DEPARTMENT OF JUSTICE

CRITICAL CODE REFORM

ISSUES PAPER

Note: Any views or legal opinions expressed in this issues paper do not necessarily represent the policies of the Northern Territory Government or the Minister for Justice and Attorney-General.

Introduction

In October 2005, the Northern Territory Legislative Assembly passed the Criminal Code Amendment (Criminal Responsibility Reform) Act (No. 2) 2005 (the "Reform Act").

The Reform Act has a two stage effect and purpose. First, it enacts new general principles upon which persons may be held criminally responsible for their conduct. The principles substantially replicate Chapter 2 of the Commonwealth Criminal Code which enacted Chapter 2 of the Model Criminal Code developed by the Model Criminal Code Officers Committee (MCCOC), a committee of the Standing Committee of Attorneys General. The Reform Act forms the basis for a progressive reform that will require all Criminal Code offences to be re-considered and re-written either by replacement with the Model Code offences or by re drafting of the NT offences in accordance with Model Code structure and the new criminal responsibility provisions applied to them. Secondly, the Reform Act also provides for the existing manslaughter and dangerous act provisions to be repealed and replaced by reckless and negligent manslaughter offences and by offences of: recklessly endangering life; recklessly endangering serious harm, negligently causing serious harm, and dangerous driving causing death or serious harm. The unlawful sexual intercourse or gross indecency offences were also amended to apply fault standards for that offence consistent with the Model Code (and Commonwealth Code).

The second stage of the reform is now under consideration. This stage involves development of a Bill that will repeal and re-enact the offences in Part VI, Division 3 of the Code which provides for homicide, suicide, concealment of birth and abortion offences. The Bill would also enact the indecent touching offences of the Model Code to replace the current equivalent offences in the NT Code.

Offences are proposed to be reorganised into separate divisions according to the Model Code structure. For example, offences that currently sit together in Part VI Division 3 will be separated into Divisions that distinguish the fatal offences from others. Likewise, a new Part is envisaged to be created entitled "Sexual Offences" into which the rape and indecent touching offences will be placed (presently these are in a Division entitled "Assaults") and into which ultimately the sexual offences against children will also be placed (at present these are in a Division entitled "Other offences against morality").

The development of the new offences to replace the existing Part VI Division 3 requires consideration of a number of issues, particularly in relation to the crimes of murder and manslaughter which are canvassed below.

Fault Basis for Murder and Involuntary Manslaughter

The fault basis for murder varies across Australia. In the NT, consistent with the Codes of Queensland and Western Australia, the fault elements for murder (leaving aside constructive murder) are confined to an intention to kill or an intention to cause a serious non fatal injury. These fault elements also constitute the crime of murder in other jurisdictions, except for the ACT, which does not treat an intention to cause grievous harm as sufficient to constitute murder. Awareness of the likelihood of causing death (i.e. recklessness as to causing death) is a sufficient fault element for murder under the *Crimes Acts* in the ACT and NSW, the Tasmanian Code and the common law in South Australia and Victoria (see *Crabbe* (1985) 156 CLR 464 at 469-470 (*NT case prior to Criminal Code*). Awareness of the likelihood of causing grievous bodily harm is sufficient in South Australia and Victoria.

In developing the Model Criminal Code, MCCOC recommended that the crime of murder should not extend to cases in which the accused intended serious harm rather than death, unless the accused was reckless as to the risk of death. Consequently the fault elements for the Model Code crime of murder was framed in terms of intention to cause or recklessness as to death. MCCOC framed manslaughter in terms of intention to cause or recklessness as to causing serious harm as well as providing for an additional homicide offence of dangerous conduct causing death, in essence a negligent manslaughter offence.

The new manslaughter offence for the NT created by the Reform Act provides for fault standards of recklessness or negligence as to death. It reinstates into the law of the Northern Territory the crime of manslaughter by criminal negligence consistent with the other States and the ACT. As a consequence the crime of murder is proposed to be drafted consistent with the current fault elements for that crime, that is, intention to kill or an intention to cause serious harm (as defined by the Reform Act).

Constructive Murder

The common law recognised two forms of constructive murder, felony murder and escape murder both involving an unintentional killing by an act of violence. The common law rules have been abolished in all jurisdictions and replaced by statutory offences with varying scope in all jurisdictions, except the ACT and under the Commonwealth Code. Under the present NT Code, the crime of constructive murder is committed where death is caused by an act done when committing or attempting to commit a prescribed offence, provided that the act is of such a nature as to be likely to endanger human life. The prescribed offences are:

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

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

(c) the offence of escaping from lawful custody.

The constructive murder rule also applies to circumstances where death is caused by administering any stupefying or overpowering substance or by stopping the

breath of any person for the purpose of facilitating one of the prescribed offences or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence.

MCCOC recommended against the retention of constructive murder and it does not feature in either the Model Criminal Code or the Commonwealth Code. You would be aware that it has been the subject of criticism by law reform commissions as an anomaly within the law of homicide because it permits a person to be convicted of murder without consideration of whether or not they intended or foresaw the particular consequences of their actions. It was abolished in England in 1957 and it has been found to be unconstitutional in Canada.

The question is whether there should be retention of this form of murder and if so what should be its scope? It may be noted that there is wide jurisdictional variation as to the associated offences that trigger constructive murder. These range from in NSW a threshold offence of 25 years, in Victoria an offence that must carry more than 10 years and must include violence as a necessary element, to the other end of the scale in South Australia where no particular grade of seriousness is required.

Voluntary Manslaughter – the partial defences of Provocation, Diminished Responsibility and Coercion

The new Part IIAA criminal responsibility provisions in the Reform Act do not contain the defences of provocation, diminished responsibility or coercion (which is a uniquely NT Code defence discussed separately below) presently provided for in the NT Code. This is consistent with the Commonwealth and ACT Code enactments of the Model Criminal Code.

Provocation

At common law provocation is a partial defence to murder which recognises that there may be circumstances where a person is provoked to the point where he or she suffers a loss of control resulting in the death of another person. Provocation reduces murder to manslaughter even though the actual intent of the accused was to kill the victim.

The test for provocation contains both an objective and subjective component. *Anything* said or done by one person in the presence of another will constitute provocation **if**:

(a) it could have deprived an ordinary person of self control to such an extent as to form an intention to kill or do grievous bodily harm;

(b) the provocative conduct did in fact deprive the accused of self control.

The objective limb limits the availability of the defence by providing a uniform minimum level of self control which must be observed by members of the community. Under the law in the jurisdictions that retain provocation as a partial defence, the assessment of the extent of the powers of self control are to be unaffected by the personal characteristics or attributes of the accused; for example, characteristics relating to ethnicity will not be attributed to the ordinary person for the

purpose of assessing the power of self control expected of him or her (see *Stingel v R* (1990) 171 CLR 312). Personal characteristics can however be considered at the second stage of the inquiry, that is, whether the accused actually lost control.

Provocation may also, of course, be relevant to prosecutorial discretion and to a Magistrate's decision to commit for trial. It may also be relevant to sentencing in jurisdictions that allow for discretion in a murder sentence even if the jury has rejected the defence.

MCCOC recommended that provocation be abolished and it is not a feature of the Model Criminal Code nor of the Commonwealth Criminal Code. The Committee considered that provocation should be considered only in determining an appropriate sentence after conviction rather than reducing criminal responsibility. Tasmania (in 2003) and Victoria (in 2005) repealed the defence of provocation. The Victorian repeal followed a recommendation of the Victorian Law Reform Commission in its Final Report on Defences to Homicide in 2004. The arguments for and against the retention or abolition of the defence are fully canvassed in that report which may be found at *www.lawreform.vic.gov.au.*

Provocation under the current NT Code bears some critical differences to the common law or where it has been retained in the other Code jurisdictions.

(a) Provocation can be a *complete* defence for non fatal offences provided that the act was not intended or likely to cause death or grievous bodily harm. The NT defence also specifically excuses criminal responsibility for the use of such force as was reasonably necessary to prevent the repetition of a wrongful act or insult. This is much broader than any other jurisdiction. The only other jurisdictions that allow provocation as a complete defence to non fatal offences are Queensland and Western Australia where the defence of provocation is extended to crimes in which assault is an element (see Criminal Code (Qld), ss268,269; Criminal Code (WA), s281).

(b) the accused's cultural and ethnic mores are taken into account within the objective limb of the provocation test. See for example *Mungatopi* (1991) 2 NTLR 1; *Jabirula v Poore* (1989) 68 NTR 26 the objective test is to be qualified so that the standard of self control for an Aboriginal accused is that of the power of self control of an Aboriginal Australian from that community. This qualification is not part of the law of provocation in any other Australian jurisdiction see *R v Stingel* (1990) 171 CLR 312.

MCCOC recommended that provocation should be relevant only to setting the sentence for murder. In jurisdictions where the life penalty acts only as the maximum, rather than the mandatory sentence, the Court may consider any provocation that was offered by the victim and sentence the offender accordingly. In the NT, however, murder carries a mandatory life sentence with minimum non parole periods. The Court can only set a lesser non parole period in "exceptional circumstances", which is limited to where the offender is otherwise a person of good character, unlikely to re-offend, and the victim's conduct or conduct and condition substantially mitigate the conduct of the offender. Provocation as a sentencing consideration might be relevant to the "exceptional" circumstances provision in relation to the setting of a non parole period. It could not, however, displace the "head" sentence of life imprisonment. By contrast the reduction of murder to manslaughter by the defence of provocation permits discretion in setting a sentence up to life imprisonment.

The following options might be considered in relation to provocation:

1. Complete abolition of provocation in the NT (as a partial defence to murder and as a complete defence to non fatal offences). In relation to murder this would result in all offenders regardless of the provocation offered being sentenced to life imprisonment (noting that a non parole period less than 20 years might be set where the Court was satisfied that the provocation was sufficient to invoke the "exceptional circumstances" discretion).

2. Provide for a defence of provocation that replicates the common law. That is, a partial defence only in relation to murder and under which the objective threshold test does not allow for consideration of the accused's cultural background consistent with *Stingel*. If the accused is able to meet the objective standard that an ordinary person would have lost control, cultural issues will be relevant to determining the second limb of the defence, that is, whether the accused did lose control. Cultural issues and background will remain relevant to sentencing and may mitigate the sentence that would otherwise be imposed. The level of culpability is determined in penalty.

3. Provide for a defence of provocation only in relation to murder that replicates the common law but maintains the current NT Code objective threshold test allowing for consideration of the accused's cultural background.

4. Provide for a defence of provocation in the same terms as the current section 34 noting that the breadth of the current defence is out of step with policy direction in other jurisdictions which has sought to limit acceptance of violence as a response within the community.

Diminished Responsibility

Diminished Responsibility is a partial defence which reduces murder to manslaughter on account of some mental dysfunction that falls short of the defence of mental impairment. It is not part of the common law but exists in four jurisdictions – Queensland, New South Wales, the ACT (to offences under the *Crimes Act* until all are replaced by the Criminal Code) and the NT. MCCOC recommended against the inclusion of diminished responsibility in the Model Code for the same reasons as it saw supporting the removal of provocation, that is, mitigating issues of mental incapacity should be a matter left to sentencing.

This rationale is again problematic for the NT, where there is a mandatory life sentence for murder. Under current provisions a life sentence is required and a court would not be able to set less than the 20 year non parole period because diminished responsibility would not fall within "exceptional circumstances" as defined for the purpose of the non parole period for murder.

The defence of diminished responsibility has also been the subject of criticism, particularly again by law reform agencies. There is an argument that current legislative formulations of diminished responsibility are out of touch with medical notions of mental impairment, that it generates a high level of disagreement amongst expert witnesses, and that it is too complex. By contrast, the New South Wales Law Reform Commission's Report on Partial Defences to Murder (1997) recommended the retention of diminished responsibility, principally on the basis that it enabled the

community (through a jury) to participate in a meaningful way in cases of this kind. In NSW the defence was re formulated in accordance with the recommendations of the Commission. Section 23A(1) of the *Crimes Act* requires that upon proof by the accused that his or her capacity to understand events, or to judge whether the act was right or wrong, or control himself or herself was impaired by an abnormality of [mind][1] arising from an underlying condition the jury will be instructed to decide whether the impairment was so substantial as to warrant reducing murder to manslaughter. The provision therefore distinguishes between the respective roles of the expert witness and the jury so that the jury are left with the ultimate issue of determining what is essentially a moral judgement not a clinical question, that is whether the accused should be convicted of murder or manslaughter.

The issue is whether diminished responsibility should be retained and, if so, whether the NSW formulation[2] is to be preferred.

Coercion

The NT Code currently provides for the partial defence of coercion. The defence reduces what would otherwise be murder to manslaughter. It has no other application.

The defence of coercion is unique to the NT. It does not exist at common law and no other jurisdiction has formulated a similar defence. It does bear similarity to the general defence of duress, which excuses criminal responsibility for an act where threats have been made that overbear the free will of the accused. However unlike duress, the defence of coercion is not limited to threats but could encompass other forms of pressure – for example, economic or emotional consequences or cultural beliefs.

Duress is a complete defence in cases where a person commits an offence because their free will has been overcome by threats made by another person. At common law the defence did not apply to murder and under s40 of the NT Code duress cannot be applied to murder, manslaughter or a crime for which grievous harm or intention to cause harm is a factor. Neither the Commonwealth Code nor the ACT Code, in accordance with the Model Code provides that limitation. MCCOC took the view that if a jury is convinced that a person's will has been entirely overcome by another then the actual offence committed should not be relevant.

The defence of duress enacted by the Reform Act in new Part IIAA follows the Model Code so that the defence of duress will extend to murder although there are some important limitations on the defence that do not exist under the s40 formulation. Under the current s40 defence the belief of the accused as to the necessity for the conduct does not have to be reasonable. The new defence contains an objective component in relation to the necessity for the conduct and the response to the threat. There is also a higher initial threshold test under the new defence, that is, the accused must reasonably believe that the threat **will** be carried out whereas under the current formulation it is sufficient if the accused believed that the person making the threat was merely **in a position** to carry the threat out.

[1] The Commission favoured use of the term "mental functioning" however this aspect was not adopted in the NSW legislation.
[2] See Attachment A

The new duress defence is constrained by the requirement that the accused must show that the conduct, for example killing someone, was a reasonable response to the threat that was made, a requirement not easily overcome.

Given the extension of the general defence of duress to apply to murder as enacted in the Reform Act, and the unique existence of the defence of coercion as part of the criminal law in Australia, retention of the defence may be questionable.

Suicide

Suicide and attempted suicide are no longer offences anywhere in Australia. All jurisdictions prohibit what is variously described as procuring, counselling, inciting, instigating, aiding or abetting suicide. The current NT offence prohibits procuring, counselling or aiding another to kill or attempt to kill himself. The penalty is life imprisonment. The maximum penalty for the various prohibited acts that may be described as assisting or encouraging suicide differs greatly across jurisdictions:

ACT : 10 years;

NSW : 10 years for aiding and abetting and five years for inciting or counselling;

SA : 14 years for aiding, abetting or counselling where suicide is committed and eight years where it was attempted but death did not result. These penalties are reduced to five and two years respectively where the acts were part of a suicide pact;

Queensland and Western Australia : life imprisonment;

Tasmania : 21 years;

Victoria : general penalties of five years for the assisting or encouraging suicide offences but also provides that if a person is tried for murder and the jury find on the balance of probabilities that the person was the survivor of a suicide pact they are to return a verdict of manslaughter for which a reduced penalty of 10 years applies.

In addition to these offences it may be noted that the Commonwealth Criminal Code was amended with effect from 1 January 2006 to add offences in relation to the use of a “carriage service” for suicide related materials. The penalties for these offences are 1000 penalty units.

The Model Code creates two separate offences of assisting suicide and encouraging suicide. MCCOC recommended that the assisting offence should carry a greater penalty than the encouraging offence. Although the Committee did not elaborate its rationale, the recommendation appears to be made on the basis that an act which assists another person to attempt to kill or actually kill themselves is more culpable than an act by which another person provides encouragement towards that end. MCCOC recommended penalties of seven and five years respectively. The penalty of life imprisonment in Western Australia and Queensland may be seen as reflective of the view taken of suicide at the time of the enactment of those Codes around the turn of the 20th century.

The issue is whether the offences should be separated and if so whether the MCCOC recommended penalties should be applied.

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CRIMES ACT 1900 - SECT 23A

Substantial impairment by abnormality of mind

23A Substantial impairment by abnormality of mind

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

(7) If, on the trial of a person for murder, the person contends:

(a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or

(b) that the person is not liable to be convicted of murder by virtue of this section, evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

(8) In this section:

"underlying condition"means a pre-existing mental or physiological condition, other than a condition of a transitory kind.