing the clearest and most dextrous of minds. That the retrospective amendment to section 154 was considered necessary at all highlights the difficult legacy of interpretation left by the drafter of the Code.

In its own right section 154 covers a multitude of potential situations. As already noted in Baumer v. R (1988) 166 CLR 51 at p.55 the High Court described section 154 as "an unusual section". The Court acknowledged the

width of application of the section and went on to add:-

> "It casts a wide net, so as to cover all acts or omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious."

The charge has become commonplace in the Northern Territory both in its own right and especially as an alternative to the charges of murder and manslaughter. There is no equivalent to section 154 elsewhere in Australia. The section provides a sentence of up to 14 years imprisonment in respect of events, acts or omissions where there was no intention or foresight of the possible consequences of the conduct engaged in. The section also embraces unintentional acts resulting in death; it has led to charges to juries of increasing complexity and length in homicide trials.

The homicide provisions ion the Code are dealt with in sections 161-164 of the Code. By section 161 of the Code a person who unlawfully kills is guilty of a crime, either murder or manslaughter, according to the circumstances of the case. Section 162 deals with murder. Section 163 provides for the crime of manslaughter. Section 162 provides:-

> " (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:
>
> (a) if the offender intends to cause the death of the person killed or of some other person or if

the offender intends to do to the person killed or to some other person grievous harm;

(b) if death is caused by means of an act done when committing or attempting to commit an offence referred to in subsection (2) which act is of such a nature as to be likely to endanger human life;

(c) if death is caused by administering any stupefying or overpowering substance for the purpose of facilitating the commission of an offence referred to in subsection (2) or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence; or

(d) if death is caused by stopping the breath of any person for either of the purposes referred to in paragraph (c),

is guilty of murder.

(2) The offences to which subsection (1) refers are -

(a) any crime for which the offender may be sentenced to imprisonment for 14 years or longer;

(b) any crime of which an assault or an intention to do or cause any injury or damage is an element and for which the offender may be sentenced to imprisonment for 7 years or longer; and

(c) an offence defined by section 112.

(3) In the circumstances referred to in subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(4) In the circumstances referred to in subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

> (5) In the circumstances referred to in subsection (1)(c) or (d) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

Section 163 provides:-

> "A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter."

By the definition of the word "unlawfully" in the Code, a killing has to be "without authorisation, justification or excuse" under the Code. By section 31(1) a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

Thus, in the Northern Territory, foresight of death as a possible consequence is a necessary ingredient of the crime of manslaughter. The crime of manslaughter accordingly embraces a narrower field of criminal conduct than in other jurisdictions where foresight of death as a possible consequence is not necessary.

In the context of murder or manslaughter section 154 is used as a charge to cover, what might be called, the third alternative where death or grievous harm was neither intended nor foreseen (subjectively) by the actor, but an ordinary

person would have clearly foreseen such a consequence and where the act or omission causing death was itself an act or omission caused serious danger (actually or potentially) to the lives, health or safety of the public or any person.

Thus, the category of negligent manslaughter known in the common law jurisdictions is not embraced by the Code. In Wurrabadalumba (supra) at p.5 Chief Justice Asche, with manslaughter, was able to conclude:-

> "It would seem, therefore, to follow that the offence created by s.154 should be available as the alternative and lesser verdict to a charge of manslaughter where the same acts and circumstances are relied on by the prosecution. So, too, in charges of murder there seems no reason why, in appropriate cases, there should not be open to the jury to consider the downwards progression of alternative verdicts from murder to manslaughter to s.154 to acquittal where the same facts and circumstances are alleged. See s.320. "

And therein lies the practical difficulty. In practice this is what happens - section 154 is added on as an alternative charge to murder and manslaughter. Charges to juries in homicide cases which were straightforward before the introduction of the Code have become relatively complex, sufficiently complex to require in most homicide cases the use of an aide memoire to be given to the jury. A typical aide memoire in a recent murder case illustrates the technical and conceptual difficulties now facing juries and to which judges and counsel must turn their minds is annexed hereto. Furthermore, the aide memoire

constitutes only the minimum conceptual material which the jury needs to grasp in order to return a verdict.

In a practical context, the use of section 154 as a third alternative to murder and manslaughter has led to the law of homicide becoming unnecessarily complex in the conduct of jury trials.

In an effort to prevent the faces of jurors glazing over and to extricate the Code from the conceptual rigours in which it is unfortunately immersed a simple, yet constructive alternative may be posited. That alternative is not to confine the crime of manslaughter to cases where foresight of possible consequences is involved. Manslaughter in the Northern Territory could include all three heads of involuntary manslaughter at common law, i.e. negligent manslaughter, constructive manslaughter and assault manslaughter.

The reintroduction of negligent manslaughter would permit judges to charge juries along those familiar terms along the lines as outlined in Bateman (1925) 19 Cr.App. R 8 at 11-12; Andrews v. D.P.O. (1937) AC 576; Nydam v. R [1977] VR 430; Vassiliev (1968) 3 NSWR 155 at p.165.

The second step in rationalising the law of homicide would be the deletion altogether of section 154 and its tortuous language. In its place could be inserted a crime of causing death by culpable negligent driving or culpable

negligent act. This latter category would fill the potential vacuum where juries might be unable or reluctant to return a verdict of manslaughter. The advantages of such a course would be twofold: it would be relatively simple to effect the change and the formal charging and addressing of juries should be made easier. The content, concept and language of the criminal law would be more comprehensible and the potential illogicalities of section 154 in cases of alcohol related crime would be eliminated.

These suggestions are, of course, addressed to a limited albeit important area of the operation of the Code. The law of homicide in its practical application is dissonant at the present time. It is so because of the poor utilisation of concepts founding criminal responsibility and in poor language used in the Code.

In recent times there has been cause for some optimism despite the recourse to retrospective amendment. The Attorney General has set up a Criminal Code review committee headed by Justice Nader. The committee has already suggested some small reforms, most of which either have or are in the process of being implemented by amendment to the Code. Further, the Attorney General, in the course of his second reading speech amending section 154, volunteered that he favoured a uniform code throughout Australia and would continue to "push for its introduction". In the meantime, he accepted that individual amendments may be necessary.

A carefully considered national criminal law or code provides the best hope for achieving in the Northern Territory a criminal law which is sound in concept and comprehensible in terminology.

Meanwhile, that "unusual" section 154 is suspect both in concept and terminology. Its deletion from the Code, a modification of the definition of manslaughter and the introduction of a simply expressed section catering for culpable negligent acts or driving would serve the public good until the Territory can enjoy a mature and truly national criminal law.

1 Nader, Justice John A. "The Northern Territory Criminal Code", a paper delivered to the A.B.A. Conference in July 1990.

2 Popple J. "The Right to Protection from Retroactive Criminal Law" (1979) 13 Crim. L.J. 251

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