

# TOWARDS A NATIONAL CRIMINAL LAW

## an overview of the model criminal code project

Since 1991, a group of lawyers from all Australian jurisdictions has been working to unify and simplify the nation's criminal laws. Their ultimate aim is to have uniform criminal codes for every serious offence in place throughout Australia by 2001. In this article, **Geoff McDonald**, explains what they have been doing.

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Australia is a country with a relatively small population of 18 million spread over a land mass the size of the continental USA. Despite this, we maintain nine different systems of criminal law. These different laws lead to inequalities, complications and unnecessary duplication of time, people, money and other resources.

A uniform criminal law for Australia simply makes good sense. It would reduce the resource drain, make the law more accessible to the people, allow police and other investigators to fight interstate crime effectively, allow lawyers to represent and prosecute throughout the country with ease and ensure equality before the law. Uniformity means a more efficient and streamlined system.

The Model Criminal Code project had its genesis in the 1990 recommendations of the Review of Commonwealth Criminal Law headed by Sir Harry Gibbs. The recommendation was that there be uniform principles of criminal responsibility throughout Australia. Later that year the idea was taken up by State and Territory Attorneys-General, lead by Mr Daryl Manzie, the then Attorney-General for the Northern Territory.

In 1991 the Standing Committee of Attorneys-General (SCAG) established the Model Criminal Code Officers Committee (the Code Committee),

comprised of criminal law experts from each jurisdiction, to develop a model criminal code for Australia. This process also includes simplification and reform of the criminal law.

A model code is not the same thing as a uniform code. The object of the model code project is to take what is best from the different jurisdictions, and from overseas as well, to develop a model code. Once an acceptable model is agreed on then, as the various jurisdictions adopt the model, it will create a 'uniform' body of law. There will still be room for regional variations where a jurisdiction has problems particular to it but in most cases the issues are much the same across the nation and can be addressed by the same offences.

The Code Committee's first project was to develop the general principles of criminal responsibility — subjects such as fault, burdens of proof, absolute and strict liability and extensions of liability through offences such as attempt, complicity and conspiracy. These principles apply across the whole spectrum of criminal offences.

Next, SCAG asked the Committee to examine fraud, theft and related offences such as bribery, blackmail and forgery. The law of theft and fraud around the country is complex and fragmented, too often offences have been cobbled together just to plug gaps in the existing law resulting in a confusing maze of offences in every jurisdiction. This is a puzzle for police, prosecutors, defence counsel, judges and juries, let alone the community. Clever criminals have been able to exploit the differences between the States and Territories. All these problems have raised calls for uniform fraud laws. The *Final Report on Theft, Fraud and Related Offences* is near completion.

Discussion papers on *Offences Against the Person* — which include sexual, non-fatal and fatal offences — are almost ready for dissemination. The discussion paper on the Administration of Justice and Government is with the drafter and a consultant is about to start work on the chapter on drug offences.

The remaining chapters will deal with damage to property, offences against public order, culpable management of motor vehicles/aircraft and miscellaneous offences. The whole project should be completed by 1998.

Apart from the code project proper, other matters are referred to the Code Committee by SCAG from time to time whenever a uniform national approach is needed. For instance, SCAG focussed on the plight of people kept at the Governor's pleasure. Model legislation regulating court proceedings for mentally impaired people and others who are unfit to be tried has been developed and was presented to SCAG at its meeting in November 1995.

Similarly, SCAG was concerned about the lack of uniformity in Australian forensic procedures legislation, so the Code Committee was asked to develop a model Bill. This model was used by the Federal Government for its Bill which was introduced into Parliament this year. NSW and the ACT have announced they will be introducing legislation based on the model and other States will do likewise throughout 1996.

In 1993 the Commonwealth Government became aware of the problem of female genital mutilation. After asking the Family Law Council to consult the community, review the issues and report to Parliament the Commonwealth Attorney-General asked the other jurisdictions to legislate. The Code Committee then developed model provisions which outlawed the practice and, more importantly, prohibited people from taking girls out of the jurisdiction to be mutilated. All jurisdictions agreed to a common legislative approach to the problem along with an appropriate education program. Their agreement to the particular form of the legislation meant there was no need for the Commonwealth to legislate.

The stages in the development of the Model Criminal Code chapters are:

- development of a discussion paper
- collation and analysis of submissions
- preparation of the final report.

The discussion paper is developed by Code Committee members and consultants. The discussion papers, which comprise draft legislation, narrative and recommendations, are disseminated to a mailing list which now numbers close to 1000 agencies, government departments, non-government organisations and individuals from around Australia and overseas. The submissions

received are then collated and analysed and on the basis of that analysis the Code Committee decides on the form of the Final Report. Of course, not all the people and agencies canvassed reply but on average the Secretariat receives 50 detailed submissions per discussion paper.

The Code Committee meets at least four times a year for two days at a time to refine the details of the discussion papers and final reports. At other times, members communicate by fax and phone and these communications are co-ordinated by the Secretariat which works out of the Commonwealth Attorney-General's Department in Canberra.

Through these procedures the Code Committee aims to draw upon the experiences of the jurisdictions as well as overseas example to arrive at model codes which embody best practices.

When the final report is completed it is circulated to SCAG Ministers for endorsement. Once it is endorsed, individual governments enact the recommended provisions, exposing them to the usual parliamentary scrutiny.

The Federal Justice Minister, the Hon Duncan Kerr MP, has begun the process of implementation with the enactment of the *Criminal Code Act 1995* in March this year. This Act embodies chapter 2 of the Code, that is the general principles of criminal responsibility.

The Prime Minister gave the Model Criminal Code his personal endorsement at the opening of the Justice Forum on 22 August 1994 and allocated extra resources to the project as part of the May 1995 Justice Statement. In November 1994 all the Premiers and Chief Ministers gave their support to the project as part of their 'National Crime Strategy'. All jurisdictions have agreed to implement the whole Code by 2001.

Uniformity of the criminal law will ultimately guarantee that whether a person is accused of murder in South Australia, Queensland or Victoria, the same principles of criminal responsibility will apply and the same defences will be available. The population of Australia is now more mobile than ever and so are its criminals and their crimes. Crime does not recognise State borders and that fact combined with the technological advances in computing and information systems has meant that Australian criminals have become national and international players with ease. A uniform national approach to crime is the only way to combat what has become a national and international crime problem.

## Model criminal code

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A uniform code will also reduce the cost of trans-border litigation, especially in the area of fraud, and reduce costs to the community for trials and appeals resulting from mistakes in applying the different and sometimes confusing laws.

Apart from making the criminal justice system generally more cost effective and efficient and ensuring equality before the law for all Australian citizens there are consequential benefits. For example, teaching law and learning it will be less confusing, especially for those wanting to practice in other jurisdictions. Criminal lawyers will have more portable skills and admission to practice in other jurisdictions will become easier as a consequence. This in turn will give real impetus to the development of a national profession. Not only will this make legal practitioners more efficient at home but it will help them market their skills in the Asia-Pacific rim countries.

Uniformity is best accomplished in the Australian context by way of the Model Criminal Code because not only does it simplify the law but four of the nine jurisdictions (Queensland, Western Australia, Tasmania and the Northern Territory) already have criminal laws based on a Code. A Code is meant to explain the state of law as it is

without the need for practitioners and the public to delve into case law to find definitions and interpretations. Because the Code will contain all the relevant law it will ensure clarity and certainty. The law articulated in the Code will be more reliable.

As for judges having less 'flexibility', in a Code the principles of criminal responsibility are enacted by Parliament, they do not evolve through precedent. Because they are codified they can be applied consistently. This is preferable to the 'flexibility' afforded by the common law where inconsistency of interpretation is likely to be more frequent.

The Model Criminal Code project has been complimented by other reform initiatives such as the uniform evidence laws recently enacted by the Commonwealth and New South Wales. It is hoped the other jurisdictions will soon follow suit.

The Model Criminal Code Committee has another three years to complete its task. Governments are committed to finishing the project by 1998 and ask that the community participates in the process by submitting comments on the discussion papers. This will work to make the model the best possible vehicle for uniformity.

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## UNIFORM CRIMINAL LAW & POLICE POWERS

### uniform lowest common denominator legislation?

**Beverley Schurr** offers a very different perspective on uniformity of laws.

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Remember the good old days — 20 years ago — when it was thought that Australian society could be improved by the passage of Commonwealth legislation that would provide a shining standard

for the States to follow? The Commonwealth is presently seeking to set standards for State criminal law through the Model Criminal Code Officers Committee and the Standing Committee of Attorneys-General.

The Commonwealth will say, of course, that they have consulted. I have a whole shelf of the discussion papers, interim reports and reports of the Gibbs Committee, the committee to review the Commonwealth criminal law. How many practitioners or private citizens, as compared with those consultants or employees paid to write responses, have been able to assess this vast amount of material?