THE MODEL CRIMINAL CODE - SO FAR, SO GOOD

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Fellow legal travellers, I'd like to bring you up to date on the progress of the model criminal code. I am one of the four remaining original members of the Model Criminal Code Officers Committee established by the Standing Committee of Attorneys-General and made up of criminal law experts from each jurisdiction, to develop a criminal code for Australia. Since 1991 the committee has changed its membership but continues to have representatives from every Australian jurisdiction . But membership's not the only thing that's changed, the model code is no longer just a 'demonstration model', it's on the road and about to be tested.

The real strengths of the model code project lie in its inter-jurisdictional make-up, its broad consultation base and its willingness to draw on the valuable work that has been done and is still being done in Australia and abroad in the field of criminal law reform. Though much of the committee's work breaks new ground it relies on precepts that have been tested and found sound. Furthermore, the project has progressed in leaps and bounds because of its staged development. This allows there to be a gradual and therefore more acceptable change to the face of Australian criminal legislation rather than a complete upheaval in one new Act.

Unlike many other exercises of this nature, it was the State and Territory Governments who initiated the idea of a Model Criminal Code for Australia. The Northern Territory Attorney-General, Mr Daryl Manzie suggested that the issue be placed on the agenda of SCAG and out of that the Model Criminal Code Officers Committee was established.

The Committee's first task was to develop the general principles of criminal responsibility and it was remarkably successful at developing consensus on those general principles, in a process that drew from the work of the Gibbs Committee, the general review of Western Australian *Criminal Code* by Michael Murray QC as he then was, the O'Regan Report on the Queensland *Criminal Code*, the Mitchell Report on Criminal Law and Penal Methods in South Australia, the various Victorian Law Reform Commission Reports on Homicide, Mental Malfunction and Mental Illness and the Western Australian Report on

Mental Disorders. Not to mention contributions from academics, the judiciary, the legal profession and the community at large.

During 1993, following a positive response to Chapter 2 general principles of criminal responsibility Attorneys-General committed themselves to implementing the Model Criminal Code by 2001 and in 1994 the Federal Government introduced the Criminal Code Bill. During 1994 the Prime Minister, the Premiers and Chief Ministers of the States and Territories gave their personal support to the development of the Model Criminal Code.

The Federal *Criminal Code Act 1995* ,which follows the Model criminal Code word for word was passed without amendment and with the support of all parties. It contains Chapter 1 which has machinery provisions and Chapter 2, the general principles of criminal responsibility. As the model chapters are developed, the Commonwealth intends to enact them into the *Code* and in due course other jurisdictions will do likewise.

As a four year old project, the Code's history is considerably shorter than any other similar project in the common law world. For instance ,the English Draft Code 1989, was first suggested in the Law Commission's Second Programme in 1968 (Law Comm No.14) whose objective was to examine the criminal law with the view to codification. In 1980 a committee was established to make proposals to the Commission in relation to a criminal code and in 1989, the draft Code was printed. It has not been implemented as yet.

Work on the Canadian Draft code was commenced in 1971 and in 1986 the first draft was tabled in Parliament and enlarged on the following year. It has not passed into legislation as yet.

The US Code was commenced in 1931 and thirty years later in 1962 the Model Penal Code, as it is known, was completed. Enactments based on the Model have been adopted by some thirty-four states but as yet the Federal sphere has not adopted it.

All these projects had their genesis because a similar set of circumstances existed in the criminal law, the archaic language of the existing statutes,

their poor organisation, the difficulty experienced in understanding the legislation, the number of obsolete provisions and the ad hoc approach of supplementing judicially developed common law concepts with statutory rules. The federations were also motivated by a need for greater uniformity among their states, territories and provinces.

Each of the draft Codes have been drawn on by our Committee for ideas and suggestions. For instance our conspiracy provisions are based on the US Model Penal Code. Proposals from England, Canada and New Zealand have also been utilised.

The fact that the Committee has relied on and sought opinions from the profession and other interested parties was recognised by the Senate Legal and Constitutional Legislation Committee, who were responsible for examining the Commonwealth's Criminal Code Bill for the Parliament. The Senate Committee made the observation that compromises were necessary if national uniformity was to be achieved and concluded that it was satisfied that the Commonwealth Criminal Code Bill "provides a thorough, workable, logical and balanced compromise between competing legal policy views, and perhaps more importantly, between the competing interests of the State and of the people, which lies at the heart of the criminal law." This could not have been achieved without the consultation process undertaken by MCCOC and the wide range of viewpoints within the Committee itself.

Consultation has been the cornerstone of the project. Scores of submissions have been received as a result of circulating the discussion papers, draft bills and reports to the Committee's extensive mailing list. This list is made up of individuals, agencies, interest groups and government bodies both within Australia and overseas and it is being supplemented constantly. In addition, the Committee made presentations on the project, for example at the 4th International Law Congress in Auckland in September 1992, and has conducted seminars in most major cities.

Now I'd like to give you some detail on Chapter 2, the general principles of criminal responsibility. The general principles blend the two main approaches to the criminal law in Australia. On one hand they contain the subjective fault-based principles of criminal responsibility of the

common law jurisdictions, while on the other hand they have provisions (such as those relating to intoxication) which are closer to the approach of the Griffith Codes. Furthermore, the general principles are the cornerstone of the Code and the Code accepts the underlying philosophy of the Griffith Codes that is that in such an important area of the law, Parliament should determine the appropriate principles.

In setting out the physical and fault elements of offences and instances where fault elements do not apply, Part 2.2 divides the elements of criminal offences into "actus reus" and "mens rea". The 'physical elements' can be the conduct, or the circumstances in which conduct occurs or a result of conduct. The 'fault elements' refer to the person's state of mind.

The Griffith Codes and the common law have taken different approaches in relation to fault elements. The essential difference is that criminal responsibility under the common law is based on what the accused knew, believed or intended at the time of the conduct, that is the subjective approach and it's unlike the basic provisions of the Griffith Codes.

In many offences under the Griffith Codes one or more forms of intention are express elements of the offence. In these cases, the difference between the Griffith Codes and the common law as regards intention is less marked. Nevertheless, in the case of many Griffith Code provisions which do not specify a fault element the difference is more significant. There is no onus on the prosecution to prove a fault element and criminal responsibility can only be negated by the defendant raising accident, or honest and reasonable mistake, or that the event occurred independently of his or her will. In the common law jurisdictions if a fault element is not specified for a serious offence, the fault element of intention is implied, and the prosecution must prove it as part of its case.

The general principles follow the common law approach in specifying subjective fault elements. This was the preferred approach in the vast majority of submissions received on the Model Criminal Code and is consistent with the US Model Penal Code, the English Draft Code, the Canadian Draft Code and the Gibbs Committee recommendations. It

strikes the right balance and strengthens the principle that the accused is innocent until proven guilty.

On the other hand, Standing Committee of Attorneys-General preferred the general approach of the Griffith Codes in relation to intoxication. The Code provides that evidence of self-induced intoxication may not be taken into account in determining whether the conduct was voluntary and that it cannot be considered in determining whether a fault element of an offence of basic intent existed. An offence of "basic intent" is an offence where the physical element is one of conduct alone (such as striking a person) rather than one requiring greater awareness (such as striking a person with intent to cause grievous bodily harm). This approach is similar to that in the law in the USA and England, but differs in some situations from the law in the common law jurisdictions of New South Wales, Victoria, South Australia and the Australian Capital Territory which follow a High Court decision known as *O'Connor*. In those jurisdictions gross intoxication can be taken into account in determining whether a person had intent.

Part 2.3 describes circumstances where there is no criminal responsibility, such as: where a person is under 10 years of age; suffers from mental impairment; is involuntarily intoxicated; or under a mistaken belief; or has a claim of right. Also covered are situations where there is some intervening conduct or event such as duress, emergency or self-defence. Apart from intoxication, which I have already mentioned, the most difficult issues concern mental impairment and self-defence.

The approach taken in relation to mental impairment follows the basic principles of what is called the *McNaghten* test. The general principles provide for a mental impairment defence primarily concerned with the determination of criminal responsibility, a legal rather than medical test. This issue must depend in part on the expertise of psychiatrists and psychologists but is not exclusively a medical issue. The approach adopted has produced a workable definition of mental impairment that allows the jury to hear relevant psychiatric testimony, based on the best scientific evidence, and properly leaves the ultimate question of responsibility to the jury.

The self-defence test is subjective as to the necessity of using force but the test as to the proportion of force used is objective and is similar to section 45 of the Tasmanian *Criminal Code*. Revision of the law of self-defence is very important in State and Territory legislation to which the same principles will apply. The decision in the case of *Runjanjic* and *Kontinnen* [1991] 53 A Crim R 362 on the issue of battered women's syndrome has an important bearing on the defence of self-defence. The case recognised that expert evidence could be admitted to show that women who have suffered "habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected from those which might be expected by persons who lack the advantage of an acquaintance with the results of those studies."

The emphasis on subjectivity in the tests for self-defence in proposed section 10.4 - compared to objective tests based on the perception of the reasonable person - will allow expert evidence on battered women's syndrome to be used to make the *actual* perceptions and responses of the woman defendant to be placed before the jury. The test of the necessity to use force in the proposed section is fully subjective. The test of the proportionality of the response is objective but it is measured according to the defendant's perception of the situation she confronts. The approach of drawing the rules relating to defences in a way that would fairly accommodate the responses of women and men was preferred to an approach which would make such syndromes free-standing defences.

Part 2.4 of the general principles deals with extensions of criminal responsibility such as attempts, complicity and common purpose, innocent agency, incitement and conspiracy. The most notable change relates to the offence of conspiracy where measures have been included to avoid it being overused. This includes a limit that the offence only applies where the offence to which it relates has a penalty of more than 12 months imprisonment or a fine of $20,000 or more. It also requires an overt act on the part of one of the parties to the agreement which forms the conspiracy and that proceedings only be commenced with the consent of the Director of Public Prosecutions. This addresses judicial and other criticisms of the use of conspiracy charges in recent decades.

Part 2.5 deals with the important issue of corporate criminal responsibility. It sets a basic standard of responsibility for bodies corporate in relation to general offences. The general principles introduce the concept that criminal responsibility should attach to bodies corporate where the corporate culture encourages situations which lead to the commission of offences. The provisions make companies accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.

I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate. This will occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.

At the Eighth International Conference of the Society for the reform of the Criminal Law held in Hong Kong in December last year, Alan Rose, President of the ALRC and former Secretary of the Commonwealth Attorney-General's Department, presented a paper on the corporate criminal responsibility provisions in the general principles. The paper was very well received and the fact that the Commonwealth was legislating the provisions raised great interest and caused some astonishment especially among the US attendees at the conference. The corporate criminal responsibilities contained in the general principles mean that now responsibility and accountability are the key words for corporations. Because the principles go beyond merely punishing a company because one of its officers committed an offence, the principles are truly innovative. In the US these sorts of considerations are only germane to the penalty imposed on the corporation, they do not go to finding the substantive fault elements.

Finally, Part 2.6 deals with proof of criminal responsibility and it sets out the respective burdens of proof to be discharged by both the prosecution

and defence. It also deals with averments and restricts their use and it follows established principles.

Of course, for Constitutional reasons, later parts of the Commonwealth Criminal Code will be different from the new State and Territory Criminal Codes because of different criminal law responsibilities, for example serious drug importation offences will remain in domain of the Commonwealth and offences against the person are in the domain of the States and Territories. Otherwise, offences common to the Commonwealth and State Codes will be expressed in the same terms and all offences will be constructed having regard to the same principles of criminal responsibility contained in the general principles.

It is my hope that the Commonwealth *Criminal Code Act 1995* will not only be the beginning of a new era for Commonwealth criminal law, but for the criminal law of Australia generally - the beginning of one of the most ambitious legal simplification programs ever attempted in this country.

Apart from the criminal code, the Committee has been asked by SCAG to develop two other pieces of legislation suitable for uniform application. The Model Forensic Procedures Bill contains provisions regulating the taking of forensic samples and carrying out forensic procedures on suspects. It contains strict safeguards especially for children and mentally impaired persons. The Model Mental Impairment Bill regulates the procedures for ensuring mentally impaired persons are not detained for indefinite periods at "the Governors Pleasure".

Both Bills have been widely circulated and have attracted a lot of comment. The Model Forensic Procedures Bill goes to SCAG for final approval very soon. The Commonwealth and NSW governments have announced they will enact it in the near future and other jurisdictions are expected to follow as a result of the *Fernando* case The Mental Impairment Bill is still being settled by the Committee.

Timetabling of the project is very important and the model code has been planned under 10 broad chapter headings. As I've said, it has commenced with the general principles of criminal responsibility (Chapter 2). Chapter 3, on theft, fraud and blackmail etc, will be

finalised soon. Discussion papers on Chapter 5, non-fatal offences against the person and Chapter 7, administration of justice and government, are almost ready to be released for comment. Discussion papers on sexual and fatal offences against the person are due for release later this year.

The other chapters are in broad terms; Chapter 4, damage to property; Chapter 6, drugs; Chapter 8, offences against public order; Chapter 9, culpable management of vehicles, aircraft, etc and Chapter 10, Miscellaneous. All chapters will be progressively developed through discussion papers with the aim of completing the whole of the Model Criminal Code by 1998. As the discussion papers are developed they will be circulated for comment. The submissions are then collated and analysed and used to draft the Final Reports which are in turn released and forwarded to SCAG for endorsement.

As the project has progressed, more and more practitioners, academics and other people have expressed growing interest in the process and are keen to be included on our mailing list. I can only urge you all to do the same and thereby ensure you are ready when the Code becomes an Australia-wide reality as it surely will.