MODEL CRIMINAL CODE

CHAPTERS 1 AND 2

GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

Report

CRIMINAL LAW OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF ATTORNEYS-GENERAL

December 1992

These are the final views of the Criminal Law Officers Committee (now Model Criminal Code Officers Committee). They do not represent the views of the Standing Committee of Attorneys-General

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ISBN 0 644 28743 8

Chapters 1 and 2 - Model Criminal Code

Explanatory Note (1999)

Chapters 1 and 2 of the Model Criminal Code, which were released in the Criminal Law Officers Committee (now Model Criminal Code Officers Committee) Final Report of December 1992 was modified by the Standing Committee of Attorneys-General in 1993 shortly before the Commonwealth Government drafted what was enacted as the Criminal Code Act 1995 ,

The main modifications concerned Division 8, the principles which apply where an accused is intoxicated. Attorneys-General reversed the position recommended in the December, 1992 Final Report .

There were also some adjustments in relation to conspiracy. The Standing Committee of Attorneys-General decided that the threshold for conspiracy should be lowered to an offence punishable by 12 months imprisonment or a fine of $20,000, rather than 2 years or $100,000.

The version of chapter 2 approved by the Standing Committee of Attorneys-General (SCAG) included a number of minor drafting changes and a different numbering system. Readers will note that in the Appendices to other Chapters use the SCAG approved version of Chapters 1 and 2. These are identical to the Commonwealth Criminal Code Act 1995.

For the convenience of readers, the following is a consolidation of the version of Chapter 2 approved by the Standing Committee of Attorneys-General. The version contained in the Final Report and accompanying commentary follows.

Model Criminal Code Chapters 1 and 2

MODEL CRIMINAL CODE

SCHEDULE

THE CRIMINAL CODE OF [(NAME OF STATE/TERRITORY)]

CHAPTER 1 - CODIFICATION

Division 1

Codification

1.1 The only offences against laws of [Name of State/Territory] are those offences created by, or under the authority of, this Code or any other Act of [Name of State/Territory].

CHAPTER 2 - GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

PART 2.1 - PURPOSE AND APPLICATION

Division 2

Purpose

2.1 The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of [Name of State/Territory]. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

Application

2.2 (1) This Chapter applies to all offences against this Code.

(2) On and after the day occurring 5 years after the day on which the Criminal Code Act 1994 of [Name of State/Territory] receives the Royal Assent, this Chapter applies to all other offences.

(3) Section 11.6 applies to all offences.

PART 2.2 - THE ELEMENTS OF AN OFFENCE

Division 3 - General

Elements

3.1 (1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

Establishing guilt in respect of offences

3.2 In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note: See Part 2.6 on proof of criminal responsibility.

Division 4 - Physical elements

Physical elements

4.1 (1) A physical element of an offence may be:

(a) conduct; or

(b) a circumstance in which conduct occurs; or

(c) a result of conduct.

(2) In this Code:

"conduct" means an act, an omission to perform an act or a state of affairs.

Voluntariness

4.2 (1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:

(a) a spasm, convulsion or other unwilled bodily movement;

(b) an act performed during sleep or unconsciousness;

(c) an act performed during impaired consciousness depriving the person of the will to act.

(4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

(7) Intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Omissions

4.3 An omission to perform an act can only be a physical element if:

(a) the law creating the offence makes it so; or

(b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

Division 5 - Fault elements

Fault elements

5.1 (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Note: Under subsection 5.4 (4), recklessness can be established by proving intention, knowledge or recklessness.

Intention

5.2 (1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Knowledge

5.3 A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

Recklessness

5.4 (1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Negligence

5.5 A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

Offences that do not specify fault elements

5.6 (1) If the law creating the offence does not specify a fault element for a physical element of an offence that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Division 6 - Cases where fault elements are not required

Strict liability

6.l (l) If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

Absolute liability

6.2 (1) If a law that creates an offence provides that the offence is an offence of absolute liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 9.2 is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.

(3) The existence of absolute liability does not make any other defence unavailable.

PART 2.3 - CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

Note: This Part sets out defences that are generally available. Defences that apply to a more limited class of offences are dealt with elsewhere in this Code and in other laws.

Division 7 - Circumstances involving lack of capacity

Children under 10

7.1 A child under 10 years old is not criminally responsible for an offence.

Children over 10 but under 14

7.2 (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

(2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

Mental impairment

7.3 (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct.

(2) The question whether the person was suffering from a mental impairment is one of fact.

(3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.

(4) The prosecution can only rely on this section if the court gives leave.

(5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.

(6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.

(7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

(8) In this section: "mental impairment" includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

(9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does

not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

Division 8 - Intoxication

Definition - self-induced intoxication

8.1 For the purposes of this Division, intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

Intoxication (offences involving basic intent)

8.2 (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(5) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Intoxication (negligence as fault element)

8.3 (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.

(2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Intoxication (relevance to defences)

8.4 (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.

(2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

(4) If, in relation to an offence:

(a) each physical element has a fault element of basic intent; and

(b) any part of a defence is based on actual knowledge or belief;

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

(5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

Involuntary intoxication

8.5 A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

Division 9 - Circumstances involving mistake or ignorance

Mistake or ignorance of fact (fault elements other than negligence)

9.1 (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

(a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

(b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

Mistake of fact (strict liability)

9.2 (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:

(a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and

(b) had those facts existed, the conduct would not have constituted an offence.

(2) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

Mistake or ignorance of statute law

9.3 (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) the Act is expressly or impliedly to the contrary effect; or

(b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.

Mistake or ignorance of subordinate legislation

9.4 (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.

(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:

(a) the subordinate legislation is expressly or impliedly to the contrary effect; or

(b) the ignorance or mistake negates a fault element that applies to a physical element of the offence; or

(c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.

(3) In this section:

"available" includes available by sale;

"subordinate legislation" means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

Claim of right

9.5 (1) A person is not criminally responsible for an offence that has a physical element relating to property if:

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Division 10 - Circumstances involving external factors

Intervening conduct or event

10.1 A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

(a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and

(b) the person could not reasonably be expected to guard against the bringing about of that physical element.

Duress

10.2 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she reasonably believes that:

(a) a threat has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective; and

(c) the conduct is a reasonable response to the threat.

(3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Sudden or extraordinary emergency

10.3 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

(a) circumstances of sudden or extraordinary emergency exist; and

(b) committing the offence is the only reasonable way to deal with the emergency; and

(c) the conduct is a reasonable response to the emergency.

Self-defence

10.4 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

PART 2.4 - EXTENSIONS OF CRIMINAL RESPONSIBILITY

Division 11

Attempt

11.1 (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying-provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose) or section 11.5 (conspiracy).

Complicity and common purpose

11.2 (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

Innocent agency

11.3 A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with the conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

Incitement

11.4 (1) A person who urges the commission of an offence is guilty of the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Maximum penalty:

(a) if the offence incited is punishable by life imprisonment - imprisonment for 10 years; or

(b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment - imprisonment for 7 years; or

(c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more - imprisonment for 5 years; or

(d) if the offence is otherwise punishable by imprisonment - imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or

(e) if the offence incited is not punishable by imprisonment - the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B (2) of at Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B (3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in second 4AA of that Act.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

Conspiracy

11.5 (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or

(b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

References in Acts to offences

11.6 (1) A reference in an Act to an offence against an Act (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.

(2) A reference in an Act (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if an Act is expressly or impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose) and 11.3 (innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY

Division 12

General principles

12.1 (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

Physical elements

12.2 If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Fault elements other than negligence

12.3 (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2) (c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate;

"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;

"high managerial agent" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Negligence

12.4 (1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

Mistake of fact (strict liability)

12.5 (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Intervening conduct or event

12.6 A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY

Division 13

Legal burden of proof prosecution

13.1 (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof prosecution

13.2 (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

Evidential burden of proof - defence

13.3 (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Legal burden of proof - defence

13.4 A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

Standard of proof - defence

13.5 A legal burden of proof on the defendant must be discharged on the balance of probabilities.

Use of averments

13.6 A law that allows the prosecution to make an averment is taken not to allow the prosecution:

(a) to aver any fault element of an offence; or

(b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

CHAPTER 2

GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

On 28 June 1990, the Standing Committee of Attorneys-General placed the question of the development of a uniform criminal code for Australian jurisdictions on its agenda. This decision flowed from the fact that most jurisdictions were either undertaking, or about to undertake, major reviews of their respective Criminal Codes or Crimes Acts. There was a recognition that continued inconsistency in criminal law throughout Australia could no longer be justified.

In the Criminal Code jurisdictions:

- the Queensland Criminal Code was being reviewed by a committee under the chairmanship of Mr Robin O'Regan QC;
- an ongoing review of the Western Australian Criminal Code was being conducted by His Honour Mr Justice Murray of the Supreme Court of that State;
- in Tasmania, as a result of consideration by the Law Reform Commissioner of questions relating to criminal intent, a review of the entire Tasmanian Criminal Code was about to commence; and
- the Northern Territory Criminal Code was under review by a panel chaired by His Honour Mr Justice Nader.

In the common law jurisdictions:

- Victoria had referred significant criminal law questions to its Law Reform Commission;
- New South Wales was about to embark on a complete overhaul of its Crimes Act;
- South Australia had been involved in an ongoing Criminal Law Reform program;
- the Australian Capital Territory Crimes Act had been reformed but politically sensitive questions had been reserved for the ACT Government which assumed responsibility for criminal law on 1 July 1990.

Since its establishment on 11 February 1987, the Review of Commonwealth Criminal Law (the Gibbs Committee) had been reviewing the criminal laws of the Commonwealth, and was about to issue its report entitled "Principles of Criminal Responsibility and Other Matters".

In the view of all members of the Standing Committee, the time was right to consider moves towards at least consistency, if not uniformity.

In July 1990, the Gibbs Committee released its Report on Criminal Responsibility. The Report's recommendations were examined by the Third International Criminal Law Congress, held in Hobart in September 1990, as a possible model for uniform principles of criminal responsibility. The Congress was attended by judges, practitioners, academics and law reformers, both from Australia and abroad, The desirability of working towards uniformity emerged as a major theme of the Conference.

In order to advance the concept, the Standing Committee of Attorneys-General established a Committee — subsequently called the Criminal Law Officers Committee (CLOC) — which consisted of officers from each jurisdiction who had special responsibility for advising his or her Attorney-General on criminal law issues.

With the support of the Standing Committee, the Australian members of the international Society for the Reform of Criminal Law conducted a Conference based on the Gibbs Committee recommendations in Brisbane from 2 to 5 April 1991. The seminar was chaired by His Honour Mr Justice Malcolm, Chief Justice of Western Australia, and attended by judges, Directors of Public Prosecutions, defence lawyers, academics and all CLOC officers. Papers were prepared in advance on each topic to ensure a sharp focus. Equally importantly, where a paper was prepared by a person from a code jurisdiction, it was accompanied by a commentary from a person in a common law jurisdiction and vice versa. The work of the seminar proved invaluable when the task of preparing the Model Code began. The Conference reiterated earlier calls to work towards uniformity.

The first formal meeting of CLOC took place in May 1991, when it was decided that priority should be given to principles of criminal responsibility as these were the very foundations of any system of criminal justice. It was also agreed that the aim would be to draft these principles as the first chapter of a Model Code capable of adoption by all jurisdictions.

The project was considerably expedited by work which had been, or was being, done in all Australian jurisdictions. Additionally, CLOC was able to utilise proposals from the United Kingdom, the United States, Canada and New Zealand.

CLOC utilised a similar methodology to that of the Brisbane Conference. Papers on the various subject matters were prepared by members of the committee. Those papers then focussed the debate and committee decision making process.

In drafting the criminal responsibility chapter of the Model Code, CLOC has attempted to make the document comprehensive and yet concise and capable of being understood not only by legal practitioners but also by the general public. CLOC felt that a Code which could only be interpreted by lawyers would fail a basic test of acceptability. The content of such a fundamental area

as the criminal law should be accessible to citizen. To that end, CLOC requested Parliamentary Counsel to adopt a plain English drafting style. The Committee expresses its gratitude to Mr Eamonn Moran, Deputy Chief Parliamentary Counsel of Victoria, who, notwithstanding vicissitudes of significant proportions, has reduced CLOC's decisions to their present format. The design of this document — with Code provisions on one page and Commentary on the facing page — was also done with a view to making the proposals as clear as possible. CLOC acknowledges the generous assistance of the Victorian Law Reform Commission in the production of the document.

CLOC also wishes to thank Mr Mathew Goode, who conducted the bulk of the preliminary research and prepared the first draft of this commentary.

CLOC believes that the Model Code approach provides the best mechanism for achieving uniformity in the important and complex area of criminal law. This first chapter on criminal responsibility represents a significant first step given the significant differences in approach between the Griffith Code and common law jurisdictions. Despite those differences, the Committee resolved that it should produce a Code which embodied a consistent and principled approach which should be capable of adoption by all Australian jurisdictions.

The Committee believes that this document provides the basis for reaching an agreement. It is hoped that the Model Code prepared at the end of the consultative process will be adopted by all jurisdictions.

The Committee had the great benefit of 52 written submissions, meetings with criminal law experts and detailed comments from delegates to the Fourth International Criminal Law Congress held in Auckland in September 1992. The Committee was particularly heartened by a unanimous motion of support for this chapter and for the Code project from the Congress. The Committee met 7 times to consider comments on the Discussion Draft and to formulate the Final Draft of chapter two contained in this Report. This critical chapter has benefited greatly from the comments on the earlier Draft and CLOC expresses its gratitude to all those who made submissions. In particular, we wish to thank Mr Ian Leader-Elliott who prepared several papers at our request and spent many hours in consultation and Mr Ian Campbell showed similar generosity. We also thank Sir Harry Gibbs for his careful consideration of our Draft in the light of the Report of his own Committee on the Principles of Criminal Responsibility.

This Report now goes to the Standing Committee of Attorneys-General for possible adoption in each Australian jurisdiction. The Committee will go on to consider the substantive law. The Attorneys have requested us to begin with fraud. A Discussion Draft on this topic will be published in mid-1993. The Committee may be contacted through its chair, Dr David Neal, c/o Attorney-General's Department, Canberra, ACT.

December 1992

CRIMINAL LAW OFFICERS COMMITTEE

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Director of Policy and Research,
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Now Consultant to the Commonwealth, Attorney-General's Department

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Glossary

Brisbane Conference:	Conference held in Brisbane in April 1991 under the auspices of the Society for the Reform of the Criminal Law chaired by the Chief Justice of Western Australia, Mr Justice David Malcolm QC.
Canadian Draft Code:	Report 31: Recodifying Criminal Law, Law Reform Commission of Canada (1987).
D, P & V:	In the text where D, P & V are used D means Accused and V means Victim.
Draft Territories Code:	Draft Criminal Code for the Australian Territories submitted to the Federal Attorney-General by the Law Council of Australia together with a commentary by the Council's Co-ordinating Committee (1969).
English Draft Code:	The Law Commission (Law Com. No.177), Criminal Law: A Criminal Code for England and Wales (1989). Volume 1: Report & Draft Criminal Code Volume 2: Commentary on Draft Criminal Code Bill
English Law Commission, Attempt:	English Law Commission, Criminal Law: Attempt and Impossibility in Relation to Attempt, Report No. 102 (1980).
Gibbs Committee:	Review of the Commonwealth Criminal Law (third) Interim Report on Principles of Criminal Responsibility and Other Matters (1990).
Griffith Code:	Generic term to refer to the Queensland, Western Australia, Tasmanian (Stephen Code) and Northern Territory Codes.
Mitchell Report:	Criminal Law & Penal Methods: Reform Committee of South Australia Fourth Report, The Substantive Criminal Law (1977).
Murray Report:	The Criminal Code: A General Review, M. Murray QC, Western Australian Crown Counsel (1983).
NZ Crimes Bill:	New Zealand Crimes Bill (1989).

O'Regan Report:	Queensland Criminal Code Review Committee, Interim Report (1991).
US Model Penal Code:	American Law Institute, Model Penal Code, Official Draft and Explanatory Notes, American Law Institute, 1985. Complete text of Model Penal Code as adopted by the American Law Institute (1962).
VLRC:	Victorian Law Reform Commission.
VLRC Homicide:	Victorian Law Reform Commission, Homicide, Report No. 40 (1991).
VLRC Mental Illness:	Victorian Law Reform Commission: The Concept of Mental Illness in the Mental Health Act 1986, Report No. 31 (1990).
VLRC Mental Malfunction:	Victorian Law Reform Commission, Mental Malfunction and Criminal Responsibility, Report 34 (1990).
WA Law Reform Commission:	The Criminal Process and Persons Suffering from Mental Disorders Project No. 69 (1991).

CONTENTS

Chapter 1 - Codification

1. How offences are created

An offence can only be created by, or under the authority of, this Code or another Act passed by the Parliament of this State or of the Commonwealth.

Chapter 1 - Codification

1. How offences are created

Chapter 1 of the Code will deal with the mechanics of implementing a Code. No detailed work has been done on this chapter as yet. Section 1 has been inserted as a guide to readers to indicate the scope of the Code and the location of the chapter on criminal responsibility.

The Code will eventually provide model provisions capable of replacing all common law offences and Crimes Act provisions in the common law jurisdictions, and the Criminal Code provisions in the Griffith Code jurisdictions. It will also apply the general principles of criminal responsibility to offences both in the Code and in other statutes. This does not mean that all preceding law will be irrelevant to interpretation of the Code. For example, English courts have drawn on the pre-existing law of larceny to assist interpretation of the English Theft Act 1968. That will also be possible under this Code.

In addition to offences contained in the existing Crimes Acts and Griffith Codes, the Committee believes that the Code should define the offences dealing with the non-medical use of drugs since they are clearly part of the criminal law mainstream. The case is not as clear for some other offences such as those dealing with the environment, taxation, fishing and consumer credit, for example. It may be preferable that they remain in separate statutory environments.

The law of contempt raises special problems and is currently under separate consideration by the Standing Committee of Attorneys-General. None of the existing or proposed Codes deals with it but it probably should be seen as a branch of the criminal law.

Similarly, the Committee has yet to consider whether general summary offences (for example, offensive language and other public order offences) should be included within the Code or dealt with somehow differently.

> See Goode, "Codification of the Australian Criminal Law" (1992) 16 Criminal L J 5. For examples of the sort of mechanical provisions that will be necessary, see Part 1, English Draft Code. On the question of the exclusion of the common law, see also s.2(1) of the Draft Canadian Code and s.1.05(1) of the US Model Penal Code. There is valuable general discussion of codification in Ashworth, "Interpreting Criminal Statutes" (1991) 107 LQR 419 at 421ff.

Chapter 2 - General Principles of Criminal Responsibility

PART 1 – PURPOSE

101. Purpose

The purpose of this Chapter is to codify the general principles of criminal responsibility.

101.1 This Chapter contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

101.2 This Chapter applies to all offences, whether they were created before or are created after its commencement. However, this Chapter only begins to apply to offences created before its commencement on and from the third anniversary of that commencement.

Chapter 2 - General Principles of Criminal Responsibility

PART 1 — PURPOSE

101. Purpose

This chapter is drafted to allow it to be implemented independently of the rest of the Code. For reasons of principle and practice, implementation of this chapter of the Code should not be delayed pending the drafting of the remainder of the Code. In principle, the basic rules of criminal responsibility should not vary from one State or Territory to another. In practice, the growth of Commonwealth criminal legislation and the increased incidence of prosecutions involving both Commonwealth and State offences in the same case highlight the need to rationalise this fundamental area.

Matters like double jeopardy, unfitness to plead, etc. will be dealt with in a separate chapter on procedure.

Section 101.1 applies the general principles of criminal responsibility to all offences. Of course, like other statutes, Parliament can override the provisions in this chapter of the Code, either elsewhere in the Code or in other legislation. Because of the fundamental nature of the principles of criminal responsibility, we would not expect this to be done lightly. However, it would be possible, for example, to exclude the requirement of voluntariness (s.202.2) in a particular offence.

This chapter will apply immediately to all new offences created after its enactment. In order for legislatures to consider the position in relation to existing offences, the operation of chapter 2 is delayed for three years from the date of enactment (s.101.2).

PART 2 – THE ELEMENTS OF A CRIME

201. Elements

An offence consists of physical elements and fault elements.

201.1 However, the law defining an offence may specify that a fault element is not required in relation to one, or more than one, physical element.

202. Physical elements

The physical element may be

- an act; or
- an omission to perform an act; or
- a state of affairs; or
- a circumstance in which an act, omission or state of affairs occurs; or
- a result of an act, omission or state of affairs.

202.1 "Conduct" is an act, an omission to perform an act or a state of affairs.

202.2 Conduct may only be a physical element if it is voluntary.

202.2.1 Conduct is only voluntary if it is a product of the will of the person who carries it out. Conduct which is not voluntary includes

- a spasm, convulsion or other unwilled bodily movement;
- an act performed during sleep or unconsciousness;
- an act performed during impaired consciousness depriving the person of the will to act;
- an act performed under gross intoxication depriving the person of the will to act.

PART 2 — THE ELEMENTS OF A CRIME

201. Elements

Section 201 adopts the usual analytical division of criminal offences into the actus reus and the mens rea or physical elements and fault elements. "Physical elements" refer to external events. "Fault elements" refer to the state of mind or fault of the accused. Although some submissions suggested that this provision was not strictly necessary, there are clear advantages in specifying the framework for analysing criminal responsibility.

Normally, offences will consist of one or more physical elements each with its accompanying fault element. However, some offences will not require a fault element for some or all of the physical elements (eg strict responsibility offences, see s.205). Section 201.1 allows for this.

202. Physical Elements

"Physical elements" are comprised of acts, omissions or states of affairs ("conduct"); circumstances surrounding that conduct ("circumstances"); and results or consequences ("consequences"). It is not necessary to define what is meant by "circumstances" or "results". The process of defining concepts has to begin and end at some point. However, there is a difficult question concerning whether "conduct" should be further defined, and if so, how.

"Conduct" may be comprised of acts, omissions to act, or a state of affairs — or a combination. The meaning of the term "act" has been problematic both at common law and under the Griffith Codes. There are two difficulties.

The first difficulty is whether acts are comprised only of physical components or whether they also contain a minimal mental component of voluntariness, ie the will to act. Voluntariness is usually regarded as part of the act and the Code has adopted that analysis. However, this makes it extremely difficult to distinguish between voluntariness and intent in simple offences (sometimes called offences of "basic intent"). This issue is discussed in more detail in relation to voluntariness (see s.202.2 and the accompanying commentary, below).

The second, more difficult problem is how the Code should deal with the often crucial facts and circumstances surrounding conduct, which give that conduct colour and meaning, but are not legal elements of the offence. For example, take a case where D pushes a glass into V's face. Should the 'act' be understood narrowly as just a bodily movement (the movement of D's hand) or more broadly to include the circumstance that D had a glass in his hand? The problem is that if "act" includes circumstances defining the conduct, then the distinction between "act" and "circumstances" seems to collapse.

202.2.2 An omission to perform an act is only voluntary if the act omitted to be performed is one which the person is capable of performing.

202.2.3 If the conduct constituting an offence consists of nothing other than a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

202.3 An omission to perform an act may only be a physical element if

- the law defining the offence makes it so; or
- the law defining the offence impliedly allows it to be committed by an omission to perform an act which by law there is a duty to perform.

This would also confuse the relationship between conduct and the fault elements. The fault elements assume a distinction between acts and circumstances (eg. see s.203.1). For that reason the US Model Penal Code took the strict view. It says: "...'act' or 'action' means a bodily movement whether voluntary or involuntary" [(s.1.13(2))]. Neither the Canadian Draft Code nor the English Draft Code perceived the problem despite the fact that both define fault elements in relation to conduct, circumstances and consequences differentially. The Gibbs Committee did not deal with the problem at all, in part because it did not define fault elements differently in relation to different elements of offences.

In a series of cases: *Vallance* (1961) 108 CLR 56; *Mamote-Kulang* (1964) 111 CLR 62; *Timbu Kolian* (1968) 119 CLR 47; *Kaporonovski* (1973) 133 CLR 209; and *Falconer* (1990) 171 CLR 30 the High Court has considered the meaning of "act" in s.23 of the Griffith Codes. At first, different meanings were attributed to the term by different members of the Court. Thus, in the context of discharge of a firearm wounding a person, the meanings ranged from the physical movement involved in the contraction of the trigger finger to the actual wounding of the victim.

However, by the time of the *Kaporonovski* decision, one view had emerged as the broadly accepted view of the Court and this was confirmed in *Falconer*. In that case Mason CJ, Brennan and McHugh JJ at p.38 and 39 said:

> In our opinion, the true meaning of 'act' in s.23 is that which Kitto J. in *Vallance* attributed to 'act' in s.31(1) of the Tasmanian Code, namely, a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility ... Adopting the meaning of 'act' expressed by Kitto J. in *Vallance*, the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer.

A similar analysis has been applied by the High Court in cases on the common law. The Committee gave much consideration to whether the position should be further clarified by, for instance, defining act (or conduct) to include the surrounding relevant circumstances. Professor Cambell provided the Committee with a forthcoming article in which he argues that cases like *Jiminez* (1992) 106 ALR 162 show that *Falconer* has not solved all the problems in this area. Ultimately, the Committee concluded that the better course is not to define "act" and to rely on the courts to apply the interpretation in *Falconer*. Although this may not solve all the problems in this difficult area, defining "act' could well introduce other more difficult problems.

Code

The problem with which this part of the commentary is concerned is best illustrated by an example.

D is charged with unlawfully doing grievous bodily harm to V. V provoked D, who pushed a glass into V's face. D says that the glass was in V's hand, and that he (D) pushed V's hand back into his (V's) face. The question is what was the "act" of D. There are two alternatives. The first is that the act is merely the physical movement of D — the movement of his hand in this case. The second is that the act comprehends the fact that the physical movement involved a glass. The High Court in *Kaporonovski* (1975) 133 CLR 209 decided the latter. The argument really comes down to commonsense. The former alternative says, for example, that the act causing death in a stabbing is the downward swing of the arm only and not the swing with a knife in the hand. See too the majority view in the High Court in *Ryan* (1967) 121 CLR 205 rejecting the contention that the relevant act was squeezing the trigger in favour of saying that it comprehended holding a loaded gun in V's back. See too *Falconer*.

The Committee considered a provision such as the following to codify the position:

"Conduct" in relation to an offence means: (a) acts, omissions or a state of affairs; and (b) the relevant circumstances and results surrounding the commission of the act, failure to act or state of affairs which are not defined as elements of the offence in question.

The Committee decided not to adopt such a provision. The philosophy of action is very complex and the Committee was not satisfied that the proposed section improved the commonsense solution arrived at by the courts. Second, a definition such as the one cited may give rise to other problems. For example, take a rape case in which the Crown wishes to prove that, in the course of admitted sexual intercourse with V, D caused bruising on V's body. That might be relevant evidence on the question of consent. But since the bruising is a circumstance surrounding the commission of the act, making it conduct would import the fact into the definition of the physical elements of the offence and, as a consequence, the Crown would be required to prove that the bruising was, in the case of rape, either intentional or reckless. That is, to define conduct in this way would be to escalate evidentiary facts into definitional facts with all that that implies. As in the case of "circumstances" and "results", the Committee concluded that there has to be some stopping point in the process of definition.

Code

202.2 Voluntariness

The problem of whether conduct involves any mental element has already been raised above (s.202). Despite the traditional analysis of crimes into actus reus and mens rea, the notion of what it means to act goes beyond mere physical movement. At a minimum there needs to be some operation of the will before a physical movement is described as an act. The physical movements of a person who is asleep, for example, probably should not be regarded as acts at all, and certainly should not be regarded as acts for the purposes of criminal responsibility. This would be inconsistent with the principle of free will which underlies the rules of criminal responsibility. These propositions are embodied in the rule that people are not held responsible for involuntary "acts", ie physical movements which occur without there being any will to perform that act. This situation is usually referred to as automatism.

In cases where the prosecution has to prove intent or recklessness, the practical operation of the voluntariness requirement is slight. This is because it will be far easier for the accused simply to argue that he or she lacked the necessary fault element. The degree of the impairment of the accused's consciousness has to be profound before the claim that he or she did not intend to act at all will be credible. Further, for many offences where the mental element does not go beyond the immediate circumstances of the physical movement, the difference between voluntariness and intent almost disappears (see the discussion of the term "act", above).

The practical significance of automatism arises in offences where the prosecution does not have to prove intent, knowledge or recklessness.

The draft follows the current position in requiring that conduct be a product of the will. In light of *Falconer*, it is now clear that the common law and the Griffith Code positions are the same on this issue.

In response to submissions, s.202.2.1 makes it clear that the list of conduct which is not voluntary is inclusive, though it is hard to imagine any involuntary conduct which would not be covered by the list. The term "reflex" was deleted from dot point one in favour of "unwilled bodily movement"; some reflex acts can be regarded as voluntary (eg the reflex responses of a skilled sportsperson). Because impaired states of consciousness may vary in degree, dot points 3 and 4 are drafted to leave the jury to decide whether the condition was so profound that it rendered the conduct involuntary. The phrase "of a kind sufficient" was deleted from both sub-sections to focus on the actual state of the defendant's mind rather than his or her *capacity* to act voluntarily.1

The Code does not make an exception from the principle of voluntariness in the case of voluntary intoxication.2 This maintains the position in *O'Connor's* case (1980) 146 CLR 64 (s.203.2.1.4).

Code

It allows a plea that the defendant was so grossly intoxicated that his or her "act" was not voluntary. (The term "gross" refers to the degree of intoxication, not the amount of alcohol ingested.) As expected, this decision proved controversial, particularly in Code jurisdictions where there is no experience of operating under the *O'Connor* rule. Some submissions expressed serious concern about introduction of the rule. On the other hand, several submissions from Code jurisdictions argued that the decision was correct in principle and ought to be followed. Submissions from common law jurisdictions confirmed that the *O'Connor* argument arose infrequently and was usually not successful The arguments are canvassed at length in the case itself and in VLRC *Mental Malfunction*, ch. 8. Some jurisdictions may wish to consider enacting specific offences of intoxication, some of which are considered but rejected in the Victorian Report.[3] People who become intoxicated in situations where they know or ought to know, for example, that their conduct in becoming intoxicated is exposing others to serious injury could be convicted of reckless endangerment or negligence offence. See for example, ss.23 and 24 Crimes Act (Vic). The Code will contain similar offences.) So, for example a railway signal operator who becomes intoxicated to the point where he or she can no longer act voluntarily when the signal has to be changed, could be prosecuted for reckless endangerment. In line with the analysis in *Jiminez,* the relevant voluntary act is becoming intoxicated. The relevant fault element is becoming intoxicated in the knowledge that this is exposing others to a substanial and unjustifiable risk of injury. A similar analysis would apply to a negligence based offence.

S.202.2.1.5 in the Discussion Draft has been deleted in response to submissions. That clause sought to deny an accused person the benefit of involuntariness if it was brought about intentionaly or with a view to strengthening resolve to commit the crime. It had particular application to the possibilty of involuntariness brought about by intoxication. It has been deleted because it was pointed out that the notion was, to say the least, far-fetched, and because the principle sought to be reflected there was one properly relating to intention. Even in that context, the notion is problematic (see s.303 and commentary, below).

Ultimately, the Committee concluded that the Code should be based on principle and that it would be inconsistent to maintain that our system of criminal responsibility is based on free will and then impose responsibility in a situation where the defendant lacked free will in the most fundamental way - namely the will to act - even though that situation was the result of gross intoxication. Even in jurisdictions where the *O'Connor* principle does not apply, intoxication can be used to deny intent or recklessness in crimes of specific intent, *Majewski* [1977] AC 480; arguably *Beard* [1920] AC 479 applied to all mens rea offences. Despite the Committee's concern about the weighty policy considerations in this area, it concluded that the need to base the Code on a consistent and rational set of principles — especially in the fundamentals of criminal responsibility — was of paramount importance.

Code

202.2.3 Status Offences

Offences like "being a vagrant" have been criticised on the basis that they penalise conduct which is involuntary. Section 202.2.3 maintains the general principle of voluntariness for such offences. A legislature which wanted to exclude voluntariness in this type of offence would have to do so explicitly.

1 The Committee discussed s.2.01(2) of the US Model Penal Code, s.33 of the English Draft Code, s.3(1) of the Canadian Draft Code, s.19 of the New Zealand Draft Bill and proposed s.3H from the Gibbs Committee Draft Bill. In the result, the Committee resolved to draft an inclusive list of those categories of cases in which the conduct is generally agreed to be of an involuntary nature, and hence comes within the automatism principle.

2 Cf. the Code position. In *Cameron* [1990] 2 WAR 1 at 13, the Chief Justice said: "There are statements in the judgments that make it clear that the decision in *R v O'Connor* did not apply to the provisions of the Criminal Code. For example, Wilson J (at 133) said: 'As a statement of general principle it is incontestable that no crime can be committed unless there is a voluntary act or omission on the part of the accused. However, there has long been a recognised exception to this principle in the case of self-induced intoxication' see for example, sections 23 and 28 Criminal Codes Queensland and Western Australia.' " That decision adopted for WA the position already reached for Queensland in *Kusu* [1981] Qd R 136.

3 On automatism generally and on the relationship between automatism and gross intoxication, see VLRC *Mental Malfunction and Criminal Responsibility*, chs. 6 and 7.

202.3 Omissions

Clearly, the physical element of an offence constituted by conduct can include conduct constituted wholly by an omission to act. However, the Committee accepted the common law and Griffith Code position that omissions attract liability only if the statute creating the offence explicitly says so, or the omission was in breach of a legal duty to act. It will be necessary for P to prove that the circumstances in which there is a legal duty to act will be set out in the relevant offence provisions. This modified the Discussion Draft which limited the range of duties to those specified in what was then s.204. However, that section related only to duties in relation to persons. Other offences impose duties not related to persons (eg. to file a tax return). Accordingly, it has been moved to the chapter of the Code dealing with offences against the person. It is included below to show how s.202.3 will work:

Code

Discussion Draft s.204

Everyone has the duties set out in section 204.1 — 204.4.

204.1 The duty to provide the necessaries of life to his or her dependent spouse, dependent child or a member of his or her household for whose welfare he or she has assumed responsibility if the spouse, child or household member is unable to provide himself or herself with those necessaries.

204.2 The duty to avoid or prevent danger to the life, safety or health of any child (whether or not related in any way to him or her) for whose welfare he or she has assumed responsibility

204.3 The duty to avoid or prevent danger to the life, safety or health of any person if the danger is attributable to any act performed by him or her or to the possession, custody or charge by him or her of any thing, object, substance or situation.

204.4 The duty to avoid or prevent danger to the life, safety or health of any person if the danger arises as a consequence of an undertaking commenced or contemplated by him or her.

1. These provisions are based on the S.2(3)(c) of the Canadain Draft Code and the proposed SS.53-4 of the Queensland Code contained in the *Queensland Code Review Committee Interim Report* (1991).

203. Fault elements

The fault element required in relation to a particular physical element may be intention, knowledge, recklessness or negligence.

203.1 A person has intention with respect to conduct when he or she means to engage in that conduct. A person has intention with respect to a circumstance when he or she believes that it exists or that it will exist. A person has intention with respect to a result when he or she means to bring it about or is aware that it will occur in the ordinary course of events.

203.2 A person has knowledge of a circumstance or a result when he or she is aware that it exists or will exist in the ordinary course of events.

203.3 A person is reckless with respect to a circumstance when he or she is aware of a substantial risk that it exists or will exist and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk. A person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk.

203.3.1 The question whether the taking of a risk is unjustifiable is one of fact.

203.4 A person is negligent with respect to a physical element when his or her conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and such a high risk that the element exists or will exist that the conduct merits criminal punishment for the offence in issue.

203.5 Unless the law creating the offence specifies to the contrary, recklessness is the minimum fault element required in relation to each physical element of an offence in order for the offence to be committed.

203. Fault elements

The Griffith Codes and the common law take different approaches to the structure of the rules of criminal responsibility. However, while the difference should not be minimised, its practical effect is less than is often thought.

The essential difference between the two systems is that criminal responsibility under the common law, but not under the basic provisions of the Griffith Codes, is based on subjective fault elements: what the accused knew, believed or intended at the time of the conduct.

In many offences under the Griffith Codes (eg section 302 of the Queensland Code (murder)), one or more forms of intention are elements of the offence. In these cases, the difference between the Griffith Codes and the common law as regards intention is less marked. While many of the provisions of the Codes — particularly those related to property — also require a subjective fault element, the basic provisions of the Codes do not. Instead, under these provisions criminal responsibility is negated by accident, or honest and reasonable mistake, or by the fact that the event occurred independently of the will of the accused. Under the relevant Code provisions, as interpreted by the courts, a range of exculpatory matters are thus available to the defence.

The differences between the two approaches can be illustrated by an example based on section 317A of the Qld Code. This section makes it an offence, inter alia, to carry or place dangerous goods on board an aircraft. No element of intention is stated.

Under common law rules, the onus would be on the prosecution to establish that the defendant knew he was placing dangerous goods on board an aircraft (see *He Kaw Teh* (1985) 157 CLR 523) or was aware of at least a likelihood that the goods he was placing were dangerous: *Bahri Kural* (1987) 162 CLR 502. In a common law jurisdiction, the case would not be allowed to go to the jury if the Crown failed to prove this matter. Under the Codes, the prosecution case would normally go to the jury without proof of knowledge by the defendant of the nature of the goods. The Crown would only need to disprove involuntariness and accident in terms of section 23, or honest and reasonable but mistaken belief under section 24, if those issues were raised.

The defence of mistake is also a point of difference. At common law, an honest albeit unreasonable mistake can afford a defence to offences involving a mental element. Under the Griffith Codes, regardless of whether the offence involves a mental element, a mistake of fact will only afford a defence where a mistake is both honest and reasonable. Notwithstanding that apparent difference, the experience of juries in common law jurisdictions is that they reject the defence where the mistake is not credible because it is unreasonable.

In light of these considerations, it can be seen that while the difference between the code and common law jurisdictions is not as great as it is sometimes portrayed

204. Absolute liability

Absolute liability applies to any physical element of an offence

- which does not require a fault element; and
- to which a defence of mistake of fact under section 307 is not allowed.

204.1 The existence of absolute liability does not make any other defence unavailable.

205. Strict liability

Strict liability applies to any physical element of an offence

- which does not require a fault element; but
- to which a defence of mistake of fact under section 307 is allowed.

205.1 The existence of strict liability does not make any other defence unavailable.

to be, there are differences which will affect the outcome in some cases. In particular, fewer cases are likely to get to the jury under the common law because generally under the Griffith Codes the prosecution does not have to prove a fault element.

The Griffith Codes have served their respective jurisdictions well. However, it must be noted that when first enacted in the late nineteenth/early twentieth century, the Griffith Codes were closer to the common law as it then stood. The common law has changed significantly since then. The main change lies in the strengthening of the presumption that intent is part of the definition of all offences and the combination of that change with the spirit of *Woolmington* [1935] AC 462 — that the prosecution bears the burden of proof, and hence the burden of proving intent. This contrasts with the significant group of Griffith Code provisions which do not specify intent but leave it to be raised indirectly if at all by casting an evidential burden on D to raise accident or mistake under ss.23 or 24 before requiring the prosecution to disprove them. The Griffith Codes now stand outside the mainstream of legal development of the late 20th century which has stressed and indeed expanded the requirements for subjective fault. In this regard the Committee noted that the US Model Penal Code, the English Draft Code, the Canadian Draft Code, the Gibbs Committee's Draft Bill and the NZ Crimes Bill 1989 have all taken the subjective fault element approach.

The Committee proposed the same approach in the Code. This was generally accepted at the New Zealand Conference and strongly supported in the submissions, including submissions from Code jurisdictions. For example, the Director of Public Prosecutions for Tasmania, Mr. Damian Bugg, agreed that the subjective fault elements approach was correct in principle and would not cause difficulty in practice. Only one submission opposed the subjective fault elements aproach, arguing for a system based on whether the defendant caused a proscribed harm, deferring questions of intent and the like to the sentencing process. The Committee was not attracted to this approach. Two submissions preferred to retain the Griffith Code generally.

The Committee identified four fault elements:

- intention
- knowledge
- recklessness
- negligence

Section 203 sets out the fault elements in descending order of culpability.

Code

203.1 Intention

The definition is based the English Draft Code. The addition is the definition of intention in relation to "conduct" which is derived from the Canadian Draft Code.

While the distinction between circumstances and consequences is problematic at the margins, there is a clear difference in most cases which has implications for the meaning of "intention" in relation to those elements. The Committee shared the view of the English Law Commission that despite the problem cases at the margins, the approach was warranted. See, Robinson and Grail, "Element Analysis in Defining Criminal Liability: The US Model Penal Code and Beyond" (1983) 35 *Stanford LR* 681.

The Brisbane Conference and the Committee both disagreed with the Gibbs Committee's decision to define "intention" to include advertence to probability. There are a number of reasons for this. Conceptually, it confuses intent and recklessness. Moreover, the legislature and the courts are unduly hampered if they want to require proof of "true intention" — in the sense of meaning an event to occur. In relation to recklessness, advertence to probability without the evaluative element of unjustifiability of risk omits a central component of the notion of recklessness (see below).

On the other hand, the definition of "intention" should include awareness that the result will occur in the ordinary course of events, or is morally or virtually certain to occur. The definition follows the wording proposed in the English Draft Code. The contrary position is that such an awareness or foresight is at best evidence, perhaps very good evidence, of intention, but does not amount to intention. That is the position taken by the House of Lords in *Moloney* [1985] AC 905; *Hancock* [1986] AC 455. See also *Nedrick* [1986] 1 WLR 1025. The Committee preferred the English Draft Code.

203.2 Knowledge

The Committee decided that knowledge should be defined in relation to circumstances and results, but not in relation to conduct. The Committee could not think of any situation in which knowledge of conduct - as opposed to intention in relation to that conduct -would be appropriate. Other definitions may be found in s.21A NZ Crimes Bill, 1989; s.18(a) English Draft Code; s.2.02(2)(b) US Model Penal Code.

Knowledge should not be defined in terms of foresight of probability for similar reasons to those given above in the context of intention. In addition, to define knowledge in terms of foresight collapses knowledge and belief. One cannot "know" something unless it is so; but one can foresee the likelihood of something that is not so or will not be so.

The Committee firmly decided that it did not regard "wilful blindness" as a discrete fault element. Knowledge and recklessness fairly cover the field.

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203.3 Recklessness

This definition substantially follows the US Model Penal Code in using "substantial" and "unjustifiable" as the two key words. The Committee has defined recklessness in terms of a "substantial" risk rather than in terms of probability or possibility because they invite speculation about mathematical chances and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.

It now seems clear at common law that foresight of probability is restricted to murder and the foresight of possibility is the test for all other offences, including, complicity in murder. [1]

The Committee has used the word "unjustifiably" for the evaluative element of recklessness rather than "unreasonably" as used by the Commonwealth Review Committee in order to avoid confusion between recklessness and criminal negligence. One submission suggested that the test for recklessness was too strict and should require "gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation", as the US Model Penal Code does. As an alternative, the submission proposed that the text for criminal negligence (s.203.4) be used for both recklessness and negligence, except that the test for recklessness would be subjective.

The Committee concluded that the modification of the existing recklessness tests by substituting "substantial" for "probability" or "possibility" and adding the concept of unjustifiability set the proper level for recklessness. Distinguishing recklessness and negligence only on the basis of the subjective/objective test would have been too great a departure from the established concepts. The Committee also concluded that the test in s.203.3 adequately distinguished between the culpability of those who knowingly take substantial and unjustifiable risks and those who do not see risks but are criminally negligent (see below). Although there are may be some cases in which it may be more culpable to be negligent, in the generality of cases recklessness is traditionally and correctly seen as the more culpable state of mind. [2]

Section 203.3 makes it clear that the unjustifiability of the risk is to be assessed on the facts as the accused believes them to be. However, sub-section 203.3.1 leaves the question of whether the risk taken is "unjustifiable" for the jury (or the judge or magistrate in cases where there is no jury).

1. Some jurisdictions employ the concept of "reckless indifference" in their criminal legislation. The Code definition should apply equally to that form of words. There are dicta to that effect in the High Court in *Royall* (1991) 65 ALJR 451.

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On recklessness in murder, see *Crabbe* (1985) 156 CLR 464; *Boughey* (1986) 161 CLR 10. On non-homicide recklessness, see the recent decisions in *Hemsley* (1988) 36 A Crim R 334; *Coleman* (1990) 19 NSWLR 467 and *Bergin v Brown* [1990] VR 888. On recklessness and murder by common purpose, see *Miller* (1980) 32 ALR 321. *Nuri* [1990] VR 641 is not consistent with this analysis, but may be rationalised on the ground that the offence in question (recklessly endangering life) is close to attempted murder in nature.

2. The idea that recklessness is a more culpable state of mind than criminal negligence is put to the test when one defines criminal negligence as requiring a judgment that the falling short of community standards be so great as to warrant criminal punishment whereas recklessness is found by a mere decision to take a substantial and unjustifiable risk. This would have been even more of a problem had recklessness been defined in terms of foresight of possibility and the taking of an "unreasonable" risk. Even so, the point has force. The US Model Penal Code saw this problem and defined negligence as follows: "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." (s.2.02)

203.4 Criminal negligence

The definition is based closely on *Nydam* [1977] VR 430. The Committee considered the phrase "merits criminal punishment" at length. Some submissions argued that it was circular and others pointed to cases suggesting that there was more than one level of negligence in the criminal law. It was pointed out that, insofar as the Committee's draft definition implied that there was only one standard of criminal negligence applied, for example, by the New South Wales courts in a line of cases such as *Buttsworth* (1983) 1 NSWLR 658, *NSW Sugar Milling Cooperative Ltd v EPA* (1992) 59 A Crim R 6 and *Warner* (1991) 58 a Crim R 54. The Committee concluded, however, that the phrase in question was well understood and and applied, and that it was the best way available by which to distinguish criminal and civil negligence, a task which has troubled courts since *Andrews* [1937] AC 576. However, the Committee also took the point that the degree of negligence required for conviction is related to the nature of the offence, and so has added the words "for the offence in issue" to make that clear. The words "in issue" are used to allow for cases in which the negligence offence is an included offence rather than the offence charged.

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203.5 Default fault element

Recklessness — the advertent taking of a substantial and unjustifiable risk — is set as the basic level of culpability. Unless the legislature explicitly specifies to the contrary, the default fault element in relation to each element of an offence will be recklessness.

204 and 205 Strict and absolute liability

The terms absolute and strict liability are not used consistently in the case law. Sections 204 and 205 codify the prevalent view that strict liability dispenses with a fault element for the physical element but allows a defence of mistake of fact; absolute liability does not allow that defence. For the sake of clarity, s.204.1 and s.205.1 state that other defences (eg. necessity) are available. The conduct constituting the physical element must be voluntary (s.202.2).

In the Discussion Draft, the definitions of strict and absolute liability were located in s.310 the defence of intervening conduct. These definitions have been relocated in the Final Draft to show their relationship to offences which do contain fault elements. The Final Draft refers to strict or absolute liability elements rather than strict or absolute liability offences to include offences where some of the physical elements require a fault element and others do not. (eg. assaulting a police officer in the course of duty.)

PART 3 – CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

301. Age of criminal responsibility

A child under the age of 10 years is not criminally responsible for an offence. A child who is aged 10 years or over but under the age of 14 years can only be criminally responsible for an offence if he or she knows that his or her conduct is wrong.

301.1 The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

302. Mental impairment

A person is not criminally responsible for an offence if at the time when he or she carried out the conduct constituting the offence he or she was suffering from a mental impairment that had the effect that

- he or she did not know the nature or quality of his or her conduct; or
- he or she did not know that his or her conduct was wrong (that is, he or she was unable to reason with a moderate degree of sense and composure about the wrongness of the conduct as perceived by reasonable people); or
- he or she was unable to control his or her conduct.

302.1 "Mental impairment" includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

302.1.1 Mental illness is an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary. A condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

302.1.2 The question whether a person was suffering from a mental impairment is one of fact.

PART 3 — CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

301. Age of criminal responsibility

Provisions on the age of criminal responsibility vary from jurisdiction to jurisdiction. The Committee decided that there should be two ages: under 10 criminal responsibility is precluded; between 10 and 14 responsibility may be found, depending on the knowledge of the child involved. In the 10 - 14 range, section 301.1 provides that the Crown has to establish awareness of wrongdoing beyond a reasonable doubt. This codifies the existing law.

302. Mental impairment

The Committee decided that the basis of the mental impairment defence should be the *McNaghten* Rules. The submission from the Criminal Law Section of the Law Council of Australia expressed concern that this would not allow for categorization of mental impairment based on modern psychiatric expertise. This approach was favoured by the Butler Committee in England, see *Report of the Committee on Mentally Abnormal Offenders* 1975 Cmnd 6244(UK). The mental impairment defence is primarily concerned with the determination of criminal responsibility, a legal rather than a medical task. Although the expertise of psychiatrists and psychologists is of great importance both in codifying the defence and in giving evidence in court, the Committee did not favour the Butler Committee approach which attempts strict categorization of the types of conditions which render a person not guilty on the ground of mental impairment. The Committee believes that the Code's broad definition of mental impairment allows the jury to hear psychiatric testimony based on the latest expertise while properly leaving the ultimate question of responsibility to the jury. The Gibbs Committee (paras 9.39-9.40) and VLRC, Mental Malfunction (paras 45 and 48 - 51) reached a similar conclusion.

The formulation of the Code's new rules proceeded on the basis that the Committee had already separately recommended extensive reforms to the procedures and consequences attached to the insanity defence. These include giving the judge a range of disposition options and abolition of indeterminate detention in these cases (see below, "Related Decisions")

The *McNaghten* test proceeds in two stages. First, it must be established that D has a "disease of the mind". Then it must be shown that the "disease of the mind" caused D not to "know" the nature and quality of his or her act, or that it was wrong.

The first arm of the test in s.302 follows *McNaghten* closely.

The second arm of the test also follows *McNaghten* but incorporates the famous formulation, often used by trial courts to this day, formulated by Dixon J in *Porter* (1933) 55 CLR 182; see VLRC, *Mental Malfunction*, para 55. Although

302.2 A person is presumed not to have been suffering from a mental impairment of a kind described at the beginning of this section. This presumption is only displaced if it is proved on the balance of probabilities (whether by the prosecution or the defence) that the person was suffering from such a mental impairment.

302.3 The prosecution may only rely on this section with the leave of the court.

302.4 If the tribunal of fact is satisfied that a person is not criminally responsible for an offence only because of mental impairment, it must return a special verdict that the person is not guilty by reason of mental impairment.

302.5 A person may not rely onevidence of mental inpairment to deny voluntariness or the existence of any required fault element but may rely on this section to deny criminal responsibility.

302.6 If the tribunal of fact is satisfied that a person's conduct was carried out by him or her as a result of a delusion caused by mental impairment, the delusion cannot otherwise be relied on as a defence.

some concern was expressed about codifying the case law in this way, the consultation process revealed that the formulation is widely used in trial courts and, in view of this, the Committee concluded that it should be reflected in the Code. (As pointed out in *Willgoss* (1960) 105 CLR 295, 301, a direction in these terms would not be appropriate in the case of a person who knows his or her conduct is wrong but has no feeling that it is wrong.)

This formulation represents an expansion and variation of s.27 of the existing Queensland and Western Australian Codes. It also moves away from the existing Griffith Code concepts based on capacity in favour of tests phrased in terms of what D actually knew.

The section adds a third head to the *McNaghten* rules: inability to control conduct. This is available under the Griffith Codes but not at common law; see *Brown* [1960] AC 432. The Murray Report in WA (1983) and the O'Regan Report in Queensland (1991) recommended its retention. See too, the Mitchell Committee at para 13.4 and the Brisbane Seminar. On the other hand, the Gibbs Committee and the VLRC, *Mental Malfunction* did not recommend it.

The Code provides that the reference to rightness and wrongness in the second arm of the test is to the sense of right and wrong held by reasonable people. This follows the VLRC, *Mental Malfunction* at para 55. It is also in accord with a comprehensive review of authority and principle in *Chaulk* (1991) 62 CCC (3d) 193.

The Committee rejected contentions that the defence of insanity should be abolished. The Committee understood that the recommendation for abolition made by the Law Reform Commissioner of Tasmania will not be accepted: *Insanity, Intoxication and Automatism*, LRC 61, (1989) see too (1990) 14 *Criminal LJ* 71, 213. Cf Campbell, "Dangerousness and Detention: An Agenda for Reform of the Insanity Defence" (1988) 18 *WALR* 175; and VLRC, *Mental Malfunction*. A consequence of abolition in several US States, for example Montana, has been a dramatic escalation in unfitness to plead cases.

Some have contended that the verdict should be cast in a form such as "the accused committed the act or omission but is not criminally responsible by reason of mental impairment". The basis for this is usually that the general public find it hard to understand why D is found not guilty when he or she performed the criminal act. Others have advocated a verdict of guilty but insane. This approach is inconsistent with the requirement that both the physical element and the fault element be present to establish criminal responsibility. The power to detain a person after a mental impairment verdict is based on an analogy with civil commitment, not punishment. The Committee's recommendations on this power will make this clear. (See now "Related Decisions".)

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The Committee spent some time discussing the name of this defence. There is something to be said against any name. The Committee's consultant on this part of the Draft Code, Professor Ian Campbell, had argued for "mental abnormality", citing the Final Report of the Brisbane Conference, the Queensland and NT Codes and the Draft Territories Code of 1969. The Gibbs Committee spoke in terms of "mental illness". The English Draft Code, the Canadian Draft Code and the New Zealand Crimes Bill speak in terms of "mental disorder". Groups representing the mentally ill and intellectually disabled have stressed the importance of nomenclatures . In the end the Committee adopted the term preferred by the Victorian Law Reform Commission: "mental impairment".

The Committee was of the view that the Code should overcome the decision in *Aarons* [1985] VR 974. The text refers to "conduct" and "conduct" is defined. Therefore, the Code should have the desired effect.

302.1 Definition of mental impairment

The Committee decided that there should be an inclusory definition of "mental impairment". The *McNaghten* term "disease of the mind" has caused a great deal of difficulty for the courts without any satisfactory conclusion. The issue is discussed in VLRC, *Mental Malfunction and Criminal Responsibility*. The balance of authority favours the view that ultimately the question of whether a condition is a "disease of the mind" is for the jury.[1]

This definition includes severe personality disorders within the definition of "mental impairment", thus allowing that condition to form the basis of a mental impairment defence. This matter has been the subject of intense discussion and disagreement in Victoria, although the main context of that debate centred on civil commitment legislation.

As stated above, the issues in relation to criminal responsibility are moral rather than medical. Ultimately, the Committee decided that the issue of personality disorder was too complex to be resolved by a blanket exclusion and that a jury should be allowed to consider whether, for example, a defendant's severe personality disorder prevented him or her from knowing the wrongness of the conduct. This decision accords with the broad definition of "disease of the mind" under the *McNaghten* Rules. The High Court has held that severe personality disorder may amount to a "disease of the mind". [2] The term "severe" was included to emphasise the degree of the disorder. Three submissions commented on this decision: two agreed and one opposed.

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1 See too the inclusory definition suggested by the VLRC; *Mental Malfunction* at para 51.

2 The cases on "severe personality disorder" are *Willgoss* (1960) 105 CLR 295, *Stapleton* (1952) 86 CLR 359. See too *Jeffrey* (1982) 7 A Crim R 55 (Tasmanian Court of Criminal Appeal) cf the WA Court of Criminal Appeal which ruled that personality disorder did not count as a "disease of the mind", *Hodges* (1985) 19 A Crim R 129, 133. In refusing the application for special leave to appeal, the High Court indicated the trial judge's ruling depended on the lack of evidence in the case and that the underlying issue might be the subject of future consideration [1986] 14 Leg Rep SL 2. See too, VLRC, *The Concept of Mental Illness*, at 12. In *Gallagher* [1963] AC 349, at 379, the House of Lords accepted that psychopathy could be regarded as a disease of the mind for the purposes of the *McNaghten* Rules.

302.1.1 Definition of mental illness

The Code confines a defendant who argues that a mental impairment caused him or her to act involuntarily or without the necessary fault element to the mental impairment defence (302.5; see too 302.6). Therefore, in some cases - for example, when involuntariness is in issue, it will be crucial to determine whether the involuntariness arose from a mental impairment. Difficulties have arisen in deciding whether conditions such as epilepsy, diabetes and dissociation amount to a mental illness. Ultimately, the test settled on by the majority of the High Court in *Falconer* (1990-91) 171 CLR 30 at 53-4 asks the jury to determine whether the defendant's mind was healthy or unhealthy. Although that test will leave a quite fundamental question to the jury in a limited number of cases, the Committee believes that there is no way to specify the issue more closely. Section 302.1.1 codifies the *Falconer* test. Section 302.1.2 makes it clear that the question whether a person is suffering from a mental impairment is for the jury to decide.

302.2 Onus of proof

In all jurisdictions, if D wishes to rely on the insanity defence, he or she bears the burden of proving the defence on the balance of probabilities.

The rule has been the subject of considerable discussion and criticism. (See, for example, the case of *Chaulk* (1991) 62 CCC (3d) 193, S(1989) 2 NSWLR 1 and *Youssef* (1990) 50 A Crim R 1). The Draft follows the recommendations of VLRC *Mental Malfunction* paras 67-70, which pointed out the severe difficulties involved in changing the standard of proof in this area. It is contrary to the decision of the Western Australian Court of Criminal Appeal in *Donovan* [1990] WAR 112 but is consistent with the views of the WA Law Reform

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Commission, *Criminal Process and Persons Suffering from Mental Discorder* at p.21. The criticism - that the reverse onus of proof can remove the onus on P to prove the fault element - is dealt with below under s.302.4, "Priority of Defences".

In the common law jurisdictions, it now appears the prosecution can raise insanity at least where D puts his or her state of mind in issue (*Bratty (1963) AC 386*, *Ayoub* (1984) 10 *Crim LR* 312 and *Radford* (1985) 42 SASR 266.) For example, under the Queensland and Tasmanian Codes, P may only raise the defence once D has introduced evidence suggesting disease of the mind. In Western Australia, P may raise insanity at any time.

302.3 Prosecution may raise mental impairment by leave

One submission opposed allowing P to raise the mental impairment defence; while two others suggested it should only be done with leave from the court. The Gibbs Committee also favoured a leave requirement (para 9.42). The Committee concluded that leave should be required in view of the consequences of the mental impairment verdict.

> In *Swain* (1991) 63 CCC (3d) 481, the Supreme Court of Canada held that a rule which allowed the prosecution to raise the mental impairment defence by leave could only survive the Charter of Rights and Freedoms if either the defence had raised it or the prosecution had proved guilt of the offence charged beyond a reasonable doubt.

302.4 and 302.5 Priority of defences

The Committee decided that the Code must provide that, where the accused lacks a fault element required by the crime alleged, or lacked "voluntariness" due to "mental impairment" as defined, the accused is confined to the mental impairment defence. As discussed above (see commentary on s302.1.1), a verdict of acquittal on the basis of involuntariness under s202.2 is precluded by s302.4 if the jury is satisfied that the involuntariness flowed from a mental impairment. This is consistent with the VLRC, *Mental Malfunction* at para 61; *Bratty* [1963] AC 386; and s.36 of the English Draft Code.

Submissions from Mr. I. Leader-Elliott and Mr. A Roden QC argued that the current rules and those proposed in the Code (and those proposed by the VLRC, Mental Malfunction at para 61 and the English Draft Code clause 36) require the jury to assume that the accused had the fault element for the crime when it may be clear that this is not the case. It should be said that virtually all mental impairment verdicts involve people who do have the fault element for the offence (eg an intent to kill) which is excused under the equivalent of dot point two of s.302. However, an accused might rely on a mental impairment which had the

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effect that he or she lacked a fault element of the offence (eg the accused's mental impairment led her or him to believe that a person was an animal). In such a case, the jury would have to return a verdict of not guilty on the ground of mental impairment, notwithstanding there was no intent to kill.

A similar analysis applies in the case of a person whose mental impairment led to an involuntary act which caused death. Given the severity of the mental impairment involved in such cases, an appropriate disposition (see below) can mitigate the situation. The more worrying case might involve a person who acted voluntarily and knew the nature and quality of the act but whose intellectual disability, for example, meant he or she lacked the relevant fault element (eg intent to kill in a murder case). It is conceivable that such a person might not be able to satisfy the jury of the mental impairment defence on the balance of probabilities, in which case there would be a guilty verdict. After very lengthy consideration, the Committee concluded that the possible options to deal with this problem all introduced other serious difficulties. (See too, Fisse, *Howards Criminal Law* (1990) who believes that the only satisfactory solution to the problem is to remove the burden of proof from D (at p.433-4). The Committee did not think the solution was practicable.) The Committee considered that while it was posible it was unlikely that a person whose mental impairment caused her or him to act involuntarily or without the relevant fault element would not qualify for a mental impairment verdict and that the disposition options proposed by the Committee - which are closely geared to the civil commitment provisions of mental health legislation - would mean that the situation could be dealt with justly by an appropriate disposition.

302.6 Delusions

The question of delusions is difficult. The *McNaghten* rules provided that the accused should be judged as if the delusions were true. The Committee took the view that delusions are symptoms of an underlying pathology and that such defendants should be confined to the mental impairment defence(s.302.5). It has taken a similar view on insane automatism (s.302.4). See, Law Reform Commission of Canada, Criminal Law - *The General Part - Liability and Defences,* (1982) at 48 and the Mitchell Committee, at para 13.2; Klink, "Specific Delusions in the Insanity Defence" (1982-3) 24 *Crim LQ* 458.

Related decisions

Although not contained within this Chapter of the Code, the Committee considers that the rules relating disposition of those found not guilty by reason of mental impairment have a great bearing on the defence. The present system of indefinite detention at the Governor's pleasure is most unsatisfactory. CLOC has made recommendations for reform of the Governor's pleasure system to the Standing Committee of Attorneys-General. The Standing Committee has referred the matter to Parliamentary Counsel's Committee for preparation of a bill based on the CLOC recommendations. The Attorneys will consider that

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bill in 1993. The provisions will be contained in a separate chapter in the Code on criminal procedure. The recommendations are printed below to enable them to be considered in relation to s.302:

(1) Where the accused wishes to plead not guilty by reason of mental impairment, the trial judge may accept the plea with the concurrence of the prosecution. This avoids farcical trials where insanity is not in issue (see the Murray Report at 390-392 referring to the similar recommendations of the English Butler Committee in 1975). In Queensland, an offender who would otherwise wish to plead not guilty by reason of mental impairment in circumstances where the Crown accepts that proposition as correct would not go before the court but would be dealt with by the Mental Health Tribunal under the Queensland Mental Health Act 1974.

(2) Where the trial judge accepts a plea in accordance with (a), the prosecution may state the circumstances of the offence to the court prior to any disposition being made. This recommendation is to overcome any suggestion that these cases would be dealt with other than in open court and allows a public airing of the facts on which the acceptance of the plea are based.

(3) The trial judge may outline to the jury the possible consequences of the special verdict of not guilty by reason of mental impairment. The Committee endorsed this approach because juries are sometimes reluctant to return a mental impairment verdict where they consider that the effect of their verdict may be that he or she will be discharged.

(4) A person found not guilty by reason of mental impairment should not be automatically detained. Detention should be the option of last resort if measures such as release on conditions are inappropriate. If detention is necessary, it should take place in a setting appropriate to the person's condition. It should only take place in a prison as a last resort. This is in accordance with the recommendation of the VLRC, *Mental Malfunction*, para 93.

(5) A person found not guilty by reason of mental impairment should not be detained for a period greater than he or she would have been imprisoned had he or she been found guilty of the offence with which he or she was charged; see Commonwealth Crimes Act, s.20BJ(1). A person released would still be subject to civil commitment.

(6) The court must make the least intrusive order that is consistent with the public interest and the interest of the person. This follows recommendations 10 and 18 of the VLRC, *Mental Malfunction*, paras 93 and 104 respectively.

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Fitness to stand trial

CLOC has already made recommendations on this topic to the Standing Committee of Attorneys-General. They are substantially similar to the recommendations relating to the mental impairment verdict. They will be contained in a separate chapter on procedure in the Code.

This will be dealt with in a separate section on procedure.

303. Intoxication (fault elements other than negligence)

If a fault element other than negligence is an element of an offence, evidence of intoxication may be taken into consideration in order to determine whether that fault element existed.

303. Intoxication (fault elements other than negligence)

Intoxication may be relevant either:

- to the requirement that D's conduct be voluntary; or
- to a fault element.

The application of intoxication to voluntariness has already been dealt with in the commentary on s.202.2. The gross nature of the intoxication required to negate voluntariness means that it is rarely relevant.

Section 303 deals with the application of intoxication to fault elements. There is a difference between the Griffith Codes and the common law on this aspect of intoxication too. In the Code jurisdictions, the courts have repeatedly held that *O'Connor* (1980) 146 CLR 64 does not apply and that intoxication may only be raised to negative fault in relation to offences requiring proof of intention with respect to a specific result where the third paragraph of s.28 of the Queensland and WA Codes would apply. (See *Cameron* [1992] WAR 1; and *Kusu* [1981] Qd R 136).

Consistent with the decision and reasoning in relation to voluntariness, the Committee decided to adopt the *O'Connor* rule on this aspect of intoxication too. Section 303 applies to all non-negligence fault element offences. The Committee concluded that the distinction between offences of basic intent and specific intent does not provide a principled basis for determining when arguments based on intoxication should be allowed (see esp. Stephen J in *O'Connor* pp.102-4).

The Discussion Draft included a section (s303.1) which codified the rule in *Gallagher* [1963] AC 349, the so-called "Dutch Courage" rule in the case of a person who deliberately becomes intoxicated in order to strengthen his or her resolve to commit an offence. On reflection, the Committee concluded that the rule was superfluous in the case of a person who has the relevant fault element and dangerous in the case of a person who does not. For example, it is dangerous if D has a change of heart after getting drunk in order to strengthen his or her resolve to kill V and accidentally kills V in a car accident while driving V home. The provision has been deleted.

304. Intoxication (negligence as fault element)

If negligence is a fault element of an offence, then in determining whether that fault element existed, regard must be had to the standard of a reasonable person who is not intoxicated.

304.1 However, if the person became intoxicated involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, then in determining whether negligence existed, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

305. Intoxication (relevance to defences)

If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be taken into consideration in order to determine whether that knowledge or belief existed. If any part of a defence is based on reasonable belief, then in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

305.1 However, if the person became intoxicated involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, then in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

304. Intoxication (negligence offences)

Because they do not involve any subjective fault element, intoxication has no relevance to offences based on negligence or strict or absolute responsibility, unless the issue of voluntariness is raised. For example, the fact that D was intoxicated is not relevant to the reasonable person test in negligence; the reasonable person is not intoxicated.

However, the restrictions on intoxication do not apply to people who become intoxicated involuntarily, for example, by fraud (*Majewski* [1977] AC 443). Because the Code allows a plea of intoxication to all fault element offences other than negligence, there is no need to provide for involuntary intoxication in those cases. However, negligence offences raise a special problem. It would be unfair to hold a person who had become involuntarily intoxicated to the standard of a reasonable person. In such cases, D will be assessed by reference to the standard of a reasonable person who was intoxicated to the same extent as D (s.304.1). Intoxication can vary enormously in degree. An accused who is only moderately intoxicated as a result of being deceived by some third party will still be liable if his or her conduct falls greatly short of the standard of care that a reasonable person, intoxicated to the same extent, would have exercised.

As in the rest of the Code, it is possible to expressly exclude the operation of these rules on intoxication for specific offences. The Committee will consider this issue on a case by case basis in codifying the substantive offences.

305. Intoxication (relevance to defences)

The Discussion Draft failed to specify how intoxication applied to defences. Section 305 now applies the same principles to defences as apply to fault elements.

306. Mistake of fact (fault elements other than negligence)

A person is not criminally responsible for an offence requiring a fault element other than negligence if at the time when he or she carried out the conduct constituting the offence the person was under a mistaken belief about, or was ignorant of, facts and the existence of that mistaken belief or ignorance negated the required fault element.

306.1 In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact is entitled to consider whether or not the alleged mistaken belief or ignorance was reasonable in the circumstances.

307. Mistake of fact (strict liability)

A person is not criminally responsible for an offence that has a physical element which does not require a fault element if at the time when he or she carried out the conduct constituting that physical element he or she was under a mistaken but reasonable belief about facts which, had they existed, would have meant that the conduct would not have constituted an offence.

307.1 A person can only be under a mistaken belief about facts if he or she has considered whether or not they existed.

307.2 A person may be regarded as having considered facts if on a previous occasion he or she had considered whether those facts existed in the circumstances surrounding that occasion and he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

306. Mistake of fact (fault elements other than negligence)

Consistent with the approach based on subjective fault elements, the Code provides that mistaken belief may negative intention, knowledge and recklessness. This codifies the common law position. (There is no clear scope for the operation of mistake in negligence offences since they only require that D intends to act.) The reasonableness of the mistake is merely a factor to consider in deciding whether the mistaken belief was actually held (see s.306.1).

This is consistent with the common law position (*Morgan* [1976] AC 182) but different to the approach taken under s.24 of the Griffith Codes which require that the mistake be reasonable. Section 306 differs slightly from the Griffith Codes in that there is no explicit reference to the mistaken belief being "honest"; the Committee thought that the inclusion of this word would be redundant.

There was some discussion of whether it was necessary to state these principles at all given that the Code requires the fault element to be established and a mistake which meant that the fault element was not present would mean that the prosecution could not establish its case. The similar provision proposed by the Gibbs Committee (s.3M(1) of its Draft Bill) was criticised by the Brisbane Conference as superfluous. One submission shared that view. Another was concerned that the provision might be misconstrued as a substantive defence. Although, strictly speaking, evidence of a mistake is only one sort of evidence which may cast doubt on the presence of a fault element, the Committee thought that for the sake of clarity, the Code should state the matter explicitly. In part, the Committee was influenced by the fact that the Code will speak to a wider audience than lawyers. Even among lawyers, the law of mistake has produced a good deal of confusion. Only one submission thought that the mistake should be reasonable.

307. Mistake of fact (strict liability)

The Committee resolved to adopt the so-called *Proudman v Dayman* (1941) 67 CLR 536 defence of reasonable mistake of fact in respect of strict liability. The Committee gave lengthy consideration to allowing ignorance as well as mistake. It was argued that there was little moral distinction between mistake and ignorance. Ultimately the Committee decided ignorance should not be included because this would make strict liability more like negligence, thus eroding the higher standard of compliance set by strict responsibility. Section 307 is consistent with *Proudman v Dayman* and with *McKenzie v Coles* [1986] WAR 224. However, the Discussion Draft was supplemented by including s.307.2 to codify the rule in *Mayer v Marchant* (1973) 5 SASR 567.regarding a belief that a state of affairs is continuing.[1]

The Committee also considered the situation where the accused acts contrary to law but under a mistaken belief which negatives a fault element of the offence charged but believes that he or she is committing another criminal offence. An

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example is a case in which the accused actually imports heroin believing that he or she is illegally importing dutiable watches. The Committee believed that the accused must be acquitted of the offence "actually committed" (in the example, knowingly importing heroin) because he or she lacked the relevant knowledge. Nor can the accused be convicted for illegally importing the watches because he or she has not done so. The Code requires proof of the physical element of the offence (importing watches) and that is absent. However, the accused should be liable to be convicted for attempting to commit the offence he or she believed was being committed. That will be possible under s.401.3 which provides for conviction in relation to impossible attempts. The offence attempted may be of greater, lesser or of equal seriousness compared to the one charged. However, the Committee believes that the attempt conviction should not be made upon the same indictment or in the same trial unless the case was conducted on the basis of the possible alternative conviction from the beginning. This is consistent with the operation of s.24 of the Queensland and WA Codes, but is a departure from the common law.

There is no specific reference to the onus of proof applicable to these provisions. They are governed by the general provisions on the burden of proof in Part 6 of this chapter. These apply the principles set out in *He Kaw Teh* (1985) 157 CLR 523. Hence, once evidence fit to go to the jury has been raised, the prosecution bears the onus of disproving the mistake.

1 It is arguable whether or not the common law version of the *Proudman v Dayman* defence requires a belief - that is, conscious advertence to the fact in issue - or whether ignorance will suffice (*Green v Sergeant* [1951] VLR 500); *McKenzie v Coles* [1986] WAR 224). The requirement of belief has been criticised because (a) there is no clear distinction between mistake and ignorance and (b) because being ignorant of a fact may, depending on the circumstances, be just as reasonable as being mistaken -and reasonableness is the whole point of the defence. See *Kain & Shelton v McDonald* (1971) 1 SASR 39; *Mayer v Marchant* (1973) 5 SASR 567. More recent cases require conscious advertence: *Hunter Water Board v SRA of NSW* (1992) 75 LGRA 15; and *Cervantes Pty Ltd v SEC of WA* (1991) 5 WAR 355.

308. Mistake or ignorance of law

Ignorance of or mistake about the existence or content of statute law or subordinate legislation does not affect a person's criminal responsibility for an offence created directly or indirectly by it.

308.1 "Subordinate legislation" has the same meaning as ["subordinate instrument" has in the Interpretation of Legislation Act 1984].

308.2 This section does not apply if a contrary intention appears in the relevant statute or subordinate legislation.

308.3 This section does not apply if the ignorance or mistake would negate a fault element of the offence.

308.4 This section does not apply in the case of subordinate legislation unless at the time of the offence

- copies of the subordinate legislation had been made available to the public or to those persons likely to be affected by it; or
- the person could, if he or she had exercised due diligence, have been aware of the content of the subordinate legislation.

308. Mistake or ignorance of statute law

The Code adopts the general principles of s.21 of the English Draft Code, and s.3J of the Gibbs Committee's Draft Bill, namely that ignorance or mistake of law is no excuse unless the Act so provides or the ignorance or mistake negates a fault element of the offence.

Subordinate legislation

The Code incorporates a defence based on mistake or ignorance of subordinate legislation. Unlike the Discussion Draft, this is stated as an exception to the general rule that ignorance of the law does not excuse rather than in a separate section. Such a defence appears in the Queensland Code but not the WA Code. See for example, *Hogan v Sawyer Exparte Sawyer* (1992) 1 QR 32. The Committee considered s.30 of the Northern Territory Criminal Code and s.3K of the Gibbs Committee's Draft Bill. Such a defence is also proposed by the NZ Crimes Bill (s.26), the US Model Penal Code (s.2.04(3)(a)), and the Canadian Draft Code (s.3(7)(b)(i)). The Committee also considered the Victorian Interpretation of Legislation (Amendment) Act 1991, which deals with subordinate legislation which in turn incorporates other material by mere reference.

While it is reasonable to presume that the contents of a statute are or should be known, that does not apply to the mass of subordinate legislation, unless it has been published, is available for sale, or the accused could reasonably be expected to have found out about it. Commonwealth subordinate legislation, for example, must be gazetted and on sale before it can be in effect. It was therefore decided that a defence of ignorance of a subordinate instrument should apply unless at the time of the offence copies of the subordinate instrument had been made available for sale to the public or to those persons likely to be affected by it, or the person could by the exercise of due diligence have been aware of its contents. This is in accordance with the general approach taken in s.22(3) and (4) of the Queensland Code, although that section states that mere publication or notification in the Government Gazette is sufficient. The Committee took the view, however, that it is unrealistic to believe such notification contributes to public awareness in any meaningful way, and agreed with similar views expressed by Mason J in *Watson v Lee* (1979) 144 CLR 374 at 408.

The words in square brackets in s.308.1 refer to the Victorian legislation by way of example. It will be up to each jurisdiction to insert its own definition of subordinate legislation.

> The defence will apply to regulations, orders, statutory instruments and the like. The Committee also considered that there were arguments that the defence should also apply to statutes. The applicable penalties may be far more significant than for a regulatory offence. Nevertheless, the

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Committee decided that it would not challenge the fundamental principle that the contents of a statute are presumed to be known.

Commonly, D is deprived of any defence in relation to statutory instruments if the statutory instrument has been "published". The Gibbs Committee had an inclusory definition which makes tabling in Parliament sufficient, or, where there is no requirement of tabling, "if copies of the instrument are available for purchase in at least one place in the State or Territory where the offence is alleged to have been committed" (s.3K(3)). The latter is problematic if the offence is committed at sea. The Northern Territory Code and the Queensland Code both say that publication in the Gazette will suffice. The US Model Penal Code, the NZ Crimes Bill, and the Canadian Draft Code do not provide a definition. The basic problem with the Gazette, tabling, and availability for purchase are that they are impractical in some cases. None of these acts are calculated to bring the delegated legislation to the public attention. In some cases the delegated legislation will be of a kind which regulates an industry in which the accused is a participant and in which, therefore, he or she should be expected to keep up to date. But this not always so: consider local government by-laws. The Committee decided on the test in s.308.4 as minimum criterion upon which to base the presumption that people know about.

The Committee decided against a defence based on reasonable reliance on judicial or administrative decisions. The Gibbs Committee favoured such a defence (s.3L), so did the US Model Penal Code (s.2.04(3)(b)) and the Canadian Draft Code, s.3(7)(b)(ii),(iii).

309. Claim of right

A person is not criminally responsible for an offence relating to property, or for any property elements of an offence that also has elements of another kind, if at the time when he or she carried out the conduct constituting the offence he or she was under a mistaken belief about a proprietary or possessory right which, had it existed, would have negated a fault element of the offence.

309.1 A person is also not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or posssessory right which he or she mistakenly believed to exist.

309.2 This section does not negate criminal responsibility for the use of force against a person.

309. Claim of right

The Committee decided that the "defence" of claim of right should appear in this part of the Code. "Claim of right" normally negatives a fault element, usually, but not necessarily, one of dishonesty, and the Code should reflect that state of the law.

The Committee discussed in some detail the use of the "defence" in relation to a prosecution against a traditional Aboriginal for trespass to Crown land or hunting a protected species and, in particular, the decision of the High Court in *Walden v Hensler* (1987) 163 CLR 561.

The Committee decided that a claim of right must relate to a proprietary and/or possessory right, and will, if established, negate the fault element (if any) required by the offence. Section 309.1 makes it clear the defence extends to other offences committed in the course of exercising the claim of right (eg. trespass in order to recover goods to which D has a claim of right). Section 309.2 precludes claim of right in relation to the use of force against the person. In an armed robbery where D had a claim of right in relation to the goods taken, D would be still be convicted of the armed assault.

310. Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute or strict liability applies if the physical element was brought about by another person, or resulted from a non-human act or event, over whom or which the person had no control and the person could not reasonably have been expected to guard against the bringing about of that physical element.

310. Intervening conduct or event

The common law contains a defence of "external intervention" for strict and absolute responsibility offences. The defence is set out by Bray CJ in Mayer v Marchant (1973) 5 SASR 567:

> It is a defence to any criminal charge to show that the forbidden conduct occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard.

Although this looks like it might be a principle of causation, it operates in practice as a defence based on lack of fault to crimes of strict or absolute liability where D can be proved to have committed the physical element of a strict liability offence. Despite the fact, for example, that D's truck exceeded the prescribed weight limit, it did so because a third person had secretly loaded it with additional items and D could not reasonably have been expected to guard against this. The defence is not necessary for offences containing fault elements because D will lack the fault element or, in the case of negligence, argue that she or he had taken reasonable care.

The WA and Queensland Codes have a similar provision in s.23 concerning accident. Both rules operate in a similar way to provide a defence to D based on lack of fault in offences where no fault element is required. Because the Griffith Codes do not take the fault element approach and have a large number of such offences, the s.23 defence is more frequently used than in the common law jurisdictions. Under the Code, which does take the fault element approach, it is only necessary to provide this defence for strict and absolute liability offences.

While the area is dominated by South Australian decisions, the doctrine has been accepted widely, see, for example, *Riley v Webb* [1987] Crim LR 477; *McKenzie v GJ Coles & Co Pty Ltd* (1988) 32 A Crim R 377; and a series of New Zealand cases listed by Fisse in Howard's Criminal Law, (Fifth Ed, 1990) at 504, note 77. A recent example of this no fault based defence in statutory form can be found in *SPCC v Blue Mountain City Council* (1991) 72 LGRA 345. Cf O'Regan, *Essays on the Australian Criminal Code* p.36. This defence is slightly narrower than the Griffith Code provision but this is appropriate given that it serves a narrower purpose in relation to strict and absolute liability offences where the legislature has limited the operation of fault elements.

311. Duress

A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her under duress.

311.1 Conduct is carried out by a person under duress if he or she reasonably believes that

- a threat has been made which will be carried out unless an offence is committed; and
- there is no reasonable way in which the threat could be rendered ineffective; and
- the conduct is a reasonable response to the threat.

311.2 This section does not apply if the threat is made by or on behalf of persons with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out by him or her.

311. Duress

The Code provides that the defence of duress should contain an objective element both as to necessity for the conduct and for the response to the threat.

The Committee also decided that the defence should not be further limited in artificial ways. Where free will is overborne by duress, the nature of the offence is not relevant. The Committee did not agree with the reasoning of the House of Lords in *Howe* [1987] 1 All ER 771 and the preceding decisions that duress should not be available in murder cases. See *Gotts* (1992) 2 WLR 284. The English Law Commission recommended that these cases be legislatively overturned: *Legislating the Criminal Code: Offences Against the Person and General Principles* (1992) para 18.22.

The recommendations of the Committee differ from the current provisions in s.31 of the WA Code which limits the applicability of the defence to certain defined kinds of serious offences. One submission contended that duress should be excluded in a murder case and another would have extended this to all serious offences against the person. One submission supported the Committee's approach. The view taken by the Committee is in accord with that taken by the Murray Report for WA (I, 48 and 160) and the VLRC, *Homicide* at pp. 100-6, but not with the O'Regan Report for Queensland at 37. Aside from the issue of principle, the Committee took the view that the general objective components of the defence were sufficient to ensure that where the accused has caused death or very serious harm, the defence could not be lightly invoked.

The Committee also decided that the defence should not be limited to defined kinds of threats (such as threats to inflict death or grievous bodily harm). It is usual to say that the defence is not available unless the accused or another has been threatened by death or grievous bodily harm. This appears in the case-law and also appears in the provisions of the Griffith Code and the Gibbs recommendations (although the latter would also include threats of "serious sexual assault"). Two submissions favoured this approach and one favoured the Committee's approach. Yeo, "Private Defences, Duress and Necessity" (1991) 15 *Crim LJ* 139 at 143, argues that there should be no such limitation as a matter of logic:

> "Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded might be trivial or serious but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist on a requirement that the accused's response was reasonably appropriate to the threat."

The Committee agreed with this view. The objective test should provide a sufficient safeguard against abuse of the defence.

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311.2 Disassociation

The defence does not apply where the accused is voluntarily associating with other persons for the purpose of carrying out a crime of the kind contemplated by the association. That limitation reflects the last substantive paragraph of s.31 of the WA Code. The Discussion Draft referred to people with whom D had associated. This left open the possibility of a substantial break between the association and the subsequent offence. This was amended to "associating" to establish a temporal link between the association and the loss of the duress defence.

312. Sudden or extraordinary emergency

A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in response to circumstances of sudden or extraordinary emergency.

312.1 This section applies where the person carrying out the conduct reasonably believes that

- circumstances of sudden or extraordinary emergency exist; and
- committing the offence is the only reasonable way of dealing with the emergency; and
- the conduct is a reasonable response to the emergency.

312. Sudden or extraordinary emergency

The usual term for this defence at common law is necessity, but the Committee took the view that the provisions of s.25 of the Griffith Codes were more appropriate, and that the defence should be available only in "a sudden or extraordinary emergency". In his notes to the Draft Code, Sir Samuel Griffith stated:

> This section gives effect to the principle that no man is expected (for the purposes of the criminal law at all events) to be wiser and better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the common law rules as to excuses for an act which is prima facie criminal.

This section recognises that an accused person is excused from committing what would otherwise be a criminal act in very limited circumstances. Like duress, the necessity of the occasion and the response to it are both subject to an objective test. The Committee's proposal is an amalgam of the principles underlying the common law of necessity and the Griffith Code equivalent.

In response to the submission of the Northern Territory Criminal Law Association, the section has been redrafted so that the words "sudden or extraordinary emergency are not defined in terms of "an urgent situation of imminent peril" (see Discussion Draft s.312.1) but left to the jury as ordinary words in the English language.

313. Self-defence

A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.

313.1 Conduct is carried out by a person in self-defence if

- the person believed that the conduct was necessary
  - to defend himself or herself or another person; or
  - to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
  - to protect property from unlawful appropriation, destruction, damage or interference; or
  - to prevent criminal trespass to any land or premises; or
  - to remove from any land or premises a person who is committing criminal trespass; and
- his or her conduct was a reasonable response in the circumstances as perceived by him or her.

313.2 This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the removal of such a trespasser.

313.3 This section does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful.

313.3.1 Conduct is not lawful for the purposes of section 313.3 merely because the person carrying it out is not criminally responsible for it.

313. Self-defence

The law on self-defence in both common law and the Code jurisdictions has been criticised. Sections 248 and 249 of the WA Code and sections 271 and 272 of the Queensland Code are generally regarded as obscure and complex. Even without excessive self-defence, the High Court criticised the complexity of the common law in *Zecevic* (1987) 162 CLR 645. Section 313 simplifies the law.

The test as to necessity is subjective but the test as to proportion is objective. It requires the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced (the words "as perceived by him or her" were added to make this clear). This approach is consistent with s.46 of the Tasmanian Code.

The Code (s.313.2) does not allow deadly force or the infliction of serious bodily harm in the protection of property. Some submissions suggested that the term "serious bodily harm" be defined. These words are the equivalent to "grievous bodily harm", a term the courts been reluctant to define. The Committee concluded that this was the preferable approach. The word "intentional" was added to ensure cases of accidental harm were not covered. This approach is consistent with the South Australian Criminal Law Consolidation (Self-Defence) Amendment Act 1991 and the Western Australian Criminal Law Amendment Act 1991.

The extension of the right to use force to situations where the purpose is to terminate the unlawful imprisonment of the accused or another is rarely invoked at common law and consequently the law is in an unsatisfactory state. The leading case appears to be the draconian *Rowe v Hawkins* (1858) 1 F&F 91, 175 ER 640. Section 313.1 extends the current provisions in the Griffith Codes, although it may be argued that s.31(3) of the WA Code may be broad enough to cover the situation if the expression "unlawful violence" is wide enough to encompass the concept of unlawful imprisonment.

The Committee placed a further restriction on the right to use force in self-defence so that it is not available where the accused was responding to force which was in fact lawful and which the accused knew to be lawful. However s.313.3.1 allows a person to use self-defence against a deadly attack by a child or an insane person, even though the attacker is not criminally responsible.

The Committee considered whether the use of force in arrest situations ought to be dealt with here. Where force is used to resist arrest, often self defence will also be relevant. Ultimately, the Committee decided to deal with arrest in a separate part of the Code because it involved situations in which D initiates the force and because the topic did not sit well in the section of the Code on general defences.

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Other defences

The Committee considered a number of other defences. These included superior orders (s.31(2) WA Code) and entrapment. The Committee rejected these defences. The High Court has held there is no place for a general defence of superior orders under common law, *Hayden* (1984) 156 CLR 532. Entrapment, as such, is not recognised in any jurisdiction. However, in NSW, entrapment has been treated as an abuse of process.

1 The Committee has not yet determined its attitude to the vexed question of the partial defence of excessive self-defence. It will do so in the context of its recommendations concerning unlawful homicide. The common law rule in Howe (1958) 100 CLR 448 became so complex (*Viro* (1978) 141 CLR 88) that the High Court abolished the defence in *Zecevic* (1987) 162 CLR 645. The Code States rejected *Howe* from the outset: see *Johnson* [1964] QR 1 and *Aleksovski [*1979] WAR 1. But SA has reintroduced a version of excessive self-defence in the Criminal Law Consolidation (Self-Defence) Amendment Act 1991, and the Victorian Law Reform Commission recommended the enactment of an equivalent to excessive self-defence in its *Report on Homicide*. The "defences" of provocation, diminished responsibility and infanticide will also be determined in the Homicide part of the Code.

Aboriginal Customary Law and Cultural Factors

The Australian Law Reform Commission has considered the effect of ethnicity on the determination of fault elements and defence in criminal trials. As the Commission has pointed out, where the law provides for subjective tests - either in a fault element or in a defence - if evidence of ethnicity helps tp show the defendant's state of mind, it will be admitted. The Code's emphasis on subjective fault continues this approach.

The situation is somewhat different in the case of defences which use objective tests. However, courts have now held that ethnic background can be taken into account in the operation of objective tests, at least in the case of provocation. It is reasonable to expet the same approach in other defences which use objective tests.

The Commission did not recommend a general customary law defence for Aborigines or other ethnic groups. It did recommend a partial excuse based on customary law which would reduce murder to manslaughter. The Committee will consider that recommendation when it come to the law of homicide.

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Australian Law Reform Commission, *The Recognition of Aborignal Customary Laws*, Report 31. v1, paras, 413-427; Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57, paras, 8.29-34 cf paras 8.37-38 which moves away from a recommendation to require courts to have regard to cultural values in determining reasonableness to incorporating such values through more general community education. This is not consistant with the approach taken in the Customary Law Report nor with the approach taken by the courts. The relevant law on objective tests is set out in the ALRC Report on *The Recognition of Aborignal Customary Law* paras 421-425. Since publication of that Report, the High Court has ruled that for provocation, ethnicity may be taken into account in assessing the gravity of the provocation but not in assessing the power of self-control of the ordinary person, *Stingel* (1990) 97 ALR 1, 8-15

PART 4 – EXTENSIONS OF CRIMINAL RESPONSIBILITY

401. Attempt

A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence.

401.1 For a person to be guilty of attempting to commit an offence, the person must

- carry out conduct that is more than merely preparatory to the commission of the offence attempted; and
- have intention or knowledge as a fault element in relation to each physical element of the offence attempted.

401.2 The question whether conduct is more than merely preparatory to the commission of the offence attempted is one of fact.

401.3 A person may be found guilty of an attempt to commit an offence even though commission of the offence attempted was impossible.

401.4 A person may be found guilty of an attempt to commit an offence even though he or she actually committed the offence attempted and, if found guilty, cannot be subsequently charged with the completed offence.

401.5 Any defences, procedures, limitations or qualifying provisions that are applicable to an offence apply also to the offence of attempting to commit that offence.

401.6 This section does not apply to an offence under section 402 (complicity and common purpose) or 405 (conspiracy).

PART 4 — EXTENSIONS OF CRIMINAL RESPONSIBILITY

401. Attempt

The Code provides that a person who attempts to commit an offence is guilty of attempting to commit that offence. This is contrary to the recommendation of the Gibbs Committee that the offender be found guilty of the offence itself(see s.7C Draft Bill). The result of the Gibbs clause would be that a person who attempts to kill another but fails would be guilty of murder. The Committee believes the distinction between the attempt and the completed offence is significant and should be reflected both in the verdict and the sentence.

401.2 Proximity

The proper test for determining when a course of conduct has progressed far enough to warrant liability for attempt has been controversial in both Griffith Code and common law jurisdictions. Tests such as "unequivocality", "substantial act", "acts of perpetration rather than preparation" and "the last act rule" have been debated in the cases and literature. The Committee selected the "more than merely preparatory" test which catches cases where D has the necessary fault element and has taken a step beyond mere preparation towards the perpetration of the offence. One submission criticised the proposed test for being too vague. Obviously, there will be cases where the distinction between preparation and perpetration will be difficult. The Committee believes that the best solution to this problem is to leave it to the jury (s.401.2). On this point, however, the Committee wished to record its disagreement with *Jones* [1990] 1 WLR 1057 insofar as it implied that a person who, with intent to murder V and escape to Spain, was not proximate under the Committee's recommended test even where he obtained a gun, shortened it to facilitate concealment, donned a disguise and while armed and carrying Spanish money, lay in wait for his victim to arrive.

The Committee considered and debated the "substantial step" test advocated by, for example, the US Model Penal Code and Professor Glanville Williams, "Wrong Turnings on the Law of Attempt" [1991] *Crim LR* 416. This test could include acts of preparation and was rejected as too broad. The Committee believes that some step towards the perpetration of the offence is essential.

The test adopted follows a number of authorities and law reform bodies: English Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Report No 102* (1980) at paras 2.48-2.49 and s.1(1) of the Criminal Attempts Act (UK) 1981; Law Reform Commission of Canada, Report No. 31, *Recodifying Criminal Law* (1987) at 45; Gibbs Committee, para 31.12-13, s.7C Draft Bill.

The Committee was aware of the difficulties that exist with the Griffith Code definition of attempt, and the artificial distinction drawn: see *Chellingworth* [1954] QWN 35. The formulation recommended by the Committee accords

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with the recommendations of the Murray Code Review and the O'Regan Code Review.

> The Committee considered and rejected a clause which would have read. "In order to be regarded as more than merely preparatory, conduct must be strongly corroborative of the criminal intention with which it was done". Similarly, the Committee considered and rejected the additional test, currently contained in s.321N(1) of the Victorian Crimes Act, that the conduct must be "immediately and not remotely connected with the commission of the offence".

401.1 and 401.2. Fault

The Committee accepted that the starting point for attempt is that the accused must act intentionally or knowingly with respect to each physical element of the offence attempted.

The Discussion Draft had included recklessness as a fault element for attempt where recklessness would suffice for the fault element of the completed offence. This represented a shift from the position in the Griffith Codes, where intent is always required and recklessness will not suffice. The position at common law is unclear, see *Alister* (1984) 58 ALJR 97 cf *Giorgianni* (1983) 156 CLR 473.[1] Several submissions opposed this proposal, principally on the basis that purposiveness is the essence of attempt. Secondly, it was said that to extend the extensions of criminal responsibility even further by allowing recklessness - as the Committee had done generally in Part 4 - was going too far. The Committee accepted these criticisms and deleted recklessness from attempt, complicity and incitement.

The Committee decided that it should be possible to commit an attempt by an omission, so long as the circumstances are such that the Code permits omissions to be treated as criminal in general. See the English Law Commission, *Attempt* (para 13.46) and the Gibbs Committee recommendations (para 21.37-31.38, s.7C(5)) to the same effect. The use of "conduct" to achieve this result follows the Victorian provision (Crimes Act, s.321N) and the course advocated at the Brisbane Conference. See too Moloney, "Attempts" (1991) 15 *Crim. LJ* 175 at 179. It follows that it should be possible, in the appropriate circumstances, for a person to be guilty of attempting to commit an offence, the conduct element of which is constituted by an omission.

It is possible to attempt strict and absolute liability offences but intent or knowledge will have to be shown. This codifies the existing position, see *Mohan* [1976] QB 1.

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1 The question is a vexed one (see review of the authorities and discussion in Moloney, "Attempts". The difficulties are well illustrated by the history of the English codification effort on point. When the English Law Commission issued its Working Paper, it proposed that consequences and circumstances be treated differently when it came to the mental element of attempt (English Law Commission, Working Paper No 50, *Inchoate Offences: Conspiracy, Attempt and Incitement*, (1973) at para 89). It proposed that the mental element of attempt be intention as to consequences and recklessness as to circumstances. But the Report of the Commission rejected that proposal as being unduly complex (English Law Commission, *Attempt*, at para 2.12ff citing Buxton, "Inchoate Offences: Incitement and Attempt" (1973) *Crim LR* 656). It recommended that there be no such distinction and that intention be required as to all elements of the offence. Indeed it went so far as to say that, contrary to its report on the general principles of criminal law, "intention" in relation to attempts did not include the situation where the accused had no doubt that the event would happen in the ordinary course of events. After some debate, the Criminal Attempts Act, 1981 enacted a requirement of intention, but it appears that the wording was insufficient to achieve the desired result (*Khan* [1990] 1 WLR 813). Because of the doubt surrounding the meaning of the words eventually enacted, the English Law Commission recommended initially that the wording of the legislation be changed so as to make it clear that recklessness as to circumstances did not suffice for attempt (*Report No 143, Codification of the Criminal Law* (1985) at para 14.30).

The Law Commission was criticised for this and decided to allow recklessness to the extent allowed in the substantive offence:

"We ourselves have no doubt that the criticisms ... reflect widely held social judgments about the need to protect potential victims against certain types of drunken and violent offender. We find the ... criticisms persuasive ... [The] distinction [between circumstances and consequences] may occasionally be difficult to apply. We are prepared to tolerate the difficulty because, in the mainstream cases where the rule is likely to operate, namely, rape and obtaining property by deception, the rule appears to work well." (English Law Commission, *A Criminal Code for England and Wales*, at para 13.4 and s.49(2) English Draft Code).

The Mitchell Committee recommended that recklessness should suffice - but by "recklessness" it did not mean the mere foresight of the possibility that, for example, a sexual partner did not consent to the act - it required proof of advertence to a "high likelihood" that

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there was no consent, at 296. The NZ Crimes Bill 1989 says that recklessness as to a circumstance suffices where it would suffice for the completed offence. The Gibbs Committee Draft Bill refers to intent (s.7C) but this must be understood in light of its definition of intent to include foresight of probability. Goode, "*Discussion Paper : The Law of Attempt*", (1991) suggested that the test should be whether or not the accused intended to take the risk. That proposal attracted little support.

401.3 Impossibility

The Committee took the view that impossibility arising by reason of matters of fact or law should no longer be a bar to conviction. The Committee agreed with the Gibbs Committee proposed s.7C(2).

As a matter of consistency, the same rule also applies to conspiracy and incitement (see ss. 404.2 and 405.3.)

401.4 Merger

The Committee debated the doctrine of merger at length. The doctrine of merger is an ancient doctrine of the common law which turns on the (even more ancient) distinction between a felony and a misdemeanour. It therefore has no application where that distinction has been abolished — as it will be in this Code. The doctrine of merger says that where the same facts constitute both a felony and a misdemeanour, the misdemeanour "merges" into the felony and hence, for all intents and purposes, disappears (See Fisse, Howard's Criminal Law, (1991) at 415). This is important in the law of attempt because an attempt was a misdemeanour at common law. It followed that, if an accused was charged with attempting a felony, and it was shown that he or she had completed the felony, the attempt misdemeanour was "merged" in the completed felony. Therefore, the accused could not be convicted of the attempt.

What authority there is in Australia holds that the doctrine applies in those jurisdictions which retain the felony/misdemeanour distinction (*Welker* [1962] VR 244). Section 401.4 substantially follows s.422(2) and (3) of the Victorian Crimes Act. Those provisions relevantly state:

> Where on the trial of a person on indictment...for attempting to commit an offence...it appears that the facts in evidence amount in law to the completed offence, the person shall not for that reason be entitled to be acquitted of the offence charged and, subject to subsection (3) shall not be liable to be prosecuted afterwards for the completed offence...the trial judge may if he thinks fit in his discretion discharge the jury from giving any verdict and direct the person to be presented for the...completed offence.

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The Committee observes that the latter part of the provision is inappropriate in that the DPP (or equivalent prosecuting authority) must retain the ultimate discretion whether or not to prosecute. Nevertheless, the Committee is of the view that, if it is said that the accused may be convicted of the attempt notwithstanding that the facts show a completed offence, there may be circumstances in which it is unfair to convict the accused on a basis other than that on which he or she was prosecuted. The principle adopted by the Committee is that an accused person should not be convicted of a more serious offence than that with which he or she has been charged, unless he or she is on notice that there is a risk of that result. If unfairness does arise, the correct course is for the trial judge to discharge the jury from giving a verdict and to allow the DPP to consider whether to prosecute subsequently for the completed offence.

401.5 Rules applicable to substantive offence

The Code provides that special rules applicable to the completed offence should also apply to the attempt. The word "defences" is added to take account of *Beckwith* (1976) 135 CLR 569.

Penalty

The Committee noted that different positions were taken on the maximum penalty for attempt. The issue of maximum penalties generally was deferred for separate consideration.

The Committee considered the question whether the attempt offence should be limited to serious (or indictable) offences. There are strong arguments for this position (see, for example, Dennis, "The Criminal Attempts Act 1981" [1982] *Crim LR* 5). At common law, it was doubtful (at best) whether attempt to commit a summary offence was available (see, for example, Smith and Hogan, *Criminal Law*, (1978) at 248 and *Kruger* (1977) 17 SASR 214 at 219). In some jurisdictions (eg South Australia), it appears that attempt to commit a summary offence became an offence only by passage of legislation (s.32 of the Acts Interpretation Act 1915 (SA), now s.270a of the Criminal Law Consolidation Act (SA), *Heffernan v Richardson* [1946] SASR 201 at 209-210). The English Law Commission recommended that the general offence of attempt should cover summary offences -but that recommendation was not accepted by the British Government (Attempt, at para 2.105). As a result, the codifying legislation limited the charge of attempt to indictable offences or offences triable by indictment (s.1(4), 4(1)(c) Criminal Attempts Act 1981 (Eng)). This is now the case also in Victoria (s.321M Crimes Act 1958) and Western Australia (s.552 Criminal Code).

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Nevertheless, the Committee decided that the crime of attempt should extend to summary offences. The main consideration was the expansion in the seriousness of offences which are classified as summary, as resource based arguments impact on the court system and jurisdictional limits are raised.

The Committee did not favour a defence of abandonment, cf s.5.01(4) US Model Penal Code. Some have suggested that this position is counterproductive in that the law should encourage persons bent on crime to desist from carrying their efforts on to completion. An offender has nothing to gain from stopping. The contrary argument is that the offender, by going so far as to breach the attempt test, has already acted on his or her criminal intent to an extent which warrants the intervention of the law. To recognise some "defence" of desistance or abandonment implies that a crime already committed is not a crime at all. Abandonment may be relevant to sentence, where some fuller enquiry might be appropriate as to whether there was a genuine change of heart - or merely a more realistic assessment of the chances of success. The English Law Commission concluded that the arguments were evenly balanced and that, as a result, the case for a change in the law had not been made out, *Attempt* (at paras 31.41-31.55). The Gibbs Committee adopted the position of the Law Commission.

402. Complicity and common purpose

A person who aids, abets, counsels or procures the commission of an offence may be dealt with and punished as a principal offender.

402.1 A person may only be found guilty of aiding, abetting, counselling or procuring the commission by another person of an offence if his or her conduct did in fact aid, abet, counsel or procure the commission by that other person of that offence, and the first-mentioned person

Complicity

- intended that his or her conduct would aid, abet, counsel or procure the commission of any offence of the type committed by the other person; or

Common Purpose

- intended that his or her conduct would aid, abet, counsel or procure the commission of an offence and was reckless about the commission of the offence (including its fault elements) in fact committed by the other person.

402.2 A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, he or she

- terminated his or her involvement; and
- took all reasonable steps to prevent the commission of the offence.

402.3 A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even though the principal offender has not been prosecuted or found guilty provided that the commission of the principal offence is proved.

402. Complicity and Common Purpose

The Code retains the traditional formula of "aid, abet, counsel or procure". Despite some difficulties, the meaning of the words is well understood both in Griffith Codes (except for "abet" which is not used) and common law jurisdictions. The Committee preferred the traditional formula to the Gibbs Committee formula of being "knowingly involved" in the commission of an offence. The Committee concluded that such a formula would add little in substance. Moreover, it is much more open-ended than the traditional formula. This means that it is less certain than is appropriate for a general provision defining the ambit of criminal responsibility in a new Code.

The Committee noted Gillies' (reference) criticism of the current law that the most trifling act of encouragement or assistance sufficed to attract responsibility for complicity. A possible formula is whether D's acts "substantially and/or materially" contributed to the commission of the principal offence. In the result, however, the Committee decided not to adopt such a formulation.

Section 402.1 was redrafted to make the relationship between the physical element and the fault element clearer.

> On the vexed question of the causation requirement in complicity (see Dressler, *Understanding Criminal Law* (1987) at 419; Smith, "Aid, Abet, Counsel or Procure" in Glazebrook (ed), Essays in Honour of Glanville Williams (1978) at 120; Smith, "Complicity and Causation" [1986] *Crim LR* 663]. The Committee was not persuaded to enter this debate.

402.1 Fault elements

The mental element of complicity at common law required proof of "knowledge of the principal's intended or contemplated act (including knowledge of any specified fault on the part of the principal in relation to the results of the act or in the form of an ulterior intention) plus the specified intention to participate in such acts." (see Dennis, "The Mental Element for Accessories" in Smith, (ed), *Criminal Law: Essays in Honour of JC Smith* (1987) at 61).

The Committee considered what role, if any, recklessness should play in the mental element of complicity. Similar issues arise in the law of attempt (see s.401.1 and commentary). The leading High Court case on this issue is *Giorgianni* (1985) 156 CLR 473. The question was whether D was (or should) be guilty of complicity where he or she was reckless as to one or more of the elements of the principal offence. Fisse takes the view that *Giorgianni* requires respectively, knowledge and intention, and that recklessness will not do. However, he argues that the mental element should encompass any situation in which D "recklessly or intentionally promoted the principal offence actually committed by D" (*Howard's Criminal Law*, (1991) at 330-333, 343). On the

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other hand, s.2.06(3) of the US Model Penal Code requires proof that D's purpose is to promote or facilitate the commission of the offence by the principal offender.

402.1 Common Purpose

The Discussion Draft included recklessness as a fault element for complicity. For the reasons outlined in relation to attempt, recklessness has also been deleted from complicity. This had implications for the common purpose doctrine. In the Discussion Draft, the Committee had echoed concerns about the width of the existing common purpose rule, extending D's liability to offences foreseen as possible by the co-offender which D foresaw as possible. It was argued that it would be unjust to allow recklessness for complicity and to allow common purpose. Therefore the Committee had proposed to abolish the common purpose rule. Submissions went both ways on the issue. With the abolition of recklessness generally from complicity, it was decided to restore common purpose in a modified form based on the general test of recklessness used in the Code (s.203.3), namely, foresight of a substantial and unjustifiable risk that another offence beyond the one agreed would be committed. Thus a person who aids another to commit an armed robbery will also be guilty of murder if the other person commits murder and the first person had foreseen a substantial risk of that occurring, and it was unjustifiable to take that risk.

The principal authority on common purpose is *Johns* (1980) 143 CLR 108-but see also *Miller* (1980) 32 ALR 321]. There is a second arm to this where the offence is authorised by D as an action which the principal offender may take in the event that it proves to be necessary and expedient. The Privy Council has expanded the ambit of the second arm of the definition by apparently eliminating the requirement of authorisation, see *Chan Wing Siu* [1985] 1 AC 168 and *Hui Chi Ming* [1991] 3 All ER 897. In *Britten and Eger* (1988) 36 A Crim R 48, a majority of the South Australian Court of Criminal Appeal held that the former case had changed the law in *Johns*.

An example of the difficulty of the existing law may be illustrated by the recent High Court case of *Davis* (1992) 66 ALJR 22. *Davis* concerned complicity in possession of a prohibited drug with intent to sell or supply. Only McHugh J dealt with the substantive issue. He said: "The Crown must prove, therefore, that a person alleged to be an aider had knowledge of the intention of the principal to sell or supply the drug." He then quoted a passage from *Giorgianni* which says that recklessness is not sufficient for complicity. That accords with the Committee's understanding of the law above. But what of the common purpose rule? That says that D is responsible for the commission of an offence which

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is authorised or is foreseen as a possible outcome of the undertaking which is the subject of the common purpose. In *Davis*, assume that the question was whether D and her friend were engaged in a common enterprise (possession only) in which D foresaw the possibility that X would be in possession with intent to sell. If she did foresee this possibility, the restriction on recklessness for complicity in *Giorgianni* would become meaningless. Section 402.1 would still allow conviction but only if D was aware of a sustantial risk of X intending to sell and it was unjustifiable to take that risk.

402.2 Disassociation

The Discussion Draft only required D to make a reasonable effort to prevent the commission of the offence. In response to submissions, this was changed to require D to take "all reasonable steps to prevent the commission of the offence". What will count as taking all reasonable steps will vary according to the case but examples might be discouraging the principal offender, alerting the proposed victim, withdrawing goods necessary for committing the crime (eg a getaway car) and/or giving a timely warning to an appropriate law enforcement authority. The models for this provision are s.2.06(6)(c) of the US Model Penal Code and s.8(2) of the Western Australian Code. A similar defence exists at common law, see *Croft* [1944] KB 195; *Beccara and Cooper* (1975) 62 Cr App R 212.

403. Innocent agency

A person is guilty of an offence if, having the required fault element in relation to each physical element of the offence, he or she procures another person to engage in conduct which (whether or not together with any conduct engaged in by the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it himself or herself.

404. Incitement

A person who urges the commission of an offence is guilty of the offence of incitement.

404.1 For a person to be guilty of incitement, the person must intend that the offence incited be committed.

404.2 A person may be found guilty of incitement even though commission of the offence incited was impossible.

404.3 Any defences, procedures, limitations or qualifying provisions that are applicable to an offence apply also to the offence of inciting the commission of that offence.

404.4 This section does not apply to an offence under section 401 (attempt), 405 (conspiracy) or this section.

403. Innocent agency

The doctrine of "innocent agency" is well known to the criminal law. The Committee drew on s.2.06(2)(a) of the US Model Penal Code and s.7 of the WA Code. The Committee decided that it was not necessary that D cause the innocent agent to commit all the elements of the offence. So, for example, if D assaults V while an innocent agent steals from V, then D will be guilty of robbery. D has committed the assault element personally and has committed the theft element via an innocent agent. The words "whether or not together with any conduct engaged in by the procurer" were added to make this clear. The word "innocent" was deleted to avoid the necessity for P to prove that the agent was innocent. The section now overlaps with complicity. This makes no difference to D's liability since, if the agent was not innocent, D would be guilty by reason of complicity.

> The law on innocent agency and proposals for reform are comprehensively discussed by Alldridge, "Innocent Agency" (1991) 2 *Criminal Law Forum* 45. Alldridge argues that there should be no provision for innocent agency in the Code; if one is included, the US Model Penal Code model is acceptable. The Committee took the view that it would not be helpful for the Code to be silent on this matter.

404. Incitement

In the Discussion Draft, the Committee followed the Gibbs Committee Draft Bill, s.7B(1) in merely specifying "incitement" rather than spelling out the common law of "counsels, commands or advises" (Glanville Williams, *Criminal Law: The General Part* (1961) at 252). There are differing verbs employed in this area with little consideration of what the differences, if any, may be. The US Model Penal Code uses "encourages or requests" (s.5.02(1)). Section 7A of the Commonwealth Crimes Act currently uses "incites to, urges, aids or encourages". The English Draft Code (s.47(1)) and the Victorian Crimes Act (s.321G(1)), like the Gibbs proposal, use "incite" only. The Canadian Draft Code collapses complicity and incitement, but refers to "advises, encourages, urges, incites". The Committee was concerned that some courts have interpreted incites as only requiring causing rather than advocating the offence. The Committee decided that the word "urges" would avoid this ambiguity while capturing the essence of the offence.

The WA Code now contains an offence of incitement (s.553) following the recommendations of the WA Murray Report at 584. These provisions are consistent with the wording in s.404 except in relation to the applicable fault element, detailed below. Experience in WA since the offence was enacted in 1987 shows that incitement is rarely charged but that circumstances may arise that are so serious that an appropriate offence is required.

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The Committee did not recommend a provision (like that in s.321G of the Victorian Crimes Act) which requires that the incitement be acted on.

The Committee examined the issue of desisting or abandonment, but resolved that incitement resembled attempt more closely than complicity. Like attempt, but unlike complicity, liability for incitement is established prior to the commission of the principal offence and irrespective of whether the principal offence is consummated. It was therefore inappropriate to provide for a defence of desisting.

404.1 Fault elements

Consistent with the decisions in relation to attempt and complicity, recklessness was deleted. In addition, the Committee was concerned that recklessness in incitement was too great a threat to free speech.

404.4 Associated offences

The Committee decided that it should not be possible to be guilty of inciting to incite, inciting to conspire, or inciting to attempt. There has to be some limit on preliminary offences. This follows the position taken by the Gibbs Committee (paras 18.41-18.46) rather than that taken by the English Law Commission. The Gibbs Committee did not think it necessary to include a provision to achieve the abolition of incitement to incite in its Bill (s.7B). The Committee considered that this was necessary in a Code.

However, there will be no bar to a charge of attempting to incite. The charge exists at common law (see *Crichton* [1915] SALR 1 and the English authority cited in Meehan, *The Law of Criminal Attempt* (1984) at 201, note 392). This is primarily designed to deal with the situation in which a communication amounting to an incitement does not, for some reason, reach its intended recipient. This is consistent with s.5.01(3) US Model Penal Code, and the English Law Commission, *Attempt*, para 2.121.

405. Conspiracy

A person who conspires with another person to commit an offence punishable by imprisonment of 2 years or more or by a fine of $100,000 or more is guilty of conspiracy to commit that offence.

405.1 For a person to be guilty of conspiracy

- the person must have entered into an agreement with any other person or persons; and
- the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
- the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

405.2 A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person

- withdrew from the agreement; and
- took all reasonable steps to prevent the commission of the agreed offence.

405.3 A person may be found guilty of conspiracy to commit an offence even though

- commission of that offence was impossible; or
- the only other party to the agreement is a body corporate; or
- the only other party to the agreement is not criminally responsible on account of age or mental impairment; or
- the only other party to the agreement is a person for whose benefit or protection the offence exists; or
- all other parties to the agreement have been acquitted of the conspiracy unless, in the circumstances of the case, a finding of guilt would be inconsistent with their acquittal.

405.4 A party to an agreement who is a person for whose benefit or protection the offence exists cannot be found guilty of conspiracy.

405. Conspiracy

The crime of conspiracy has attracted a great deal of criticism.

The Committee debated at some length the question whether or not the crime of conspiracy should be retained. It particularly had in mind the criticisms made of the existence of the offence at the Brisbane Conference by Gillies ("Secondary Offences and Conspiracy" (1991) 15 *Crim LJ* 157 at 161-163) and others. It considered that there are some cases where only a conspiracy charge adequately reflects the criminality of the conduct. The Committee did conclude, however, that limitations should be imposed.

The first limitation concerns the scope of the offence, particularly in relation to acts which are not criminal themselves. Section 405 limits the conspiracy to agreements to commit other criminal offences. The Committee took the view that if this left any gaps in the law, these were of minor significance compared with the principle that a person should not be guilty of a crime merely by reason of an agreement to do something not of itself criminal. Any gaps should be filled by the appropriate substantive law.[1]

The Committee considered whether conspiracy to commit a minor offence should be an offence. Some argue that there is too much really serious crime now classified as summary to warrant that kind of restriction. Others argue that conspiracy is a serious offence which should be restricted to serious offences. In the end, the Committee decided that conspiracy should be limited to offences carrying a penalty of two years imprisonment or a fine of $100,000.[2] Submissions from the police argued that this limitation was too severe, instancing firearms, liquor licensing and traffic offences. The Committee remained of the view that conspiracy should be reserved for more serious offences.

As a further indication of its concern that the crime of conspiracy has been abused, or has led to abuse, the Committee agreed that there should also be procedural restrictions on conspiracy charges. The charge should be subject to the consent of the DPP (or the equivalent authority), see s.405.7. In response to submissions, s.405.5 empowers the court to dismiss the conspiracy count; in the Discussion Draft this had merely been a power to stay the conspiracy count. The most likely use of this provision will arise when the substantive offence could have been used, a criticism repeatedly voiced by the courts (see, for example, *Hoar* (1981) 148 CLR 32. However, the Committee believes that the decision about further charges should be left to the prosecution, cf Gibbs Committee, s.7F).

These limitations on conspiracy charges drew some criticism, particularly from police and prosecutors. In particular, it was put to the Committee that the abuses of conspiracy charges with which the Committee was concerned were a thing of the past. The Committee concluded that repeated criticisms by the courts over a long period justified the limitations imposed. A relatively recent example is provide by *Moore* (1988) 1 QdR 252, in which an accused was

405.5 A court may dismiss a charge against a person of conspiracy if it considers that the interests of justice require it to do so.

405.6 Any defences, procedures, limitations or qualifying provisions that are applicable to an offence apply also to the offence of conspiracy to commit that offence.

405.7 The consent of the Attorney-General or the Director of Public Prosecutions is necessary to the commencement of proceedings for an offence of conspiracy.

405.7.1 This does not prevent a person being arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

acquitted on appeal, and in which McPherson J said: "Indeed, to suggest conspiracy as the explanation of such conduct would be risible were it not fraught with such injurious consequences for an accused on charges as serious as these ..." (at 258-9).

Section 405.1 dot points one and two were redrafted to more clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement.

1 The Committee noted that, in England and in Victoria, conspiracy to defraud had been exempted from this commonly accepted limit on the common law (see s.5(2) Criminal Law Act 1977 (UK) and s.321F(2) Crimes Act 1958 (Vic)). On the English legislation, see *Ayres* [1984] AC 447). The question whether abolition of common law conspiracy to defraud would leave an unacceptable gap in the criminal law has recently been the subject of comprehensive treatment by the English Law Commission, *Working Paper No 104, Criminal Law: Conspiracy to Defraud,* (1987).

The Committee did not debate Gillies' proposed alternative restrictions that either (a) conspiracy should be limited to cases sufficiently proximate to the commission of the offence to satisfy the attempt proximity requirement; or (b) conspiracy should be limited to cases in which the agreed offence was committed.

2 Cf s.321 Crimes Act 1958 (Vic) which extends conspiracy to summary offences.

405.1 Fault elements

The Committee agreed that intention was required and that recklessness would not suffice. This is in accordance with the proposals of the Gibbs Committee, (s.7D(1)(c)), and the common law (*Gerakiteys* (1983) 153 CLR 317). The concept of recklessness is foreign to an offence based wholly on agreement.[1]

The requirement of intention to commit the crime which was the object of agreement (s.405.1 dot point two) will prevent conviction for conspiracy where, for example, the only parties to the agreement are the accused and an agent provocateur.

The Committee discussed the problem of "wheel" and "chain" conspiracies raised by such decisions as *Meyrick and Ribuffi* (1929) 21 Cr App R 94. The Committee believes that proof of intent to enter an agreement involves proving that the accused intended to become a party to an agreement comprehending other parties, not all of whom might be known to D.

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1 This proposal is also in accord with Gillies, "Secondary Offences and Conspiracy" (1991) 15 *Crim LJ* 157 at 164, and the following common law authorities: *O'Brien* (1954) 110 CCC 1; *Freeman* (1985) 3 NSWLR 303; *Nirta* (1983) 51 ALR 53; it is contrary to s.48(2) English Draft Code and s.321(2)(b) Crimes Act (Vic).

Overt Act

Section 405.1 also requires that the accused or at least one other party to the agreement committed an overt act pursuant to the agreement. The reason for this was the Committee's view that the simple agreement to commit a criminal offence without any further action by any of those party to the agreement was insufficient to warrant the attention of the criminal law. The requirement of overt act is common in American law, see s.5.03(5) US Model Penal Code. The requirement was criticised in some submissions on the basis that it is vague. The Committee understands that the requirement works well in the American jurisdictions which have it.

405.2 Disassociation

The Committee agreed that, if there was a requirement of an overt act, it was impossible to resist the conclusion that there should be a defence of withdrawal or disassociation, for there would be time between the agreement and the commission of the overt act for that to take place. Unlike attempt and incitement, the disassociation here comes before there has been a criminal act. In that case, the policy encouraging people to desist from criminal activity prevails. As for complicity, the requirement was changed from "making a reasonable effort" to taking "all reasonable steps" to prevent the commission of the offence agreed on. Again, what amounts to taking all reasonable steps will vary from case to case. Examples might include informing the other parties of the withdrawal, advising the intended victims and/or giving a timely warning to the appropriate law enforcement agency.

Parties issues

Conspiracy raises a number of issues which might be described as issues related to the "parties" to the agreement.

No protection is provided for spouses. Clearly a husband and wife can be guilty of conspiring with each other. Marital immunity is outdated; any objections to husband/wife conspiracies are objections which go to the nature of the conspiracy offence itself; see *Mawji* [1957] AC 126; *Kowbel* [1954] SCR 498 and discussion by the Gibbs Committee at para 39.3. Some Griffith Codes are also outdated on this issue: see s.33 Queensland Code (recommended for repeal by O'Regan, p5) and s.297(2) Tasmanian Code, both taking the common law position.

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Section 405.3 makes it possible for a corporation to be party to a conspiracy. It is well established at common law that a company can be guilty of conspiracy, see *ICR Haulage* [1944] 1 KB 551; *Simmonds* (1967) 51 Cr App R 316.[1]

Section 405.3 also provides that a person may be found guilty of conspiracy even though other parties to the alleged agreement have been acquitted of the conspiracy, unless a finding of guilt would be inconsistent with those acquittals This decision is in accord with *Darby* (1981) 148 CLR 668 and s.321B Crimes Act 1958 (Vic). The courts must not be hindered from examining the merits of what may be a quite complex situation by rules about formal inconsistencies on the face of the record, see Gibbs Committee, Ch 47.

The Committee decided that it should be possible for a person to commit a conspiracy even where the only other party to the agreement is a person for whose benefit the offence exists (see s.405.3). An example would be an agreement between a child under the age of consent and an adult to commit the offence of unlawful sexual intercourse with the child. On the other hand, the Committee decided that the Code should provide that a person who is the protective object of an offence cannot be found guilty of a conspiracy to commit that offence (see s.405.4).

1 The Code does not deal with difficult questions about conspiracies between companies with interlocking directors, or the case where the individual accused is the relevant "controlling officer" of the corporation, see *McDonnell* [1966] 1 QB 233. The most comprehensive summary of these problems is to be found in Goode, *Criminal Conspiracy in Canada*, (1975) at 109-134.

Accessory after the fact

This topic will be dealt with in a separate chapter as a substantive offence.

PART 5 – CORPORATE CRIMINAL RESPONSIBILITY

501. Bodies corporate

This Code applies, with any necessary modifications, to bodies corporate in the same way that it does to natural persons. A body corporate may be found guilty of any offence, including one punishable by imprisonment.

501.1 A physical element of an offence committed by a servant, agent, employee or officer of a body corporate acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority must be attributed to the body corporate.

501.2 If intention, knowledge or recklessness is a required fault element of an offence, that fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

501.2.1 The means by which this test may be satisfied include proving

- that the board of directors of the body corporate intentionally, knowingly or recklessly engaged in that conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence ;
- that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in that conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence but the test will not be satisfied if the body corporate proves that it exercised due diligence to prevent that conduct
- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. Factors relevant to this issue include

PART 5 — CORPORATE CRIMINAL RESPONSIBILITY

501. Bodies corporate

Recent history has emphasised the need for corporations to be subject to the criminal law. Critics of the existing law have cited recent major disasters — the Air New Zealand Mount Erebus crash, the Bhopal disaster in India, the Chernobyl explosion in what was the USSR, the Exxon Valdez oil spill in Alaska and the Zeebrugge ferry disaster — in support of arguments to reform the rules of corporate criminal responsibility. The committee has strived to develop rules which fairly adapt the general principles of criminal responsibility to the complexities of the corporate form.[1]

Criminal liability of corporations was virtually unknown until the latter half of the nineteenth century, and was in the early stages, limited to vicarious liability for strict liability offences in circumstances where a natural person would be criminally liable for the acts of his or her servant or agent.[2] With the growth and increasing importance of corporations, the criminal responsibility corporations was extended to offences involving fault elements. Examples of vicarious responsibility of corporations for offences involving mens rea in Australia date back to 1921. In *The King and the Minister for Customs v Australasian Films Limited and Anor* (1921) CLR 195, the High Court held that a body corporate may be guilty of an offence involving an intent to defraud the revenue where its servant or agent, in the course of his or her employment, had engaged in the proscribed conduct and that servant or agent, or some superior servant or agent by whose direction the conduct was engaged in, had the necessary intent.

Since 1944, corporations can also be held primarily responsible for the conduct of very senior officers, or persons to whom the particular functions of the corporation have been delegated so that they may be performed unsupervised. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company. The leading authority is *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 173.

Given the "flatter structures" and greater delegation to relatively junior officers in modern corporations, the Committee concluded that the *Tesco* test - which among other things, requires the prosecution to prove, beyond reasonable doubt, that the officer was at a sufficiently high level to be regarded as "the directing will and mind" of the corporation - is no longer appropriate.

The position under the Griffith Code seems to be even more restrictive. The original Griffith Code did not contain principles of corporate criminal responsibility. This reflects its nineteenth century origin. The effect was that corporations could not be criminally liable. However, in 1978 Queensland added s.594A to its Code making procedural provision for the prosecution of

- whether authority or permission to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate
- whether the servant, agent, employee or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

501.2.2 "Corporate culture" is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place. "High managerial agent" is a servant, agent, employee or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate.

501.2.3 If the law creating an offence specifies that recklessness is not a sufficient fault element in relation to a physical element of the offence, section 501.2.1 does not enable the required fault element to be proved by proving that the board of directors or a high managerial agent of the body corporate recklessly engaged in the conduct or authorised or permitted the commission of the offence.

501.3 The test of negligence for a body corporate is that set out in section 203.4.

501.3.1 If negligence is a required fault element of an offence, that fault element may exist on the part of a body corporate even though no individual servant, agent, employee or officer of the body corporate has that fault element if the conduct of the body corporate when viewed as a whole (that is, by aggregating the conduct of any number of its servants, agents, employees or officers) is negligent.

companies. However, it may only allow prosecution for a strict responsibility offence. One submission doubted that the position was so restrictive. At best, the situation is unclear.[3]

The Committee concluded that neither the common law nor the Griffith Codes was adequate in this area. It considered a range of proposals and recent attempts to deal with organisational blameworthiness. For example, under section 65 of the Ozone Protection Act 1989 (Cth), where conduct is engaged in on behalf of a body corporate by a director, servant or agent, both the state of mind and the conduct of the relevant person is deemed to be the conduct of the body corporate. The body corporate has a defence if it can prove, on the balance of probabilities, that it took reasonable precautions and exercised due diligence to avoid the conduct, ie if it can establish a lack of organisational blameworthiness. Two submissions favoured this approach but the Committee decided that such a general reversal of the onus of proof just because a company was charged, especially for the most serious offences (eg manslaughter), could not be justified. The Committee's objective was to develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation. The Committee believes that the concept of "corporate culture" - as defined in s.501.2.2 - supplies the key analogy. Although the term "corporate culture" will strike some as too diffuse, it is both fair and pratical to hold companies liable for the policies and practices adopted as their method of operation. there is a close analogy here to the key concept in personal responsibility - intent. Furthermore, the concept of "corporate culture" casts a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test.

It is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate. However, it would not be appropriate to adopt the reverse onus of proof as the general rule. Other than the two submissions mentioned, the response to the corporate responsibility provisions was favourable. Most of the submissions raised matters of detail.

1 On Mt. Erebus, see *Report of the Royal Commission to Enquire into the Crash on Mount Erebus, Antarctica*, of a *DC10 Aircraft Operated by Air New Zealand*. On Zeebrugge, see *UK Department of Transport, MV Herald of Free Enterprise* (1987) Report of Court No. 8974.

2 See the UK Law Commission, *Working Paper No. 4, General Principles: Criminal Liability of Corporations.*

3 The definition of "person" when used with reference to property includes corporations. That provision is designed to accommodate corporate ownership of property.

501.4 A body corporate may rely on a defence of mistake of fact under section 307 to escape liability for conduct which would, but for this sub-section, constitute an offence on its part if

- the servant, agent, employee or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts which, had they existed, would have meant that the conduct would not have constituted an offence; and
- the body corporate proves that it exercised due diligence to prevent that conduct.

501.5 Negligence or failure to exercise due diligence may be evidenced by the fact that the carrying out of the prohibited conduct was substantially attributable to

- inadequate corporate management, control or supervision of the conduct of one or more of its servants, agents, employees or officers; or
- failure to provide adequate systems for the conveying of relevant information to relevant persons in the body corporate.

501.6 A body corporate may rely on section 310 except where the other person is a servant, agent, employee or officer of the body corporate.

Section 501

Section 501 applies the Code to corporations subject to any necessary modifications. Some of those modifications are set out in s.501 itself. Others will have to be developed by the courts as this area develops.

Thus the general principles of liability, such as the definition of conduct in s.202.1 and the definitions of the various fault elements in s.203 (eg recklessness in s,203.3) apply to companies. Companies can be liable directly (eg for an omission where a statute imposes liability on the company) or indirectly through the acts of its servants and agents according to the attribution rules set out in s.501. The section provides that corporations can be found guilty of any offence, even if it is punishable by imprisonment alone. The English Draft Code (s.30(7)) restricts liability to offences punishable by a fine. This is not acceptable, see for example, VLRC, *Homicide* paras 15-21.

> The Committee has not had time to consider sanctions for corporations. There is a vast amount of literature on this. See, for example, Fisse, "Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney LR* 277.

501.1 Physical elements

Section 501.1 attributes the physical elements of the offence to the company where these elements were committed by a servant, agent, employee or officer of the company acting within the actual or apparent scope of his or her employment or his or her actual or apparent authority. This does not impose vicarious liability because liability depends also on fault as defined below.

> Fisse takes the view (common in the United States) that this ought to be limited also to those cases in which the individual acts "on behalf of the body corporate". This requirement leads to difficulties and American courts have adopted interpretations of it which strain its natural meaning. There is no such requirement in the English Draft Code, which takes a conservative approach in this area, nor in the Gibbs Committee Draft Bill (see s.4BA(1)(a)).

501.2 Corporate intention , knowledge or recklessness

This section deals with offences requiring proof of intent, knowledge or recklessness. The Discussion Draft had a separate provision for offences based on recklessness but, on reflection the Committee concluded that it was inconsistent and impractical to have different mechanisms for intent and recklessness. However, where an offence may only be committed intentionally

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or knowingly, recklessness will not suffice (s501.2.3). Where the requisite fault element is intention, knowledge or recklessness, that fault element exists on the part of the body corporate that expressly, tacitly or impliedly authorised the commission of the offence. Under s.501.2.1 that may be proved in three ways.

First, it may be shown that the conduct was performed or tolerated by the board of directors or a high managerial agent (defined as someone whose position in the company can be said to represent the policy of the company (s.501.2.2)). The test is based almost exactly on s.2.07(1)(c) US Model Penal Code. It is envisaged that this provision will be used in one-off situations where it cannot be said that there is any ongoing authorisation of the conduct. The company has a defence in the case of a high managerial agent if the company proves that it used due diligence to prevent the offence. the defence is not available in the case of the board of directors itself.

The third dot point deals with the more elusive situation of implicit authorisation where the corporate culture encourages non-compliance or fails to encourage compliance. The term "corporate culture" is defined in s.501.2.2. The rationale for holding corporations liable on this basis is that "...the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation." (See Field and Jorg, "Corporate Manslaughter and Liability: Should we be going Dutch?" [1991] *Crim LR* 156 at 159). The section extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (eg recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence.

The notion of "corporate culture" draws on Fisse, "Corporate Criminal Responsibility" (1991) 15 *Crim LJ* 166 at 173 and Fisse, "Criminal Law: The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney LR* 277 at 281ff, 286. See too the thought-provoking work done by Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) *75 Minnesota LR* 1095.

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501.3 Corporate negligence

There was some confusion about the standard for negligence in the case of corporations. Section 501 applies the general rules of the Code to companies but for the sake of clarity s.501.3 makes the application of s.203.4 explicit.

Where negligence is the requisite fault element, it is not necessary to establish that any one employee, etc was negligent. If the conduct of the company when the acts of its servants, agents, employees and officers, viewed as a whole, is negligent, then the corporation is deemed to be negligent. In some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent. This changes the common law on this point, see *R v HM Coroner for East Kent; ex parte Spooner* (1989) 88 Crim App R 10.

PART 6 – PROOF OF CRIMINAL RESPONSIBILITY

601. Burden of proof - prosecution

The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on him or her.

601.1 In this Code "legal burden", in relation to a matter, is the burden of proving the existence of the matter.

601.2 A legal burden of proof on the prosecution must be discharged beyond reasonable doubt unless the contrary intention expressly appears.

602. Burden of proof - defence

A burden of proof which is imposed on a defendant by this Code or another Act is an evidential burden only. However, it is a legal burden if the provision creating the offence or providing the defence expressly

- specifies that the burden of proof in relation to the matter is a legal burden; or
- requires the defendant to prove the matter; or
- creates a presumption that the matter exists unless the contrary is proved.

602.1 In this Code "evidential burden", in relation to a matter, is the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

602.2 A legal burden of proof on a defendant must be discharged on the balance of probabilities.

602.3 A defendant who wishes to rely on any exception, exemption, proviso, excuse or qualification provided by the provision creating an offence bears an evidential burden in relation to that matter.

602.3.1 It does not matter whether the exception, exemption, proviso, excuse or qualification does or does not accompany the description of the offence.

602.3.2 No evidential burden is on the defendant if evidence sufficient to discharge the burden is adduced by the prosecution.

602.3.2.1 The question whether an evidential burden has been discharged is one of law.

PART 6 — PROOF OF CRIMINAL RESPONSIBILITY

601. and 602. Burden of proof

One of the most hallowed and respected statements in the law is the description in *Woolmington v Director of Public Prosecutions* (1935) AC 462 by Lord Sankey of the duty of the prosecution to prove the prisoner's guilt as "the golden thread always to be seen throughout the web of the English Criminal Law". Lord Sankey stated that the principle was subject to the special rules as to sanity and "subject also to any statutory exceptions".

Although it may seem strange to include an apparently procedural issue in a chapter of the Code which deals with the general principles of responsibility, it is the combination of positive fault elements with the location of the burden of proving those elements on the prosecution that gives force to *Woolmington*. Section 601 establishes the presumption that the prosecution bears the legal burden of proving every element of the offence beyond reasonable doubt.

Where a burden of proof is cast on the defendant, that burden is evidential unless the statute imposes a legal burden on the defendant, requires him or her to prove the matter, or creates a presumption that the matter exists unless the contrary is proved. (s.602)

The evidential burden on the defendant may be discharged by pointing to evidence in the prosecution case (s.602.1). A legal burden on the defendant is on the balance of probabilities (s.602.2).

These provisions accord with the basic principles accepted in all jurisdictions. They have been reiterated by the High Court in *He Kaw Teh* (1984-5) 157 CLR 203.

The single provision in the Discussion Draft (s.601) dealing both with the prosecution and the defence burdens proved confusing. They have been split into two sections.

602.3 Exceptions

In Australia, a distinction is drawn between statutory provisions where the statute, having defined the ground of criminal liability, introduces by some distinct provision a matter of exception or excuse and, on the other hand, provisions where the definition of liability contains within it the statement of exception. In the first case, the onus lies on the defendant to prove the exception or excuse on the balance of probabilities, in the latter the onus lies on the prosecution: *Dowling v Bowie* (1952) 86 CLR 136 at 139-140; *De La Rue v Matthews* (1945) VLR 275; *Ex parte Ferguson; Re Alexander and Ors* 45 SR (NSW) 64, R v Golding (1973) WAR 5.

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Whilst Dixon C J in *Dowling v Bowie* (supra) noted that "The distinction has been criticised as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect", its acceptance has led to certainty in statutory interpretation. *He Kaw Teh* casts doubt on the weight of these authorities.

Legislatures may not consciously turn their minds to the legal effect of a proposed statutory provision, leading to uncertainty as to the intent of legislatures, which is resolved by the strict application of grammatical rules of statutory interpretation.

There have also been differences of opinion as to what onus is transferred to an accused. For example, the defence of honest and reasonable mistake under the Codes only requires the accused to put the matter in issue, and the onus is on the prosecution to negative it: *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* (1955) St R Qd 264. At common law, in offences not involving a mental element, it had been thought that the onus on the accused was persuasive: *Maher v Musson* (1934) 52 CLR 100, *Proudman v Dayman* (1041) 67 CLR at 541, until the High Court in *He Kaw Teh v The Queen* (1984-5) 157 CLR 523 aligned the common law position with that of the Code jurisdictions — (see pp. 535, 558-9, 574, 582 and 591-4). It would also appear that there is greater scope at common law to remove a case from the jury because the question of whether an evidential onus is discharged is one of law, whereas in Code jurisdictions even slight evidence would render the question one of fact for the jury.

Section 602.3 clarifies the position. The defendant bears an evidential onus regarding exceptions, etc which can be discharged by pointing to evidence in the prosecution case (s.602.3.2). Like other provisions in this chapter, there is a three year delayed operation (s.101.2). This is to permit legislatures to review its application to offence provisions such as sections 14 and 15D of the Crimes Act 1914 (Cth) and like State or Territory provisions which currently impose a legal burden.

603. Use of averment

If a person is prosecuted for an offence under a law that allows for the making of an averment by the prosecution, the prosecution must not use an averment

- to aver any fault element of the offence; or
- if the offence is directly punishable by imprisonment.

603. Use of averment

Averment provisions in some legislation permit the prosecutor to allege matters of fact in an information or complaint. The averment amounts to prima facie evidence of the matters averred. The Griffith Codes did not contain averment provisions, although the Queensland Code now does (eg s.638) and the WA Code contains deeming provisions. In the words of Dixon J in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-508, an averment provision:

> ...does not place upon the accused the onus of disproving the fact upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.

The Committee believes that averment provisions are generally inappropriate. The Code provides that the prosecution must not aver the intention of the defendant or other fault element expressed by the provision creating the offence nor may it use averments in cases where the offence is directly punishable by imprisonment.

List of Written Submissions Recieved

Ian Leader-Elliott, Senior Lecturer, Law School, University of Adelaide (Multiple submissions)

Professor I G Campbell, Law School, WA University (Mulitple submissions)

Headquarters Australian Defence Force (Legal Services Branch)

National Council of Women of Tasmania

WA Australian Bas Association

Commonwealth Director of Public Prosecutions (Multiple submissions)

Department of Industry, Technology and Commerce, Legal and Parliamentary Branch

Geoff Harders, Consultant Draftsperson

Charles Cato, Crown Prosecutor, NSW Director of Public Prosecutions Office (Multiple submissions)

NSW Police Service

Commissioner of Police, WA

Commissioner of Police, NT

NSW Law Society

Aboriginal Legal Service of Western Australia (Inc.)

WA Bar Association

Criminal Law Section, Law Council of Australia

Australian Quarantine & Inspection Service Compliance Investigation & Legal Branch

Criminal Justice Commission, Queensland

Chief Justice, Supreme Court of Tasmania

Alan V Walker, Captains Flat

Bill Purves, Crown Prosecutor, NSW Director of Public Prosecutions Office

Criminal Law Association of the Northern Territory

Commonwealth Attorney-General's Department, Criminal Law & Security Division

Australian Customs Service

Law Society of Western Australia

David Brown, University of NSW

Roman Tomasic, Head, Department of Law, University of Canberra

Chief Commissioner, Victorian Police

WA Police Department

Australian Department of Administrative Services

There were lengthy consultations between the following and members of the Committee during which comments and analysis of the Discussion Draft were provided in coinsiderable detail:

Ian Leader-Elliott
Prof Ian Campbll
Sir Harry Gibbs
Prof Brent Fisse
David Weisbrot
David Mellick
Damian Bugg
Peter Maloney