Fixing the Crimes Act

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Introduction

Many articles have been written by lawyers calling for an end to higher rates of imprisonment, longer sentences, and all of the other manifestations of regressive and fruitless law and order auctions. This article focuses on a different kind of reform, namely technical changes to the relevant legislative framework in order to make the criminal law clearer and simpler, and the criminal justice system more efficient.

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Current position

The substantive criminal law of this state[2] is by no means easy to grasp in its entirety. In order to do so, one needs to understand:

- the common law principles of criminal responsibility;
- the statutory provisions regarding the principles of criminal responsibility;
- the common law offences that still exist;
- the offences created by New South Wales statutes; and
- the English statutes that still apply in New South Wales, by way of the *Imperial Acts Application Act 1969* (NSW).[3]

To make matters worse, the central criminal statute of New South Wales is, to put it bluntly, a mess. As Judge Woods QC has recently demonstrated[4], the *Crimes Act 1900* (NSW), far from being a well thought out piece of legislation when it commenced, was rather a collation of various pre-existing pieces of legislation overlaying the common law. Since its commencement over one hundred years ago, it has become far worse, in that it has been used as the repository of last resort for countless disparate pieces of criminal law reform.

The upshot is that, as things stand, the Crimes Act is an almost incomprehensible jumble of provisions old and new.

For example, we defy any lawyer who claims expertise in criminal law to explain, without a deal of research, the definition of 'cattle' in sec 4 (and why yaks are not included); or what on earth secs 11 and 12 are getting at; or secs 166 and 167; or sec 515 (stealing fences whether alive or dead); or why the offence of 'secreting' a library book in sec 525 needs to be in the Crimes Act.

As well, the rate of piecemeal reform is getting faster, not slower. Almost every perceived 'law and order crisis' leads to some form of legislative response directed to a particular set of circumstances. Without time for consideration of the overall structure, the result is that the Crimes Act is becoming more and more ramshackle.

We suggest that, if things proceed as they are, the criminal law will become unworkable and unknowable. The result will be that judicial officers and lawyers will be unable to apply it properly.

Nor is this just a matter of concern for those who trust that lawyers and the courts can be relied upon to get the law right. It is fundamental that citizens be able to know what behaviour is prohibited by the state and what is not. No citizen, without considerable training as a legal researcher, along with access to a law library that includes English statutes and cases that stretch back to the Middle Ages, could know with precision what the criminal law of New South Wales actually is.

All is not entirely bleak, however. Two facts provide grounds for optimism.

The first is that a Model Criminal Code for Australia exists that provides a template that can, at the very least, be seriously considered by anyone trying to achieve well-thought out criminal law reform.[5] An important aspect of the Model Criminal Code is that it contains not only a coherent set of principles of criminal responsibility, but also simple offences in a structure that makes sense. As well, it formed the basis of the *Criminal Code Act 1995* (Cth), which commenced in December 2001, so one is able to see how it works in practice. In short, one does not need to follow the Code slavishly to get a great deal of benefit from looking at it.[6]

The second is that, over the past few years, there have indeed been some worthwhile structural reforms of criminal law in New South Wales. The abolition of the archaic concepts of felony and misdemeanour and related provisions, the creation of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW), and the removal of the procedural provisions from the Crimes Act to the *Criminal Procedure Act 1986* (NSW) all constitute steps in the right direction.

Furthermore, the offences relating to contamination of goods that were inserted in the Crimes Act some years ago are derived from the Model Criminal Code and are very clear and concise.[7] So are the new computer offences[8] and the new kidnapping provisions.[9] These new offence provisions show that incremental reform, in these cases directed towards a limited kind of criminal behaviour, is achievable and valuable.

Proposal

It is time for the problem of the New South Wales Crimes Act to be addressed. We are not so optimistic as to expect wholesale adoption of the Model Criminal Code, although we note that the ACT has recently adopted its principles of criminal responsibility.[10] Instead, we put forward a plan for improvement that can be effected in a number of discrete steps, commencing with the easiest (both technically and politically) and culminating in the most difficult. We urge the new government to commence to fix the problem, as follows.

Have a concept of what should be in the Crimes Act, and implement it rigorously

The Crimes Act should contain:

- however much of the general principles of criminal responsibility are in statutory form, including criminal defences; and
- all serious statutory offences, namely those capable of being dealt with on indictment.

Everything else should not be in the Crimes Act. It should be as focused as possible on those two aspects.

Of course, there will be some common-sense exceptions. For example, the *Drug Misuse and Trafficking Act 1985* (NSW) works well as a stand-alone set of offences, and one would not seek to have indictable drug offences put in the Crimes Act. As well, there may be some procedural provisions and wholly summary offences that are so bound up with certain indictable offences that they should remain in the Crimes Act. But basically, the Crimes Act should contain the statutory concepts of criminal responsibility that apply to all offences, the serious statutory offences, and nothing more.

Furthermore, once the offences in the Crimes Act are re-organised into more sensible 'bite-sized chunks', they will be more amenable to focused reform...

Move the police powers to a new Act

To be fair, this has been done by way of the *Law Enforcement (Powers and Responsibilities) Act 2002*. When the Act will commence, we do not know, but it should be as soon as possible. The result will be that Parts 10, 10A and 10B will be gone from the Crimes Act, along with the powers in secs 563 and 578D.

Move all of the summary offences to the Summary Offences Act

The whole of Part 14A should be removed from the Crimes Act, along with any other wholly summary offences in the Act, subject to the exception discussed above. It can be seen that there are still very many wholly summary offences in the Crimes Act. Many of them are very old, most are anachronistic, and some of them are ridiculous. Some seem to be there to paper over gaps in the common law. All of them should be moved to the *Summary Offences Act 1989* (NSW). A number of them will be seen to be clearly unnecessary at that time,[11] and should be deleted from the Crimes Act without being re-enacted in the Summary Offences Act.

Move the provisions relating to the Supreme Court in its summary jurisdiction to the Criminal Procedure Act

The provisions in Part 13B allow for a certain procedure to be adopted with regard to criminal offences. Therefore they should be in the Criminal Procedure Act. In light of the fact that they are very seldom used, consideration should be given to abolishing them altogether.

Move the provisions relating to review of convictions and sentences to a stand-alone Act

Although some of the provisions in Part 13A permit referral of matters to the Court of Criminal Appeal, other provisions are to do with inquiries into convictions. The regime cannot sensibly be fitted into the *Criminal Appeal Act 1912* (NSW). For clarity and logical recognition of its unique nature, this regime needs to have its own Act.

Move the domestic violence provisions to a stand-alone Act

In accordance with the initial concept, these provisions in Part 15A should not be in the Crimes Act. Because of the unusual nature of the AVO regime, the provisions should be in a stand-alone Act. Furthermore, it is appropriate for there to be a stand-alone Act in order to reflect the seriousness of apprehended violence. Of course, because the offences of stalking and intimidation contained in sec 562AB are indictable offences, they should remain in the Crimes Act.

Move the current provisions regarding the general principles of criminal responsibility to the start of the Act

Even though the principles of criminal responsibility are very substantially to be found at common law in New South Wales, there are nevertheless quite a few statutory provisions that deal with the subject directly or indirectly. They are currently scattered throughout the Crimes Act. Examples include Part 8A with regard to attempts, Part 9 with regard to accessorial liability, sec 407A with regard to the abolition of the presumption of the existence of the defence of marital coercion, Part 11A with regard to the effects of intoxication on criminal responsibility, sec 417 with regard to proof of lawful excuse, and Division 3 of Part 11 with regard to self-defence.

It is true that a recent effort has been made to tidy these up, by creating Part 11—Criminal Responsibility—Defences. But it makes even more sense for these provisions to be moved to the front of the Act and re-organised. The opportunity should also be taken to double-check that the general statutory principles are expressed to apply to all offences, not just the offences contained in the Crimes Act.[12] The result should be that the reader first comes across so much of the general principles as are in statutory form, including any statutory criminal defences,[13] and then the specific statutory offences.

Reorganise and renumber the remaining provisions.

If all of the foregoing were achieved, one would have an Act that would contain:

- so much of the principles of criminal responsibility as are in statutory form;
- a large number of statutory indictable offences of various kinds; and
- a few intractable bits and pieces.[14]

At that stage, all of the sections of the Crimes Act should be reorganised into sensible parts and divisions, and renumbered. The order of the *Criminal Code Act 1995* (Cth) should be generally followed, for ease of cross-reference. Repealed sections and section numbers should not be included in any way, thereby clearing out a great deal of clutter that is currently there. Furthermore, the section numbers should recommence with each new part or division, so that repeated re-numbering of

the whole Act would not be necessary every time the Act is amended.[15]

All of the above could be achieved without difficulty. The changes require almost no thought at all, in that they are almost completely mechanical. The definitions of offences and defences would not have changed at all. Nor would maximum penalties have been altered (although the obvious anomalies in the area will need to be addressed one day). And yet the Crimes Act would be far more accessible and make far more sense as a result. One would know where to find all of the statutory provisions regarding the general principles of criminal responsibility, indictable offences, summary offences, and procedural matters. Furthermore, once the offences in the Crimes Act are re-organised into more sensible 'bite-sized chunks', they will be more amenable to focused reform, of the kind that has already occurred and is discussed in the review of the current position above.

What needs to be done is to sort out precisely the nature of the offences that are applied by the Imperial Acts Application Act, amend that Act by deleting any reference to imperial offence-creating statutes, and then re-enact the offences in the Crimes Act as necessary.

But having achieved all of that, the government should not rest on its laurels.

Abolish the current property offences and replace them with a simple, coherent regime

Current secs 93J to 193 and 250 to 307 of the Crimes Act legislate for well-known and reasonably straight-forward offences such as robbery, burglary, stealing, fraud, forgery and so forth. That approximately one hundred and fifty sections are required to achieve that goal, without the common law having been abolished with regard to the topic, seems astonishing. When it is borne in mind that the Model Criminal Code covers the same field with only about thirty sections, the current state of affairs can be seen to be laughable.

What is worse, far from being coherently organised,
the current sections are a 'crazy quilt' of provisions that assume knowledge of the common law and proceed on the basis of it, provisions that seek to plug gaps in the common law, and provisions that seek to plug gaps in other provisions.
The result is a farrago that few lawyers can sincerely claim to understand. In short, there can be no doubt that the property offences are the portion of the Crimes Act in most urgent need of root and branch reform.

It is noteworthy that South Australia, another Australian jurisdiction that founds its general principles of criminal responsibility on the common law, has very recently enacted a new set of property offences based to some degree on the Model Criminal Code provisions.[16]

We are aware that reform of the property offences along these general lines had been under consideration during the previous term of the New South Wales government. What is now required is implementation this year.

Abolish all common law offences and replace them with statutory indictable and summary offences as necessary

Does the offence of incitement of an offence that is not committed exist at common law? Can it be committed when the offence that is incited is a wholly summary offence? The offence of false imprisonment does not appear in the Crimes Act, but does it exist at common law? If so, what are its elements? Can one falsely imprison a person who is consenting, for example a child? These are not mere theoretical questions about the parameters of the criminal law; indeed, circumstances leading to the need to answer them will commonly arise. And yet doing so accurately is not easy. It will almost always require recourse to the law reports of a foreign country, and often they will be reports of old and obscure decisions. By their nature, of course, the answers to questions about common law offences are not to be found in any statute of any jurisdiction.

There should be an end to common law offences in New South Wales. All indictable offences should be able to be found in the Crimes Act and all summary offences in the Summary Offences Act. Offences of the importance of conspiracy and attempt should be clearly defined in the Crimes Act. Very many of the common law offences have been superseded by statute in any event.

All of the common law offences should be identified,[17] abolished, and re-enacted as simple statutory offences only as necessary.

Repeal the *Imperial Acts Application Act 1969* (NSW) as it applies to criminal law, at least with regard to offence-creating provisions.

The offence of treason is perhaps the most serious known to law. Although it forms part of the substantive criminal law of New South Wales, it is not contained in any statute of this state. Nor is it a common law offence. Amazingly, it is contained in 25 Edward III st 5 c 2, a law of the Parliament at Westminster of the year 1351, as amended by countless subsequent Acts of the same parliament. To define the elements of the offence would take many hours of location and consideration of archaic provisions.

Those provisions are applied to our jurisdiction by a New South Wales Act, the *Imperial Acts Application Act 1969* (NSW).[18] So are other offence-creating provisions relating to piracy.[19]

That state of affairs is completely unsatisfactory. Again, it is not merely a theoretical exercise to try to understand what is said by the criminal law of New South Wales to constitute treason, or indeed piracy.

What needs to be done is to sort out precisely the nature of the offences that are applied by the Imperial Acts Application Act, amend that Act by deleting any reference to imperial offence-creating statutes, and then re-enact the offences in the Crimes Act as necessary.

The same Act also applies to New South Wales certain Acts of the Parliament at Westminster that have a constitutional

aspect.[20] Many of those Acts have an effect on our criminal law.[21] In a perfect world, these provisions would be looked at as well. But we accept that any amendment and re-enactment of any of these provisions will be politically very controversial and technically very difficult.

Proceed to grapple with Chapter 2

Adopting a new set of principles of criminal responsibility will be neither easy for the government nor popular amongst lawyers and judicial officers. But at the moment self-defence is a statutory defence[22] but the closely-related defences of duress and necessity are not; the provisions in the Crimes Act relating to accessorial liability are a confusing jumble;[23] 'maliciously' and 'possession' are (confusingly) defined in the Crimes Act[24] but 'voluntariness' and 'intention' are not; and the presumption of the existence of the common law defence of marital coercion is abolished, but not, remarkably, the defence itself.[25]

By the time parliament comes to this step, the provisions of the *Criminal Code Act 1995* (Cth) will have been operating for some time. So will the ACT provisions. It will then be time for New South Wales to end the inaccessibility of the common law and to get all of the principles of criminal responsibility written down and in a public statute where they belong.

Conclusion

The Crimes Act has drifted along for over one hundred years. Although it has been frequently tinkered with, it has been not been the subject of thorough-going reform in that time. Templates for reform have been developed and enacted by the Commonwealth and other Australian jurisdictions. Governments often wish to be seen to be serious about criminal law reform. We submit that the process of serious reform of the Crimes Act must begin in 2003.

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1 Each of the authors have served as Director of the Criminal Law Review Division within the Attorney General's Department of New South Wales. They are all barristers and New South Wales public defenders.

2 By which we mean the general principles of criminal responsibility and the offences that are built upon them, as opposed to the rules of evidence and procedure that are adopted in criminal courts.

3 Of course, to understand the whole of the criminal law that applies in the geographical area of New South Wales, one needs to understand the Commonwealth criminal law as well, but that is beyond the scope of this article.

4 In *A history of criminal law in New South Wales, the colonial period* (Federation Press, 2002) at chapter 29.

5 For the discussion papers and final reports of the Model Criminal Code Officers' Committee, see www.law.gov.au

6 We confess to having been involved in its development. But that has not affected our favourable view of it in the least!

7 See Part 3C of the *Crimes Act 1900* (NSW).

8 See Part 6 of the Crimes Act.

9 See Division 14 of Part 3 of the Crimes Act.

10 See the *Criminal Code Act 2002* (ACT).

11 For example, parts at least of sec 523 mentioned above.

12 That has been a point of confusion in the past; see, for example, the terms of sec 417.

13 The exception should be the partial defences that are specific to the crime of murder, and any other 'offence specific' defences.

14 These will include Part 12 (transitional sentencing provisions abolishing the death penalty), Part 14 (transitional provisions regarding the old system of summary disposal of indictable offences), and secs 578A and 579 (for which it is hard to find a logical alternative home). But these can be neatly tucked away in a Part for miscellaneous provisions.

15 *The Criminal Code Act 1995* (Cth) has this very useful characteristic as well.

16 See the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA), which commenced very recently.

17 A useful discussion is in Watson, Blackmore and Hosking, *Criminal Law* (NSW) (LBC).

18 See sec 6 and Part 2 of Schedule 2 of the Act, and sec 16 of the Crimes Act.

19 See sec 6 and Part 2 of Schedule 2 of the Act.

20 By way of sec 6 and Part 1 of Schedule 2. Examples are *Magna Carta 1297* and *The Bill of Rights 1688*.

21 See, for example, *Jago v District Court* (NSW) (1989) 168 CLR 23 and *Deitrich v The Queen* (1992) 177 CLR 292; and the discussion of the continuing effect of sec 8 of *The Habeas Corpus Act 1679* (31 Car II Ch 2) in Howie and Johnson, *Criminal Practice and Procedure in New South Wales* (Butterworths) [8-s 310D.10]. For an interesting attempt to rely on the Bill of Rights in a sentence appeal to the Court of Criminal Appeal, see *R v Boyd*, NSW CCA, 18 September 1995.

22 Division 3 of Part 11 of the Crimes Act.

23 Part 9 of the Crimes Act.

24 Sections 5 and 7 of the Crimes Act.

25 See sec 407A of the Crimes Act and the discussion at [6-715] of Criminal Practice and Procedure in New South Wales, op. cit.