

CONSTRUCTING CRIMINAL LAW REFORM AND THE MODEL CRIMINAL CODE*

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1. Introduction - The Genesis of The New Movement to Australian Codification of the Criminal Law

The constitutional arrangement in Australia is that the general criminal law is a matter for the States and Territories and not for the Commonwealth. This gives rise to some problems, for, of course, the Commonwealth has its own interests to protect and both should and must enact laws, criminal in nature, to deal with them¹. The *constitutional* problem that this division of powers produces is not profound - so long as the Commonwealth is acting within the scope of its other nominated powers (and the other Constitutional constraints not relevant to this paper), the offence is constitutional. The consequence of that is, however, that there must exist, side by side, a State/Territory criminal law system dealing with traditional crime (rape, robbery, murder, drink driving, queue jumping and the like) and Commonwealth crime (importing drugs, social security fraud, some environmental offences, Commonwealth property and so on).

But this system produces a substantive problem as well as a constitutional one, and the substantive problem is less well appreciated. If there is no criminal law enacted by the Commonwealth Parliament on a particular question that arises upon a prosecution for a Commonwealth offence, the default system provided is that the court, which is exercising Commonwealth jurisdiction, "picks up" and applies the relevant State or Territory law of the place in which the court is sitting². That would be well and good if the States and Territories maintained a modicum of consistency, if not uniformity, in the criminal law or the law of criminal procedure and evidence - but they do not. While, to its credit, the High Court has recently maintained an effort to converge the effect of the criminal laws of the States and Territories³, it can only go so far, and irreconcilable differences remain. It necessarily follows

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¹ Compare Canada, in which the reverse is true. Still, problems arise with that system too. In Canada, the problem may be somewhat crudely reduced to the question of characterisation - ie whether a provincial (State) law imposing a punishment is a "criminal" law (invalid) or whether it is something else regulatory (valid). Whatever else can be said about the considerable jurisprudence which this fascinating distinction has produced, it can be said that, in the end, considerations of practicality appear to have won the day. See, for example, *Reference Re Firearms Act* [2000] 1 SCR 783.

² This result is achieved by ss 79 and 80 of the Commonwealth *Judiciary Act*. A recent interesting example of the process at work is *Sexton* (2000) 116 A Crim R 173. The position is somewhat complicated by s 4 of the Commonwealth *Crimes Act* which provides that "The principles of the common law with respect to criminal liability shall, subject to this Act, apply in relation to offences against this Act". That provision applies only in relation to the *Crimes Act*, and, in any event, raises the question whether there is one Australian common law. It appears that a majority of the High Court now believes that there is but one common law, (*Winfield and Lipohar* (2000) 168 ALR 8) but the question can hardly be regarded as absolutely settled.

³ See, for example, the efforts that the High Court has taken to try to keep the *Evidence Act* jurisdictions in line with the common law jurisdictions in relation to the "right to silence": *RPS* (2000) 199 CLR 620; *Azzopardi* [2001] HCA 25.

that a Commonwealth prosecution in, for example, Queensland, may well be dictated by legal considerations significantly different from an identical prosecution in, for example, New South Wales. The Commonwealth is entitled to regard that situation as intolerable.

In the recent past, the situation described has become worse from the Commonwealth's point of view because of a steady expansion in Commonwealth legislative power brought about by a centralist succession of High Court judgments⁴. In relation to basic criminal matters, this has, to some extent, been at the expense of State and Territory criminal jurisdiction, but not to any great degree⁵. By and large, it is true to say that "traditional" crime remains a State and Territory responsibility while the Commonwealth has concentrated on newer and more specialised crimes. The major exception to that generalisation is the field of drug offences⁶.

While this dichotomy in spheres of influence may have minimised constitutional clashes in claims to *jurisdiction* over criminal matters, the lack of a basic Commonwealth criminal jurisprudence became more problematic as Commonwealth activity in expanding criminalisation increased. A deal of the problem related to a lack of a Commonwealth law about the general principles of criminal responsibility. In 1990, this problem was put quite neatly in the following way:

"The result is that in many cases the answer to the question what principles of criminal responsibility should be applied in a prosecution for a breach of Commonwealth law will depend on whether the proceedings arose under the *Crimes Act* or under another Commonwealth statute and in the latter case where the court is held. For example a child aged seven can be criminally responsible for an offence against the *Crimes Act* wherever the offence was tried since seven is the age at which criminal responsibility at common law but if the offence charged is a breach of any other Commonwealth statute, a child under the age of eight would not be criminally responsible if the court were held in Victoria or the Australian Capital Territory and a child under the age of ten would not be criminally responsible if the court were held in New South Wales, Queensland, South Australia or the Northern Territory. However, a child aged seven would remain criminally responsible in Western Australia and Tasmania."⁷

The Commonwealth Government established a body called the "Review of Commonwealth Criminal Law" to deal with this problem (the Gibbs Committee). The Committee consisted of retired Chief Justice of the High Court, Sir Harry Gibbs, the Honourable Mr Justice Ray Watson and distinguished public servant Mr Andrew Menzies. The Committee began in the by now time honoured fashion by issuing Discussion Papers and then a series of Reports⁸. However, while the

⁴ For a well read Australian lawyer or person interested in political science, this statement is axiomatic. For the interested outsider to this knowledge, reference may be made to any Australian text on the subject.

⁵ Of course, the expansion came at the expense of a great deal of *non-criminal* State jurisdiction.

⁶ The Commonwealth, by use of its constitutional power over customs, has enacted primary drugs offences in the *Customs Act* 1901, and, by judicial interpretation, established that, since almost all illegal heroin is imported, the *Customs Act* offences apply to heroin offences within Australia. By contrast, cannabis and amphetamine offences (for example) tend to be dealt with by State and Territory legislation.

⁷ Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (July, 1990) [the Gibbs Committee] at para 3.5.

⁸ Review of Commonwealth Criminal Law, *Interim Report, Computer Crime* (November, 1988); Review of Commonwealth Criminal Law, *Interim Report, Detention Before Charge* (March, 1989); Review of Commonwealth

composition of the Committee was distinguished, its reports and recommendations did not always align to the needs and aspirations of the States and Territories, and, as doctrine, its proposals were controversial and subject to well reasoned criticism⁹. This was particularly the case in relation to the Committee's recommendations in relation to the general principles of criminal responsibility¹⁰. It was not entirely clear that the Review Committee intended that the *entire* criminal law of the Commonwealth should be codified, but it carefully and clearly concluded that the general principles of criminal responsibility should be codified¹¹. It is, of course, a nice question whether the Commonwealth criminal law could have any (non-codified) common law component beyond the general principles of criminal responsibility and enacted offences and defences - but that is another impossible question for another time.

In September 1990, the Third International Law Congress was held in Hobart. The codification of Commonwealth criminal law and the recommendations of the Gibbs Committee were considered. The general impression left by the Congress was not only support for the codification of Commonwealth criminal law but, far more importantly, a strong questioning of the extent of the diversity between the criminal laws of the States and Territories¹². Significantly, the then Attorney-General of Queensland gave a paper at that conference in which he said:

“Why should a person's criminal responsibility, the punishment which a certain offence carries or even, indeed, whether certain conduct amounts to an offence, vary simply by the crossing of State boundaries? In a country as homogenous as Australia, this amounts to at worst lunacy or at best illogicality.”¹³.

The fact that it was an Attorney-General of Queensland who was speaking of the need for national uniformity of criminal law and whose extended example of the need for uniformity was the age of consent for sexual behaviour is full of ironies, as will be seen below.

Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (July, 1990); Review of Commonwealth Criminal Law, *Fourth Interim Report*, (November, 1990) [administration of justice offences, offences against government, bribery and corruption, search warrants]; Review of Commonwealth Criminal Law, *Fifth Interim Report*, (June, 1991) [arrest, sentencing, forgery, offences relating to the security and defence of the Commonwealth].

⁹ See, generally, Colvin, “Unity and Diversity in Australian Criminal Law: A Comment on the Draft Commonwealth Code” (1991) 15 Crim LJ 82.

¹⁰ See Symposium (1991) 15 Crim LJ 79-152, 157-202.

¹¹ Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (July, 1990) at para 3.12: “The Review Committee considers that the most convenient course... is to codify all relevant principles relating to criminal responsibility. This course should achieve uniformity of principle throughout Australia in Commonwealth criminal trials and should make the relevant principles more readily accessible and, it is hoped, more clear and certain. It should be noted that codification does not necessarily involve radical reform; the Review Committee would not propose to depart widely from existing principles, but would rather propose generally to restate existing principles whilst at the same time to fill gaps, remove obscurities and correct anomalies.”

¹² See Editorial (1991) 15 Crim LJ 79: “... the often disparate State and Territory criminal laws on the same subject-matter created injustice and inequality before the law; that the time was ripe for the criminal laws of the various States and Territories to be uniformly expressed and applied; and that the Review Committee's report was a viable starting point towards achieving this uniformity.”

¹³ The speech is reported in *The Bulletin*, 16 October, 1990 at page 111. “Homogeneity” is, of course, a relative concept. Some might disagree with the argument on that ground, but the point for present purposes is that it was made.

In Brisbane, in April 1991, the Society for the Reform of the Criminal Law staged a major conference on the Gibbs Committee proposals¹⁴. While the Gibbs proposals themselves were the subject of sustained criticism at a substantive level, the final report of that seminar stated:

“It therefore appeared that there was reason for optimism that the process of consistent codification of the criminal law in Australia could and should proceed. Delegates from both Code and common law jurisdictions were of a like mind that the process of codification was an important matter to be addressed and should be pursued now. It was an idea whose time was at hand and this country had an opportunity, it was felt, to assume a position as a world leader in the process of formulating, in a codified form, a just system of criminal law, responsive to modern needs, expressed in clear terms and capable of being applied uniformly across the country.”¹⁵.

The three themes that seem to have emerged at this point were (a) consistency, if not uniformity across Australian criminal jurisdictions; (b) the overall benefits of codification and (c) the consensus on these objectives by both old Code and common law jurisdictions. One of the objectives of this paper is to study what happened to these themes in practice.

Prior to the Brisbane conference, on 28 June, 1990, the Standing Committee of Attorneys-General (“SCAG”) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee (“CLOC”), but, in November 1993, the name was changed to the Model Criminal Code Officers Committee (“MCCOC”) in order to reflect the principal remit of the Committee directly¹⁶.

The first formal meeting of the Committee took place in May 1991. In July 1992, the Committee released its first paper, a Discussion Draft on the general principles of criminal responsibility, and, after a great deal of public consultation, including 52 written submissions and a lengthy seminar at the Fourth International Criminal Law Congress in Auckland in 1992, delivered a Final Report to SCAG which was released in December 1992. With the exception of the general principles relating to intoxicated defendants¹⁷, the recommendations in that Final Report formed the basis for the Commonwealth *Criminal Code Bill*, 1994, which was passed by the Commonwealth Parliament in March, 1995¹⁸. In 1994, both the Commonwealth Government and

¹⁴ It was that conference which produced the papers referred to in footnote 9.

¹⁵ From the author’s own records. I am unaware that the final communiqué was published at any time.

¹⁶ For general background, see Goode, “Codification of the Australian Criminal Law” (1992) 16 Criminal LJ 5.

¹⁷ The Committee recommended that the law be based on the decision of the High Court in *O’Connor* (1980) 54 ALJR 349 but the Standing Committee decided that it preferred the position taken in *Majewski* [1977] AC 443. That decision is not a principal focus of the discussion which follows. The very interesting debate is well-rehearsed in other places. However, the MCCOC proposed solution to the SCAG decision is an unusual one which has not been well debated.

¹⁸ In December 1993, MCCOC released the first of two Discussion Papers on theft, fraud and related offences. The second Discussion Paper, which dealt with blackmail, forgery, bribery and secret commissions, was released in July, 1994. Both of these Discussion Papers have been the subject of a great deal of public comment. A Final Report encompassing the subject matter of both Discussion Papers was released in late 1995.

the State and Territory Premiers' Leaders Forum endorsed the Model Code project as one of national significance.

2. The Establishment and Composition of MCCOC

The idea of MCCOC was not unusual in a sense, but was unusual in another sense. There have, of course, been many other committees consisting of representatives of each jurisdiction reporting back to SCAG. There is nothing unusual in that. But there were two unusual features of this committee. First, it was composed of representatives who were the principal advisors to their Attorneys-General on crime. This was considered to be vital. MCCOC was meant to be, and was, a committee of highly influential advisors who could get things done and who had good access to their respective Ministers. Second, it was unusual in that the subject matter which was its remit was that normally associated with a law reform commission in some form or another¹⁹. This was not a law reform commission in the now traditional sense of the word²⁰, neither, for example, in the nature of its composition nor, importantly in practice, in the fact that the MCCOC task was additional to the work that the members of the Committee performed in the ordinary course of their duties. This latter fact should be borne steadily in mind when one considers the MCCOC legacy (whether one considers it to be significant or not and, if so, in what way).

The initial members of CLOC (later, MCCOC,) were:

<i>Chair:</i>	Dr David Neal (Director, Policy and Research, Victorian Attorney-General's Department)
<i>NSW</i>	Mr Peter Berman, (Director, Criminal Law Review Division, NSW Attorney-General's Department)
<i>Queensland</i>	Mr Peter Svensson, (Legal Consultant, Attorney-General's Department)
<i>Western Australia</i>	Mr Graeme Scott QC (Crown Counsel)
<i>South Australia</i>	Mr Matthew Goode (Legal Consultant, Attorney-General's Department)
<i>Tasmania</i>	Mr Nick Perks, (Crown Prosecutor)
<i>Northern Territory</i>	Mr Len Flanagan, (DPP)
<i>ACT</i>	Mr John O'Keefe, (Director, Justice Section, Attorney-General's Department)
<i>Commonwealth</i>	Mr Herman Woltring (Principal Advisor, Criminal Justice, Attorney-General's Department) assisted by: Mr Andrew Menzies (Consultant) and Ms Alexis Fraser (Adviser)

There may appear to be too many prosecutors in that list. Certainly, at the time, Peter Berman, Graeme Scott QC, Nick Perks and Len Flanagan were active prosecutors. But David Neal, Peter

¹⁹ For example, codification of the criminal law was the task of the UK Law Commission in that jurisdiction and the Law Reform Commission of Canada in that jurisdiction. The American Model Penal Code was the product of the American Law Institute, but that was an anomalous body conforming to American codification tradition at a time before the law reform commission paradigm was established. The law reform commission paradigm seems not to have taken hold in the United States, perhaps because other institutions of a similar kind served it as well.

²⁰ See, for example, the description of the characteristics of a typical law reform commission by Sackville, in "The Role of Law Reform Agencies in Australia" (1985) 59 ALJ 151.

Svensson, Matthew Goode, John O'Keefe and Herman Woltring were not - and, what is more, none of the latter could have been known for a prosecution bias. In practice, the accusation that MCCOC did not contain any or sufficient defence representation was made only once to my memory²¹. If anything, MCCOC was criticised far more often and vehemently for being too libertarian rather than not being libertarian enough²².

Dr David Neal continued as Chair until the election of the Kennett Government in Victoria. The newly elected Victorian Attorney-General was not disposed well to MCCOC and Victorian involvement ceased for about 18 months, until, happily, she relented. After Dr Neal departed as Chair, he continued as a Commonwealth consultant on those matters for which he had become responsible, notably dishonesty offences. Thereafter, the Committee was chaired by Mr Rod Howie QC from New South Wales who successively became Judge Howie and then Mr Justice Howie. The representatives of the various jurisdictions on the Committee over time are detailed in a table attached to this paper.

3. What The Committee Did and Reactions To It

From its beginning, MCCOC proceeded in the traditional way, issuing Discussion Papers and Reports, and taking in comments from all over Australia on both. Both Discussion Papers and Reports had to be, and were, approved for release by vote of SCAG Ministers. A list of these documents is attached as an Appendix to this paper. Almost all of the time, the proceedings of the Committee excited little controversy²³, although, of course, there was consistent attention to the product of the Committee by those to whom the project was central, such as police forces, law societies, bar associations, prosecutors and judicial officers. It is a sad but true fact that Australia legal academics (or indeed, academics from any field) had almost no interest in making submissions to the Committee at all²⁴. In my opinion, this says a great deal more about the state of academia specialising in criminal law than it does about the work of the Committee²⁵. Be that as it may, the work of the Committee excited major controversy among others worthy of note in three distinct areas.

²¹ The papers associated with submissions in relation to all the Discussion Papers and Final Reports over ten years are too voluminous to hunt down the reference or to be entirely sure that it only happened the once, but I think that to be right. If memory serves, the context was a submission from the Victorian Bar Association in relation to proposals to restrict the defence "right" to subpoena sexual assault counselling records.

²² Although the initial formal representation contained no women, it will be seen that that state of affairs did not last long. I do not recall that matter being the subject of criticism at any time.

²³ For example, the MCCOC DP and Report on *Offences Against the Administration of Justice* excited no controversy and appears to have gone pretty well unnoticed (except by the UK Law Commission: *Legislating the Criminal Code: Corruption* (Report No 248, 3 March, 1998). It is not an area of law which appears to excite any attention from legislators, academics or those otherwise involved in the criminal law.

²⁴ The most notable exceptions to this general statement are Professor David Lanham of the University of Melbourne who made significant comments on the work on fatal and non-fatal offences against the person and criminal jurisdiction, and a number of eloquent feminist academics who made significant contributions to the thinking of the Committee on homicide issues.

²⁵ Some commentary appeared after the event, when it was far too late to affect the work of the Committee at all. See, for example, Bronitt, "Defending Giorgianni - Part Two: New Solutions for Old Problems in Complicity" (1993) 17 Crim LJ 305; Stuart, "Punishing Corporate Criminals With Restraint" (1995) 6 Crim L Bull 219; Woolf, "The Criminal Code Act 1995 (Cth) - Towards a Realist Vision of Corporate Criminal Liability" (1997) 21 Crim LJ 257; McSherry, "Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms" (1999) 23 Crim LJ 135.

(a) *Principles of Criminal Responsibility: The Queensland Supreme Court*

The Committee decided very early in its life that the very first project in a codification exercise must be the foundational general principles of the criminal law. Hence, the Committee began with a Discussion Paper and Final Report on the general principles. That decision turned out to be absolutely correct. The general principles guided the deliberations of the Committee in its work on the specific offences to be included in the Code in ways which were fundamental to the structure and drafting of the recommended provisions of the Code. The most important of these provisions were those which dealt with default fault elements of offences.

This is not the place to explain in great detail why the general principles took the form that they did. In general terms, the fundamental structure of criminal offences was taken directly from two major sources: the monumental and influential work of Professor Glanville Williams in his *Criminal Law: The General Part*²⁶ and the very fine judgment of Brennan J (as he then was) in the leading High Court decision of *He Kaw Teh*²⁷. It might be thought that these were very good sources. However, the decision to use these sources entailed a decision, not taken lightly, that the basic framework of the general principles would be derived from what might loosely be called common law principles rather than Griffith Code principles. There are two general points to be made about that decision.

The first is a note of explanation for those not familiar with the Australian system of criminal law. As a general proposition, as noted above, criminal law is not a Commonwealth matter. Australian criminal jurisdictions fall generally into one of two kinds. The first are the “common law” jurisdictions. In New South Wales, Victoria, the Australian Capital Territory and South Australia, the criminal law is based on English common law as supplemented, usually extensively, by local statute²⁸. By contrast, Queensland, Western Australia, Tasmania and the Northern Territory are what might be termed “Griffith Code” jurisdictions, as their criminal law is codified; based on a form of Criminal Code developed by Sir Samuel Griffith for Queensland at the turn of last century. For present purposes, it is not necessary to go beyond that general distinction.

The second note is that, while both statutory amendments to the common criminal law and statutory amendments to the Griffith Code have often proceeded at least down the same path, the basic assumptions of the general principles of criminal responsibility have become very different over the course of a century. While the common law under the influence of a sequence of High Court decisions culminating in *He Kaw Teh*²⁹ has proceeded down the route of subjective criminal responsibility, the Griffith Code enacted what was at the time thought to be the common law position of objective criminal responsibility and has remained faithful to that position. The result of this may be illustrated by the general illustrative proposition that, in the common law states, the crime of rape requires proof that the accused knew or was recklessly indifferent to the

²⁶ (Second Ed, 1961).

²⁷ (1985) 157 CLR 523.

²⁸ Although those statutes may be very old inheritances indeed.

²⁹ (1985) 157 CLR 523.

consent of the other party³⁰, whereas in the Griffith Code jurisdictions, the accused may escape only if he or she was reasonably mistaken as to the consent of the other person³¹. This is not the place to enter into the debate about the wisdom of either outcome. That issue has and no doubt will continue to be debated as a matter of principle in other fora. The point for present purposes is that the difference, in general terms, exists.

MCCOC had to decide what model it would pursue or, to put it in the Australian context and in all reality, what model of criminal liability it would recommend for Australian consistency and for a Commonwealth criminal law. It decided on the common law model, based, as noted above, on Glanville Williams and Brennan J. Why?

- ?? First, the Griffith Code position was based on the law as it was then thought to be (and certainly was³²). But the common law has moved on and the Griffith Code has not³³. The major problem with existing Griffith Codes is that they crystallised the development of the idea of criminal fault in 1900 (or thereabouts), and much has changed for the better in the common law since then. In general terms, the concept of voluntariness has appeared, been developed and taken shape, and the ideas of fault and mistake have been rationalised and developed to a significant degree, both in Australia and in common law and Code systems overseas.
- ?? Second, the argument about basic fault principles is about *default* principles not *legislated* principles. The real question is - what happens when the Parliament does not state what the fault elements are? Parliament can specify what it wants the law to be if only it has the will to do it. If Parliament wants a particular result, for example, in relation to the rape offence - which is statutory in all jurisdictions - it can simply say so. The fact that this is the real question escaped - and has continued to escape - most critics of the Model Code general principles.
- ?? Third, the Griffith Code scheme of default no fault has and had no real supporters outside the vested interests in those jurisdictions. For example, the Queensland Criminal Justice Commission advanced the quite ludicrous proposition that the MCCOC draft “introduces many concepts and terminology which are foreign to most States”³⁴. That is simply not true. It is true that the subjective fault based approach as a *default proposition* is not the law in four jurisdictions, but it is a fact that all four of those jurisdictions employ all of the concepts in the general principles draft at some point in their criminal justice system.
- ?? Fourth, flowing from that, when the High Court is given a choice between a subjective fault based regime and a Griffith Code regime, it has adopted the former. An outstanding example is *Chew*³⁵ which concerned the interpretation of the fault elements of an offence in the Companies (WA) Code.

³⁰ The notorious statement of the principle is *Morgan* [1976] AC 182. See also *Sarragozza* [1984] VR 187; *Tolmie* (1995) 84 A Crim R 295.

³¹ *Attorney-General's Reference (No 1)* [1979] WAR 45; *Ingram* [1972] Tas SR 250. However, in *McMaster* (1994) 4 NTLR 92, it was held that the NT version of the Code required proof of subjective fault.

³² Griffith and other codifiers at the time would have been substantially influenced by such decisions as *Tolson* (1889) 23 QBD 168.

³³ This fact may have considerable implications for an argument about whether codification is a good thing or not.

³⁴ Submission, October 15, 1992.

³⁵ (1992) 173 CLR 626.

However, the basic scheme of general principles outlined in the Model Criminal Code (“the CCA”) was attacked publicly by a senior judicial officer as having a “potential for disaster” and as “an unworkable academic nightmare”³⁶. Mr Justice Thomas of the Queensland Supreme Court did not understand the scheme of elements of offences, let alone what follows from it:

“The problem’, the judge said, ‘is that the drafters of the Code have been side-tracked into the metaphysics of action. They have attempted to define all kinds of unlawful human conduct and activity by isolating multiple ‘physical elements’ and ‘fault elements’. It is necessary that some parts of the code be mentioned before it can be judged whether it is comprehensible and workable. Don’t blame me for the headache you get when you try to understand it - the complexity is the code’s, not mine.”³⁷.

There is a basic answer to this criticism. It is that “physical elements” and “fault elements” are merely plain English phrases for *actus reus* and *mens rea*, which have been staple criminal law fare for centuries. There is extensive law on the need to distinguish between acts and omissions and the liability consequences that flow from that distinction³⁸, and the difference between elements of offences which are absolute and those which allow for a defence of reasonable mistake. These basic non-understandings are the subject of classes taught in elementary law courses all over the country. The opinion by Thomas J that the CCA analysis of physical elements is an “over-ambitious academic”³⁹ attempt to reduce human conduct and future legislative action to a tortured and unnecessary classification.” is mere unreasoned abuse⁴⁰. It will be shown below that the CCA did not complicate that which is already complicated and did, to some considerable degree, simplify and clarify such issues.

In a later letter to the journal, Queensland Chief Judge Pat Shanahan “confined himself” to observing that Queensland had done without “mens rea” and “actus reus” for over 90 years and should not begin now⁴¹. But the plain fact is that, whether or not the terms “*actus reus*” and “*mens rea*” have been used in the Griffith Code, equivalent concepts have been widely employed in a variety of guises.

³⁶Among other things. See “Model Criminal Code, Judge fears potential for disaster”, *Australian Lawyer*, June 1995 at 12-13. The Model Code team replied in *Australian Lawyer*, August, 1995 at 14-15 and there was further correspondence from Queensland in the *Australian Lawyer*, October 1995 at 6-7.

³⁷“Model Criminal Code, Judge fears potential for disaster”, *Australian Lawyer*, June 1995 at 12.

³⁸This despite the fact that the criminal law has observed such a distinction for over 100 years. The distinction can be traced back to the championship of Macaulay in his work on the Indian Codes [*Notes on the Indian Penal Code*, (1837)] and early common law development; an example is *Smith* (1826) 2 C&P 448, 172 ER 203. Little attention has been paid to the distinction in the Griffith Code, but it is there and it is thought that the distinction has some importance generally (see *Evgeniou* (1964) 37 ALJR 508 at 509). That is not to deny that the distinction between act and omission is very slippery indeed. A minor example can be found in *Fagan* [1969] 1 QB 439 and a very serious example can be found in *Bland's case* [1993] 1 All ER 821 (and cases like it).

³⁹It might be noted that Thomas J consistently uses the word “academic” as a term of denigration and abuse. This is all too common in Australian legal culture as well as other non-legal areas of knowledge.

⁴⁰In addition to that quoted above, also “unworkable academic nightmare”; “worse than useless”; “incomprehensible law”; “a career of obfuscation”; “a nightmare” (again); and “this horror”. This is the same Mr Justice Thomas who, in the course of wise advice to judges on the appropriate standard of dress for their wives and on “punting” advised: “All things in moderation”: Thomas, *Judicial Ethics*, (1988) at 43.

⁴¹*Australian Lawyer*, October 1995 at 7.

One may compare the reaction of Thomas J with that of Murray J, of the Western Australian Supreme Court, who conducted the most thorough modern review of a Griffith Code to that time. His Honour said to the Senate Legal and Constitutional Legislation Committee about the CCA:

"Time moves on and one's ideas change, but I have become involved in the process of the organisation of this bill and it is lovely to see it come forward. ... I think it is a fine document. I heard, just as Her Honour was leaving, what Judge Yeats said about terminology. It is certainly a very valid point of view. It does have some complexity of terminology, but I think what needs to be clear in our minds is that it is a model, and I hope it would provide a model that would be operative not only in relation to Commonwealth law but would provide a model in relation to state law. There are a number of significant areas which seem to me to embody distinct improvements on the law, both the common law and, in some respects, the Griffith codes."⁴²

In fact, the Griffith Codes have grappled with versions of these issues over the years. Apart from the "mystical" WA provision (for example) "An act or omission which renders the person doing the act or omission liable to punishment is called an offence."⁴³, the notable Griffith Code sections are those dealing with mistake and accident. The judicial gloss on those sections of the Codes shows, conclusively, that they heavily involve what Thomas J believes to be "the metaphysics of action".

To take the most simple of examples, the Griffith Codes did not and do not deal with the (for them) entirely novel idea of recklessness. That necessitated a great deal of what may be called, generously, inventive interpretation in *Vallance*, in the course of which Dixon CJ (to whom, one would have thought, the greatest respect should be shown) stated:

"... an examination of the Code, in an attempt to answer what might have been supposed one of the simplest problems of the criminal law, leaves no doubt that little help can be found in any natural process of legal reason. The difficulty may lie in the use in the introductory part of the Code of wide abstract statements of principle framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do. It may lie in that because it is followed by many chapters defining particular crimes more often than not in terms adopted long before as occasion demanded by a legislature introducing a new crime or crimes into a common law system, and prone to the use of definitions of a somewhat practical or earthy kind. In the Code these abstractions of doctrine are not the generalised deductions from the particular instances that follow: they come ab extra and speak upon the footing that they will restrain the operation of what follows."⁴⁴

His was, in the result, a minority judgment - but nevertheless, though the High Court judges gave a variety of reasons for their decision, they were unanimous in their view that no-one could be guilty of unlawful wounding unless the accused realised the risk of harm⁴⁵.

⁴²Senate Legal and Constitutional Legislation Committee, *Hansard*, 22 November, 1994 at 271.

⁴³WA *Criminal Code*, s 2.

⁴⁴*Vallance* (1961) 108 CLR 56 at 58.

⁴⁵See also, for example, *Bennett* [1990] Tas SR 72.

Mr Justice Thomas and Judge Shanahan might, like the Queensland Criminal Justice Commission in its submission to the Model Code Committee, have politely said that "[t]he meaning of the Code provisions relevant to criminal responsibility are now well understood as a consequence of a body of precedent which has been derived from judicial interpretation of the provisions over the period of almost a century.". But even had they done so, they would have been wrong. Anyone who could call the collection of judicial decisions which includes *Van Den Bemd*⁴⁶, *Mamote Kulang*⁴⁷, *Hubert*⁴⁸ and *Jackson and Hodgetts*⁴⁹, let alone the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood⁵⁰.

The only conclusion that can be made to the criticisms advanced by Mr Justice Thomas is the equivalent to that made by Professor JC Smith to Francis Bennion, who criticised the English Law Commission Code as "over-technical, poor on exposition and a sore puzzle from beginning to end". Professor Smith concluded:

"Mr Bennion concludes by observing that what really matters is whether his objections are of substance. I agree. In my opinion, they are of no substance. None of them goes to any great issue of principle and in my opinion they are irrelevant or wrong."⁵¹.

Precisely so.

(b) *Shock, Horror Teen Sex Incest*

In November, 1996, MCCOC published a Discussion Paper on *Sexual Offences Against the Person*. A storm erupted. The Committee was aware that the topic of sexual offences was bound to generate controversy. The subject of sexual offences makes many people irritable. Furthermore, in this particular area, the Committee took the view that the history and current state of debate about sexual offences was such that it was absolutely necessary to consider evidentiary and procedural provisions peculiar to charges of sexual offences as well as and in the context of consideration of the offences and defences applicable to the area. In addition, SCAG made it clear that it wanted MCCOC to make recommendations about the law as it related to the compelled production of sexual assault counselling notes, which had become a cause celebre at the time, particularly in New South Wales.

It should first be made clear what recommendations did and did not cause the backlash described. Of course the standard issues invited the usual differences of opinion. Those standard issues included whether to retain separate offences of what is commonly called rape and indecent

⁴⁶(1994) 179 CLR 137 (HC), (1992) 70 A Crim R 489 (QCCA).

⁴⁷(1964) 111 CLR 62.

⁴⁸(1993) 67 A Crim R 181.

⁴⁹(1989) 44 A Crim R 320.

⁵⁰See, generally, Goode and Leader-Elliott, "Criminal Law" in Baxt and Moore (ed), *An Annual Survey of Australian Law* 1994 at 161-170.

⁵¹Smith, "The Law Commission's Criminal Law Bill: A Good Start for the Criminal Code" (1995) 16 Statute LR 105 at 108 replying to Bennion, "The Law Commission's Criminal Law Bill: No Way to Draft a Code" (1994) 15 Statute LR 108.

assault or whether to merge them into degrees of sexual assault; whether and to what extent an honest but unreasonable belief in consent would negate criminal liability; the extent to which the complainant's sexual history could be the subject of cross-examination; and the requirements (if any) of corroboration. There were unheralded difficult issues too. Current law commonly does not pay sufficient attention to the balance between allowing people with impaired capacity to consent to have an appropriate sexual relationship (on the one hand) and protecting them from exploitation (on the other hand). The Committee carefully considered these issues and was quite prepared to deal with the genuinely held, if sometimes forcefully opposing views (from a number of sides) about these issues. The Committee was also quite prepared to consult on and take into account the views of those who would, for example, ban access to an alleged victim's counselling records on the one hand and those who thought that any change from the current rules would prejudice the right of the accused to a fair trial on the other hand. The Committee was well aware that certain fringe groups still hold the view that what used to be called "sodomy" should be made a criminal offence, despite the fact that homosexual relations between consenting adults are legal in every Australian jurisdiction.

But the Committee was unprepared for the storm which broke over its collective heads based upon complete and, often, wilful misunderstanding and misrepresentation of the Committee's proposals. The most important example of this was the recommendations about the age of consent. Essentially, the Committee recommended a two tiered age of consent. The first was a "no defence age", below which any sexual contact at all would have no defence whatsoever. The Committee suggested that this age should be 10. The second was "true age of consent". This was suggested to be set at 16. Between the ages of 10 and 16, the Committee proposed a number of limited defences: (a) marriage or reasonable belief that there was a marriage; (b) the accused and the victim were not more than 2 years different in age (the sexual experimentation defence); and (c) reasonable belief that the victim was of or above the age of consent.

The Committee received literally thousands of letters on this subject. Almost all of them completely failed to understand the proposals as a result of a campaign of misinformation persistently and wilfully promulgated by an organization calling itself the Australian Christian Coalition. This body conducted an organised campaign, mainly, it seems, in Queensland, on the basis that what the Committee was recommending was the lowering of the age of consent to 10. This was, of course, plainly not true. As opposed to this massive chorus of often highly abusive disapproval⁵² based on a false premise, many informed religious organizations and organizations who work with young people supported the Committee's recommendations. These included the Social Issues Committee of the Anglican Diocese of Sydney⁵³, the Baptist Churches of NSW, the Uniting Church (National Secretary for Social Justice), the Presbyterian Church of Tasmania⁵⁴, SA Police, the National Children and Youth Law Centre and the Federation of Community Legal Centres. More simply, a number of submissions revealed that the correspondents were completely unaware of the age of consent in their own jurisdictions, which had sometimes been in place for many years.

⁵² One submission received stated: "My initial response was that it must have been put together by a panel of paedophiles".

⁵³ Although that Committee would have preferred the true age of consent to be 18 rather than 16.

⁵⁴ Although the Church would have preferred that the "no defence age" to start at 14.

The other proposal which touched some very raw nerves (and prejudices) was the proposal that the criminal offence of incest between consenting adults should be abolished. Again, this proposal was greeted with persistent and wilful misinformation and abuse. This time, it was put about that the Committee was recommending abolition of the law which criminalizes sexual contact between adults and related *children*. That was, of course, simply and completely untrue. The Committee had recommended a sound suite of severe offences dealing with the victimisation of children. The Committee *was* proposing that consenting sexual behaviour between two adults within the prohibited degrees of consanguinity should not be a criminal offence.

Many of those who did understand the proposal still opposed it. Almost all opposition was based either on some peculiar idea of genetics and/or the idea that the criminal law should reflect sexual practices thought to be distasteful or contrary to particular religious conviction by the enactment of a serious criminal offence. The Discussion Paper had dealt quite properly with these objections in advance, but that made no difference to most of these people.

Such was the clamour that groups such as the Australian Christian Coalition had set up, most particularly in Queensland, the then Queensland Attorney-General, Mr Denver Beanland, took the extraordinary step of placing a large public advertisement in the newspapers condemning MCCOC and disassociating himself from its Discussion Paper. Further, in a letter to the editor of "*The Australian*", the Attorney-General declared he would have no part of the Model Criminal Code⁵⁵, and, in so doing, repeated the entirely false interpretation of the MCCOC recommendation about the age of consent. He expressed the opinion that anyone who wanted to codify the criminal law should adopt the Queensland Code which had been serving people well for a century. His press release was stronger. It said that "It is an outrage our Federal taxes are being spent on this rubbish." He moved in SCAG to end the work of the Committee entirely. Happily, that move was not supported, but it signalled an effective end to Queensland participation in the Committee. At no point, of course, did Mr Beanland concern himself with the substantive merits of the policy debate⁵⁶.

The reader should not fail to direct the absolutely massive irony in this situation. It was the then Queensland Attorney-General who gave the political impetus to the process that began MCCOC by pointing to what he regarded as the indefensible results of having different rules for the age of consent across Australia. It was another Queensland Attorney-General who, because of the issue of age of consent (in large part) not only tried to stop the work of the Committee but also gave public voice to the great many who would not agree to the reduction of the age of consent in their jurisdiction or who, having heard what it was, simply did not believe it.

All of this placed the Committee in an impossible position. Most respondents thought that there should be a uniform age of consent and, if one took plain numbers, a great many thought that it should be as high as 18. However, in general terms, most Australian jurisdictions have an age of

⁵⁵ "*The Australian*", 29/4/97 p 8.

⁵⁶ It should not be thought that other, less eminent politicians did not repeat this infamous line. In debate on the New South Wales *Crimes Legislation Amendment (Child Sexual Offences) Bill*, the Hon Franca Arena repeated the same calumny (*Hansard*, 28 October, 1998 at p 58). However, in this instance, a properly briefed Attorney-General set the record straight (*Hansard*, 19 November, 1998, pp 66-67).

consent of 16 and those that do not, have an age of 17. For the Committee to move to recommend that the age be raised would be to deprive people of an existing right to have consensual sexual intercourse or sexual touching for absolutely no defensible reason whatsoever. Not only would the right be gone, but such conduct would be the subject of very serious criminal sanctions.

Furthermore, it seemed clear that those who were opposed to the age of consent being set at 16 (as recommended by the Committee) were in large part motivated by prejudice against homosexuality. There is nothing surprising about this, either in conservative community feeling and discourse nor, indeed, in the law. At the time, homosexual sex was entirely illegal in Tasmania, and there were discriminatory provisions involving a raised age of consent (18-21) in Western Australia⁵⁷, New South Wales, the Northern Territory and, (of course) Queensland. The Committee was determined not to resile from its view that the age of consent had no rational connection with sexual orientation. There is simply no reason to discriminate. If the general age of consent was 16, and the principle was that there were no rational grounds for discrimination on the basis of sexual orientation, the basis for MCCOC's recommendations is clear. Since that reasoning proved unacceptable, MCCOC was left with no choice but to say, in its Final Report, that it could find no rational basis to depart from the principles that it had formulated, but that, since the general age of consent was quite clearly revealed as a political issue, it could not recommend a fixed age. Instead, it chose to stick by the principles that it had recommended.

The same result was unhappily true for the recommendation about incest. There could be no doubt that thousands of submissions were adamantly opposed to the abolition of the offence, despite the fact that offences against children were comprehensively dealt with by other offences. Few or no submissions were in favour⁵⁸. However, the only argument against the recommendation of the Committee for abolition which might have made any sense in the slightest was the argument that adults who have sexually abused children in the past continue the sexual relationship after the child has passed the age of consent. The idea was that "consent" was vitiated by the compulsion inherent in the previous relationship and the abuse of trust and relative position of power involved. I cannot see the strength of this argument. If there is evidence of sexual abuse in the past, charge and prove it. If there is not, then there is no value in the generalisation. No scientific evidence of any kind was produced in support of this generalisation. Further, sexual offences should be framed (and were recommended by MCCOC) in such a way that abuses of power and position were dealt with in their proper context: that is, for example, the definition of consent, the recommendations concerning persistent sexual abuse of a child and so on. If there was something wrong with these provisions, the Committee was happy to address the problems, and in fact did so with revised recommendations about a raised age of consent in relation to abuse of position of trust by persons in authority.

However, MCCOC was effectively intimidated by the response on incest. It must be remembered that MCCOC was a body representative of and reporting to SCAG, itself a political body of Ministers. If MCCOC so defied the concerted campaign, not only of ignorant interest groups and

⁵⁷ It appears that the new WA Government is committed to lowering the homosexual age of consent in that State from 21 to 16, the same age as heterosexual consent.

⁵⁸ I confess that with the lapse in time, I cannot recall if any were in favour. If there were any, they were small in number.

individuals in their thousands, but also influential politicians and the media prepared to believe them, it would place, if not its existence, then quite possibly its thorough and extensive work on the major part of the structure of sexual offences at severe risk. No Attorney-General can be expected to authorise even the release of recommendations which he or she knows will bring calumny heaped upon his or her head - nor should an Attorney be expected to. So the Committee was compelled to change its mind by the forces of darkness and ignorance. It recommended an offence of incest. But it gave the traditionalists and the moralists exactly what they had asked for - a traditional offence of incest. The recommended offence would criminalise consensual sexual penetration between adults who are parents, sons, daughters, siblings, grandparents and grandchildren (related by birth and not marriage or adoption)⁵⁹. This, of course, caused great angst among those members of the public who wanted to see an expanded incest offence to cover just about every family form or quasi-family form possible. In this form, of course, the offence of incest could well cover the a very large part of the field of child sexual abuse and to that extent render the general offences redundant. Such a result would indeed see the tail wagging the dog.

The same themes can be seen here again. Parochialism loomed large, particularly in Queensland. The (Griffith) Queensland Code was presented (exclusively by Queenslanders) as the best the world had to offer, despite the overwhelming evidence to the contrary and the lack of sustainable substantive argument to support the proposition. And, obviously, populist politics which pander to the lowest common denominator in public discourse prevail. No matter what you say, the louder you shout, the better off you are. Never argue with a person who has a loud hailer.

⁵⁹ MCCOC, Chapter 5, *Sexual Offences Against the Person: Report* (May 1999) at 187ff, s 5.2.34.

4. *Some Thoughts About The Law Reform Process - Thinking It Through*

(a) *The MCCOC Objectives and Observations About National Consistency*

It is necessary to be clear about what the Model Code is and what it is not. It is *not* an attempt to force a uniform scheme on any Australian jurisdiction. It is also most definitely *not* an attempt by the Commonwealth to take over the criminal law powers of the States and Territories. It *is* an attempt by a group of experts, with considerable input from widespread community consultation, to put in the public arena a set of best practice basic criminal law provisions in the form of a criminal code which can serve as a model for all Australian jurisdictions to pick up and use in whole or in part when they want to do so. The aim is, in short, voluntary consistency not compulsory uniformity, with the agenda and its results being transparent, owned by all jurisdictions and not just being driven by one. Clearly, of course, the Commonwealth had a greater stake in the codification exercise because it lacked its own enacted criminal law which has led to the great inconvenience outlined at the beginning of this paper. But there are advantages to be had by the established State and Territory jurisdictions as well.

This observation leads me to make some comment on the objectives of national consistency in general. While it is clear that the goal is national consistency in serious criminal offences, none of this should be taken to mean that I think that *everything* should be nationally based, uniform and/or consistent. I do mean to say that it makes no sense at all to have, as we do in this country, a variety of different ages at which consent to sexual intercourse may be given. It is nonsense to say that a person who has consensual sexual intercourse with a 17 year old is guilty of a major crime in one State and no crime at all in another. Equally, I think it to be inescapably wrong for the issue of euthanasia, which is really about the law of homicide, to be decided on a State/Territory rather than a national basis. But I do not think that applies to all criminal justice issues.

For example, there is no reason, in my view, why there should be a national regime about the existence and location of brothels. That is quite clearly a matter on which local communities, probably more local than State and Territory communities, may differ on a rational basis (even if there is often little rational about the debate). Similarly, I think that while the commercial *trade* in illicit recreational drugs should be a national matter, I see no reason why local communities should not determine what policy they want to have on recreational drug *use*. The only question is how local that decision should be.

But what *principles* guide the decision about what should be the subject of national policy and what local and, if local, how local should it be? I am not aware of any work that has been done on this subject. My own view is that the answer depends, not on pre-determined or fixed canons of right and wrong across the policy spectrum, but upon at least three considerations.

The first is a characterisation and identification of the precise nature of the policy issue involved. The second is a public interest analysis of the base of local power appropriate to its resolution. The third is an assessment of the effectiveness and representative quality of the instruments of governance of the locality concerned. I do not pretend that these principles provide *an answer*. I

see no evidence that there is one answer. I do think that it is necessary in the conduct of public affairs to pay careful and sensitive attention to the nature of a given decision and the way in which it affects communities of interest in which the decision has impact.

(b) *The Significance Of The Record*

There is precedent for just such a national consistency codification exercise within a federation. In 1962, the American Law Institute published what it called the Model Penal Code (Proposed Official Draft)⁶⁰. It was, like the MCCOC project, an attempt to provide a model for the consistent codification of the criminal law but, of course, across the United States⁶¹. It had no Government backing. There were no grandiose claims for implementation strategies and no instant gratification for the years of hard work that had gone into the project. When it came time to celebrate the 25th anniversary of the 1962 draft, however, it was estimated that the Model Penal Code had had a significant influence in the development of the criminal law in at least 37 of the American States⁶².

Although, in accordance with what has been said above, Australian progress may be hoped to be more rapid, the record of implementation shown below reveals the beginnings of voluntary consistency based on a public model at successful work. But it would be completely unrealistic to expect that, given a number of factors ranging from the drafting idiosyncrasies of Parliamentary Counsel through to the political gyrations of parties contesting for election victory by law and order auctions, for there to be complete certainty and consistency in any jurisdictional criminal agenda. The MCCOC project should not, for those reasons and by comparison with the experience of other jurisdictions, be seen wholly in terms of its immediate implementation record, although that has been quite good. In an enterprise of this kind, one must take the longer view. The experience of the 1990s has not been good for projects of this kind. The Canadian Government abolished the Law Reform Commission of Canada, which had done an enormous amount of work on a new Criminal Code to replace their current one based on a model developed by Sir James Stephen implemented in the 1890s. The UK Law Commission still exists, but it's reports notoriously languish unimplemented⁶³, despite repeated calls for action by the legal profession and the judiciary⁶⁴. A similar dismal history even beyond the 1990s has been documented in the United States, despite the influence of the Model Penal Code⁶⁵.

One might also usefully compare the record of MCCOC with the recent record of that supposed paragon of jurisdictions, Queensland⁶⁶. Despite the apparent reverence in which the Griffith

⁶⁰ There were "Tentative Drafts" (which we would call Discussion Papers) at least as early as 1955. An "Official Draft" was released in 1985, but it was the 1962 version which proved to be influential.

⁶¹ See, generally, Wechsler, "The Challenge of a Model Penal Code" (1952) 65 Harvard LR 1097; Schwartz, "The Model Penal Code: An Invitation to Law Reform" (1963) 49 ABAJ 447; Packer, "The Model Penal Code And Beyond" (1963) 63 Columbia LR 594; Wechsler, "Codification of the Criminal Law in the United States: The Model Penal Code" (1968) 68 Columbia LR 1425.

⁶² See Symposium (1988) 19 Rutgers LJ Number 3.

⁶³ The latest in a long series is Law Com 218, *Legislating the Criminal Code: Offences Against The Person and General Principles* (1993) Cmnd 2370.

⁶⁴ See, for example, the strong remarks of Lord Ackner in *Savage* [1992] 1 AC 699 at 752.

⁶⁵ See Robinson, "Are Criminal Codes Irrelevant?" (1994) 68 So Cal LR 159.

⁶⁶ The following account is taken from Kift, "Contemporary Comment" (2001) 25 Crim LJ 28.

Code was held, in the 1990s the same modifying movement was felt in Queensland and in April, 1990, a Criminal Code Review Committee chaired by Mr R O'Regan QC was set up to investigate and draft a new one. This Committee reported in 1992. It therefore ran parallel to the MCCOC General Principles review, but neither touched the other in any way. The O'Regan review was scarcely fundamental. It was in large part a tidying up and modernising exercise which did not examine the foundational structure of the Griffith Code in any meaningful way. Not one of the O'Regan recommendations were enacted. Instead, a completely new a comparatively radical redraft of the entire Criminal Code was produced from the blue in 1994 and enacted as the *Criminal Code*, 1995. I do not intend to go into this in any detail, for two reasons. First, it was accompanied by little analytical explanation and again, a salient point is that it paid no attention to the MCCOC project. Second, it failed to come into operation. The Goss Government, which had enacted it, was defeated at a by-election, lost power, and the new Government scrapped it and announced a new (and third) review. By this time, Mr Beanland was Attorney-General. A new Working Group was set up, which, of course, paid no attention to the MCCOC exercise, and it produced what became the *Criminal Law Amendment Act*, 1997. This was hardly radical stuff. Among other things, it defined "woman" as "including any female", referred to "principle offenders", predictably retained an offence of sodomy punishable by 14 years to life and made other miscellaneous and tidying up amendments⁶⁷. Three superficial but supposedly major reviews of a *Criminal Code* defended as perfect by the judiciary and at least one involved Attorney-General produced what can only be described as a mouse.

(c) *Remarks About Law Reform*

I have no doubt at all that the serious criminal offences should be as consistent as possible throughout Australia. I also have no doubt at all that this objective will be difficult to achieve and, if achieved, will take time. The Model Criminal Code is a first big step to providing uniform justice for all Australians. But experience teaches that there are major and serious institutional obstacles to the achievement of nationally consistent legislation, whatever the law reform model used to try for it, even in an area in which all players are agreed on the principles involved. As Duggan has pointed out⁶⁸, politicians, bureaucrats, ministerial advisers, drafters of legislation, the public and, where relevant, the consumers or industry all can pose major stumbling blocks, sometimes derived from the promotion of self-interest, to the achievement of the principled result.

(d) *Remarks About The Process*

The MCCOC process was and is, in many respects, unique. It did not resemble the traditional law reform agency in any of its guises. That fact was a product of its genesis, but it took on a life of its own because of the dedication and hard work of all of its real participants. Frankly, so far as I am concerned, no praise is too high for those who participated. In its latter stages, MCCOC worked weekends to accommodate the possible participation of full time judicial officers, practicing lawyers and public officials who had full time case loads to cope with so that, in all

⁶⁷ See, in general, Kift, "How Not To Amend A Criminal Code" (1995) 22 Alt LJ 215.

⁶⁸ See the careful analysis of experience in consumer protection laws contained in Duggan, "Some Reflections on Consumer Protection and the Law Reform Process" (1991) 17 Monash ULR 252 at 279ff.

cases, weekend breaks did not exist for those working at that meeting. A great deal of this was completely extra work. They did it anyway. They believed in it and, I think, still do.

There are some, no doubt, who will find the MCCOC process flawed when compared to the traditional “new principle” law reform agencies, such as the highly professional Australian Law Reform Commission and the newly established Victorian Law Reform Commission. It is, of course, absolutely true that MCCOC *appeared* to be much more of an “insiders’ club” in its composition and decision-making. But I use the word “appeared” advisedly. True it is that MCCOC was an officials group with no representation from “outside interests” on it. True it is that MCCOC was not “independent” in the sense that, in reporting to SCAG, it was conscious of the fact that its recommendations had to be politically acceptable. The risks of running too close to the wind have been illustrated above. Other examples could be given.

But I would argue that such a view is misconceived. In terms of legal representation, members of the Committee had worked not only in government, but also as prosecutors, defenders, academics and judges. MCCOC adopted the time honoured method of consulting with the community and interest groups by issuing a Discussion Paper before a Final Report. In the case of Sexual Offences, MCCOC conducted public hearings or seminars across the country facilitated by the Commonwealth Office of the Status of Women. And in terms of politics, much has been accurately said about the waste of time and effort involved in law reform bodies’ work gathering dust or being substantially modified, because it is, for one thing, politically unacceptable. MCCOC had the advantage of the insider’s view on such matters. It also, incidentally, had the very strong advantage of working with professional and dedicated Parliamentary Counsel. Thinking through the idea when trying to get it drafted is a salutary discipline. The same is true for the reader or consumer of the document. Parliamentary Counsel are also not shy about giving instructors the benefit of their views on the policy they are being asked to implement. I should say that no praise is too high for the Parliamentary Counsel with whom the Committee worked.

In the end, MCCOC must be judged by its results. A summary of implementation to date is attached to this paper. I have already remarked that the process of change in the non-Commonwealth jurisdictions must be expected to be incremental. Perhaps we should have another look at what has happened in a decade.

July, 2001

ATTACHMENT 1 - REPRESENTATION

	NSW	Victoria	SA	WA	Qld	ACT	NT [?]	Tas	C/W	Other [?]
1991	Mr P Berman, Ms J Orchiston	Dr D Neal (Chair), Mr S Bailey	Mr M Goode	Mr G Scott QC	Mr P Svensson	Mr J O'Keefe	Mr R Minahan, Mr L Flanagan QC	Mr N Perks	Mr H Woltring	Mr A Menzies*, Ms A Fraser
1992	Mr P Berman, Ms J Orchiston	Dr D Neal (Chair), Mr S Bailey	Mr M Goode	Mr G Scott QC (Mr Justice Scott)	Mr P Svensson	Ms D Merryfull, Mr J O'Keefe	Mr L Flanagan QC	Mr N Perks	Mr H Woltring	Mr A Menzies, Ms A Fraser

[?] Representation from the Northern Territory was a constant *practical* problem throughout the latter part of the life of the Committee. This was in part due to the tyranny of distance. Public service rules restrict the places in which meetings can be held and it is hard for Territorians to get to those places without taking more time than others. While Mr Flanagan QC was able to attend most meetings, none of his successors played any significant role in the deliberations of the Committee.

[?] Generally, after the first two years it worked out by consensus that the chair of the Committee did not formally represent any particular jurisdiction. The Chair did not, therefore, vote. Therefore, the reader will find the Chair in this column. The purposes for which various people are listed will be detailed separately.

* Mr Menzies was a member of the original Gibbs Committee and continued as a consultant to the Commonwealth on CLOC and MCCOC. He was vitally interested in the offences relating to the administration of justice which, although they excited little popular attention and controversy, he dealt with in his customary thoughtful and detailed way.

1993	Ms J Orchiston	None [?]	Mr M Goode	Mr M Muller, Mr R Cock	Mr P Svensson	Mr J O'Keefe	Mr L Flanagan QC	Mr N Perks	Mr H Woltring	Dr D Neal, (Chair), Mr A Menzies, Ms A Fraser
1994	Ms M Latham	None	Mr M Goode	Mr R Cock, Ms L Jenkins	Mr G Hannigan	Mr J O'Keefe	Mr L Flanagan QC	Mr N Perks	Mr H Woltring	Mr R Howie QC (Chair), Mr G McDonald, Ms A Goldman, Dr D Neal, Mr A Menzies, Ms P Supomo [?]
1995	Ms M Latham	Ms A Cannon	Mr M Goode	Ms L Jenkins	Mr G Hannigan	Ms D Merryfull	Mr L Flanagan QC	Mr N Perks	Mr G McDonald	Mr R Howie QC (Chair), Dr D Neal, Ms A Goldman, Mr A Menzies, Ms P Supomo, Ms K O'Rourke, Ms A Will
1996	Ms M Latham	Ms A Cannon	Mr M Goode	Ms L Jenkins	Mr G Hannigan, Mr D Groth	Ms C Stuart	Mr J Karczewski	Mr N Perks	Mr G McDonald	Judge R Howie (Chair), Dr D Neal, Mr A Menzies, Ms P Supomo, Ms A Will

[?] As noted elsewhere, for 18 months the then newly elected Liberal Government in Victoria decided not to participate in MCCOC.

[?] Ms Supomo was a consultant provided to the Committee by NSW for the purpose of researching and writing the papers on sexual offences against the person.

1997	Ms M Latham	Ms A Cannon, Mr G Byrne	Mr M Goode	Ms L Jenkins	Mr P Byrne	Ms K Greenland	Mr J Karczewski	Mr N Perks	Mr G McDonald	Judge R Howie (Chair), Dr D Neal, Dr C Howard QC ² , Mr R Button, Mr A Menzies, Mr I Leader-Elliott ³ , Ms A Will, Ms K O'Rourke, Ms K Merrifield
1998	Ms M Latham (Judge M Latham)	Mr G Byrne	Mr M Goode	Ms L Jenkins	None ⁴	Ms K Greenland	Ms E Kelly, Ms Z Marcham, Mr P Jamieson	Mr N Perks	Mr G McDonald	Judge R Howie (Chair), Dr C Howard QC, Mr R Button, Mr I Leader-Elliott, Mr C Pruiti ⁵ , Mr B Bannerman, Mr A Kristjanson

² Dr Howard is an eminent criminal law academic who was nominated by the Victorian Attorney-General to advise the Committee.

³ Mr Leader-Elliott is an eminent academic who was employed by the Commonwealth as a consultant, and who contributed very substantially to the development and writing of the MCCOC work on Criminal Damage and Serious Drug Offences.

⁴ After late 1997, Queensland ceased to provide any representative on the Committee. The reasons for that decision sufficiently appear in the discussion above.

⁵ Mr Pruiti was at the time an officer attached to the Western Australian Crown, whose services were contributed by WA for the development and writing of the MCCOC work on homicide.

1999	Judge M Latham	Mr G Byrne	Mr M Goode	Ms L Jenkins	None	Ms K Greenland	Ms E Kelly	Mr N Perks	Mr G McDonald	Judge R Howie (Chair) , Mr I Leader-Elliott
2000	Mr A Haesler	Mr G Byrne	Mr M Goode	Ms L Jenkins	None	Ms K Greenland	Ms E Kelly	Mr N Perks	Mr G McDonald	Judge R Howie (Chair) , Mr I Leader-Elliott, Judge M Latham
2001	Ms C Loukas	Mr G Byrne	Mr M Goode	Ms L Jenkins	None	Ms K Greenland, Ms A Casimar	Ms E Kelly	Mr N Perks	Mr G McDonald	Mr Justice R Howie (Chair) , Mr I Leader-Elliott, Judge M Latham, Mr A Haesler

ATTACHMENT 2 - PAPERS AND REPORTS⁶⁹

NAME OF PAPER	CONTENTS	RELEASE
Chapter 2, Discussion Paper, <i>General Principles of Criminal Responsibility</i>	Elements of offences, fault, defences, extensions of criminal responsibility, corporate criminal responsibility, burden of proof	July, 1992 <i>(Principal Author: Mr Matthew Goode)</i>
Chapter 2, Final Report, <i>General Principles of Criminal Responsibility</i>	As above	December, 1992 <i>(Principal Author: Mr Matthew Goode)</i>
Report on the Abolition of the Year and a Day Rule In Homicide	Recommending the abolition of the rule that a homicide may not be attributed to an accused if the death occurred more than a year and a day after the act.	1992
Chapter 3, Discussion Paper, <i>Theft, Fraud and Related Offences - Part 1</i>	Theft, fraud, receiving, robbery, burglary	December, 1993 <i>(Principal Author: Dr David Neal)</i>
Chapter 3, Discussion Paper, <i>Blackmail, Forgery, Bribery and Secret Commissions</i>	Blackmail, forgery, bribery and secret commissions	July, 1994 <i>(Principal Author: Dr David Neal)</i>
Chapter 3, Final Report, <i>Theft, Fraud, Bribery and Related Offences</i>	Theft, fraud, receiving, robbery, burglary, blackmail, forgery, bribery and secret commissions	December, 1995 <i>(Principal Author: Dr David Neal)</i>
Model Provisions on Mental Impairment	Detailed draft legislation dealing with all facets of the mentally ill person who commits what would be a crime but for their mental impairment	1995-1996

⁶⁹ The items listed as official MCCOC publications were published in publicly available material and distributed in book form. The items in bold face were "non Code" projects given to the Committee by SCAG and reported to SCAG as draft legislation with a commentary. After some small time, the MCCOC papers and reports were made available on-line at <http://law.gov.au/publications/Model_Criminal_Code/index.htm>.

Model Provisions on Forensic Procedures	Detailed draft legislation dealing with police powers to collect forensic samples and the establishment and maintenance of a national DNA data base.	1995-1996
Chapter 3, Discussion Paper, <i>Conspiracy to Defraud</i>	Conspiracy to defraud	June, 1996 <i>(Principal Author: Dr David Neal)</i>
Chapter 5, Discussion Paper, <i>Non-Fatal Offences Against the Person</i>	Causing harm, threats, stalking, endangerment, traps, causing a serious disease, unlawful confinement, kidnapping, child abduction, female genital mutilation, abortion, defences	August, 1996 <i>(Principal Author: Mr Matthew Goode)</i>
Chapter 5, Discussion Paper, <i>Sexual Offences Against the Person</i>	Sexual acts committed without consent, sexual offences committed against or with children, sexual acts with or against mentally impaired people, provisions relating to evidence and procedure in sexual offences	November, 1996 <i>(Principal Authors: Ms Prita Supomo ; Mr Richard Button)</i>
Chapter 6, Discussion Paper, <i>Serious Drug Offences</i>	Serious drug offences including trafficking, manufacturing, cultivation, offences involving children, property derived from serious drug offences	June, 1997 <i>(Principal Author: Mr Ian Leader-Elliott)</i>
Chapter 3, Final Report, <i>Conspiracy to Defraud</i>	Conspiracy to defraud	May, 1997 <i>(Principal Author: Dr David Neal)</i>
Chapter 7, Discussion Paper, <i>Offences Against the Administration of Justice</i>	Perjury, Protection of witnesses, Perversion of justice and related offences	July, 1997 <i>(Principal Author: Mr Andrew Menzies)</i>
Chapter 8, Discussion Paper, <i>Public Order Offences: Contamination of Goods</i>	Specific offences dealing with product contamination of threats to do so with a view to causing public alarm	July, 1997 <i>(Principal Author: Mr Greg Byrne)</i>
Chapter 8, Final Report,	Specific offences dealing	March 1998

<i>Public Order Offences: Contamination of Goods</i>	with product contamination of threats to do so with a view to causing public alarm	(Principal Author: Mr Greg Byrne)
Chapter 9, Discussion Paper, <i>Offences Against Humanity: Slavery</i>	Offences dealing with slavery, servitude and sexual slavery	April 1998 (Principal Author: Mr Matthew Goode)
Chapter 5, Discussion Paper, <i>Fatal Offences Against The Person</i>	Murder, manslaughter, causing death by dangerous driving and defences specific to these offences	June, 1998 (Principal Authors: Ms Lindy Jenkins, Mr Colin Pruiti)
Chapter 7, Final Report, <i>Administration of Justice Offences</i>	Perjury, Protection of witnesses, Perversion of justice and related offences	July, 1998 (Principal Author: Mr Andrew Menzies)
Chapter 5, Final Report, <i>Non-Fatal Offences Against the Person</i>	Causing harm, threats, stalking, endangerment, traps, causing a serious disease, unlawful confinement, kidnapping, child abduction, female genital mutilation, abortion, defences	September 1998 (Principal Author: Mr Matthew Goode)
Chapter 6, Final Report, <i>Serious Drug Offences</i>	Serious drug offences including trafficking, manufacturing, cultivation, offences involving children, property derived from serious drug offences	October, 1998 (Principal Author: Mr Ian Leader-Elliott)
Chapter 9, Final Report, <i>Offences Against Humanity: Slavery</i>	Offences dealing with slavery, servitude and sexual slavery	November 1998 (Principal Author: Mr Matthew Goode)
Chapter 5, Final Report, <i>Sexual Offences Against the Person</i>	Sexual acts committed without consent, sexual offences committed against or with children, sexual acts with or against mentally impaired people, provisions relating to evidence and procedure in sexual offences.	May, 1999 (Principal Authors: Ms Prita Supomo ; Mr Richard Button)
Model Forensic Procedures Bill and the Proposed DNA Database	Further report on the requirements for a principled legislative regime for the collection, storage and use of	May, 1999 (Principal Author: Mr Geoff McDonald)

	DNA material with a particular view to the implementation of the Commonwealth CrimTrac system.	
Chapter 4, Discussion Paper, <i>Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction</i>	General offences dealing with criminal damage including arson, bushfire, sabotage and general damage offences; and innovative computer damage offences; and model provision relating to criminal jurisdiction in general	January 2000 <i>(Principal Authors: Mr Ian Leader-Elliott (damage and computer); Mr Matthew Goode (jurisdiction))</i>
Final Draft: Model Forensic Procedures Bill and the Proposed National DNA Database	Further report on the requirements for a principled legislative regime for the collection, storage and use of DNA material with a particular view to the implementation of the Commonwealth CrimTrac system.	February 2000 <i>(Principal Author: Mr Geoff McDonald)</i>
Chapter 4, Final Report, <i>Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction</i>	General offences dealing with criminal damage including arson, bushfire sabotage and general damage offences; and innovative computer damage offences; and model provision relating to criminal jurisdiction in general	January 2001 <i>(Principal Authors: Mr Ian Leader-Elliott (damage and computer); Mr Matthew Goode (jurisdiction))</i>

ATTACHMENT 3 - CURRENT IMPLEMENTATION RECORD⁷⁰

REPORT	IMPLEMENTATION
Chapter 2: General Principles of Criminal Responsibility	(Commonwealth) <i>Criminal Code Act, 1995</i> (SA) <i>Criminal Law Consolidation (Self Defence) Amendment Act, 1997</i>
Chapter 2: Criminal Jurisdiction	(NSW) <i>Crimes Legislation Amendment Act, 2000</i>
Chapter 3: Theft, Fraud and Related Offences ⁷¹	(Commonwealth) <i>Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act, 2000</i> (SA) <i>Criminal Law Consolidation (Offences of Dishonesty) Amendment Bill, 2001</i>
Chapter 4: Criminal Damage and Computer Offences	(NSW) <i>Crimes Amendment (Computer Offences) Bill, 2001</i> (Commonwealth) <i>Cybercrime Bill, 2001</i>
Chapter 5: Non-Fatal Offences Against the Person ⁷²	(NSW) <i>Crimes (Female Genital Mutilation) Amendment Act, 1994</i> ; (ACT) <i>Crimes (Amendment) Act (No 3), 1995</i> (NT) <i>Criminal Code Amendment Act (No 2), 1995</i> (SA) <i>Statutes Amendment (Female Genital Mutilation and Child Protection) Amendment Act, 1995</i> (Vic) <i>Crimes (Female Genital Mutilation) Act, 1996</i> (Qld) <i>Criminal Law Amendment Act, 2000</i>
Chapter 5: Sexual Offences Against the Person	(Vic) <i>Evidence (Confidential Communications) Act, 1998</i> (SA) <i>Evidence (Confidential Communications) Act, 1999</i> (NSW) <i>Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act, 1999</i>
Chapter 5: Fatal Offences Against the Person	Not Yet Complete

⁷⁰ I have tried to capture all relevant legislation, but may not have succeeded. If not, my apologies to that extent. I would be grateful to be corrected so that a better record can be established.

⁷¹ It may be noted that the recommendations of the Committee reflect what is, largely, already the law in Victoria and the ACT.

⁷² The Committee's recommendations in relation to female genital mutilation are the only subject from that report which has been taken up at this stage. The Committee's recommendations on the subject of stalking ran parallel to and reflected legislative action that had already begun.

Chapter 6: Serious Drug Offences	The recommendation that PIEDs (Performance and Image Enhancing Drugs) (sometimes know as anabolic steroids) be subject to major criminal sanctions has been implemented in every jurisdiction except SA.
Chapter 7: Offences Against The Administration of Justice	None
Chapter 8: Public Order Offences: Contamination of Goods	(NSW) <i>Crimes (Contamination of Goods) Amendment Act, 1997</i> (Qld) <i>Justice and Other Legislation (Miscellaneous Provisions) Act, 1997</i> (Vic) <i>Crimes Amendment Act, 1998</i> (SA) <i>Criminal Law Consolidation (Contamination of Goods) Amendment Act, 1999</i> (Tas) <i>Criminal Code Amendment (Contamination of Goods) Act, 1999</i>
Chapter 9: Offences Against Humanity: Slavery	(Commonwealth) <i>Criminal Code Amendment (Slavery and Sexual Servitude) Act, 1999</i> (SA) <i>Criminal Law Consolidation (Sexual Servitude) Amendment Act, 2000</i>
Model Provisions For Mentally Impaired Accused	(SA) <i>Criminal Law Consolidation (Mental Impairment) Amendment Act, 1995</i> (Vic) <i>Crimes (Mental Impairment and Unfitness to be Tried) Act, 1997</i> (ACT) <i>Crimes (Amendment) Act, 1994, Crimes (Amendment) Act, 1999</i> ⁷³
Model Provisions for Forensic Procedures ⁷⁴	(Vic) <i>Crimes (Amendment) Act, 1997</i> (SA) <i>Criminal Law (Forensic Procedures) Act, 1998</i> (Commonwealth) <i>Crimes Amendment (Forensic Procedures) Act, 1998</i>
Model Provisions for the DNA Database	(Commonwealth) <i>Crimes (Forensic Procedures) Act, 2000</i> (NSW) <i>Crimes (Forensic Procedures) Act, 2000</i> (ACT) <i>Crimes (Forensic Procedures) Act, 2000</i> (Tas) <i>Forensic Procedures Act, 2000</i> (SA) <i>Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Bill, 2001</i>

⁷³ The ACT legislation differs from the Model Provisions in a number of respects, most notably in the involvement of the Mental Health Tribunal.

⁷⁴ It may be noted that Queensland and the Northern Territory enacted legislation in this area. Both legislative schemes depart from the Model Provisions in very significant respects.

Abolition of the Year and a Day Rule	<p>(NSW) <i>Criminal (Injuries) Amendment Act, 1991</i></p> <p>(SA) <i>Criminal Law Consolidation (Year and a Day) Amendment Act, 1991</i></p> <p>(Vic) <i>Crimes (Year and a Day Rule) Act, 1991</i></p> <p>(Qld) <i>Penalties and Sentences Act, 1992</i></p> <p>(WA) <i>Criminal Law Amendment Act, 1991</i></p> <p>(Tas) <i>Criminal Code Amendment (Year and a Day Repeal) Act, 1993</i></p> <p>(ACT) <i>Crimes (Amendment) Act, 1995</i></p>
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