Codifying the Criminal Law

Expert Group on the Codification of the Criminal Law

November 2004

DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

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Dublin

Published by the Stationery Office.

To be purchased directly from the
Government Publications Sales Office,
Sun Alliance House, Molesworth Street, Dublin 2,
or by mail order from
Government Publications, Postal Trade Section,
4-5 Harcourt Road, Dublin 2,
(Tel: 01-6476834/35/36/37; Fax: 01-4752760).

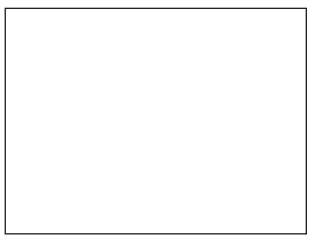
ISBN 0-7557-7000-5

€12

Baile Átha Cliath
Arna Fhoilsiú ag Oifig an tSoláthair.

Le ceannach díreach ón
Oifig Dhíolta Foilseachán Rialtais,
Teach Sun Alliance, Sráid Theach Laighean, Baile Átha Cliath 2,
nó tríd an bpost ó
Foilseacháin Rialtais, an Rannóg Post-Tráchta,
4-5 Bóthar Fhaearchair, Baile Átha Cliath 2,
(Teil: 01-6476834/35/36/37; Fax 01-4752760).

Designed by first impression



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FOREWORD

The genesis of this Report is to be found in the commitment in the Programme for Government to undertake a feasibility study of the desirability of codifying the criminal law in Ireland, and in the decision of the Minister for Justice, Equality and Law Reform, made pursuant to that commitment, to establish an Expert Group on Codification of the Criminal Law.

On behalf of my colleagues on the Expert Group, I should like to thank Minister McDowell for giving us the opportunity of contributing to this historic project; and, on my own behalf, for doing me the honour of inviting me to chair the Group's deliberations. We sincerely hope that we have repaid his trust in us; and we should like to record our appreciation of his support for our endeavours throughout the research and consultation process which preceded the drafting of this Report.

The Expert Group owes a debt of gratitude to the many people, both in Ireland and throughout the common law world, who assisted us in the preparation of our Report. Mr Caoimhín Ó hUiginn, Assistant Secretary, Department of Justice, Equality and Law Reform, kindly read the Report in draft and made valuable suggestions for its improvement. Several of his colleagues in the Criminal Law Reform Division of the Department responded generously to requests for advice and information. Mr Peter Charleton, S.C., a long-time advocate of the value of codifying the criminal law, provided us with a helpful memorandum setting out his views on the subject. Ms Leah O'Hegarty, Parliamentary Legal Advisor, Houses of the Oireachtas, answered our many queries on Dáil and Seanad procedures with courtesy and good humour.

Mr Geoff McDonald, Assistant Secretary, Federal Attorney-General's Department, Australia, provided us with valuable information on the Australian Commonwealth Criminal Code. Ms Janelle Brassington, Principal Legal Officer, Department of Justice and Attorney General, Queensland, and Ms Kelly Foster, Criminal Law and Justice Group, Australian Capital Territory Department of Justice and Community Safety, promptly responded to all our pleas for information about their respective criminal codes. Ms Giovina D'Allesandro, Articled Clerk, Solicitor for the Northern Territory, was similarly obliging in respect of the Northern Territory Criminal Code, and Mr Neville Trendel, Senior Consultant, Law Commission, Wellington, New Zealand, answered several questions on his country's experience of codification.

The Expert Group is especially indebted to the distinguished speakers who addressed our international conference on codification in November 2003: Professor Ian Dennis, University of London; Professor Pamela Ferguson, University of Dundee; Professor Chris Gane, University of Aberdeen; Mr Don Piragoff, Acting Assistant Deputy Minister, Department of Justice, Canada; Professor Roger Clark, Rutgers University; Mr Matthew Goode, Managing Solicitor, Office of the Attorney General, South Australia; Professor Paul Robinson, University of Pennsylvania; and Professor Alberto Cadoppi, University of Parma.

Our thanks are also due to Mr Justice Nial Fennelly, Mr Justice Barry White, Mr James Hamilton, Director of Public Prosecutions, and Professor Paul O'Connor, Dean of the Faculty of Law, University College, Dublin, who chaired the conference sessions, and to the many people, identified by name and professional affiliation in Appendix 3, who attended and contributed to the discussion at our national and international conferences.

The members of the Expert Group themselves attended assiduously at our fortnightly meetings and at our individual half-day sessions, despite their heavy professional responsibilities. I should mention in particular the exceptional contribution of Ms Geraldine Larkin, Principal Officer, Department of Justice, Equality and Law Reform. Apart from being an active member of the Expert Group, she performed the multiple roles of facilitator, convenor and administrator with extraordinary skill, intelligence and dedication, and was a source of wise counsel to me during the drafting process. She was very ably assisted by the ever helpful Ms. Antoinette Doran, Secretary to the Expert Group, who gave support of a consistently high quality over the period of our endeavours, and by the administrative staff in the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform.

Mr John Byrne, the legal researcher to the Expert Group, produced numerous research papers of the highest quality. These provided invaluable material for our fortnightly discussions and were of great assistance to me when writing the Report, his succinct surveys of common law criminal codes proving especially helpful in this regard.

Thanks to the good offices of the curator, Ms Ruth Ferguson, the Expert Group was able to secure the use (and enjoy the splendour) of the Bishop's Room, Newman House, University College, Dublin, as the venue for our fortnightly meetings.

Finally, I should like to pay tribute to my secretary, Ms. Yvonne Toal, for her unfailing courtesy and support throughout the exercise.

Finbarr McAuley,

Chairman of the Expert Group,

Institute of Criminology,
Faculty of Law,
University College, Dublin.

INTRODUCTION

ESTABLISHMENT

1. The Expert Group on Codification of the Substantive Criminal Law was established by the Minister for Justice, Equality and Law Reform in December 2002, pursuant to a commitment in the Programme for Government to codify the criminal law into a single Crimes Act dealing with homicide, violence, property offences, dishonesty, corruption, public order, arrest, criminal procedure and court jurisdiction, sentencing procedure and policies, and the defences to a criminal charge.

TERMS OF REFERENCE

2. On foot of that wide-ranging commitment, the Expert Group was assigned the following terms of reference:

- Having regard to the commitment in the Programme for Government to undertake a scoping study of the possible approaches to codification of all the substantive criminal law into a single Crimes Act;
- To advise on the scope and extent of such approaches, in particular identifying any areas where it is considered codification may give rise to policy difficulties;
- To outline the overall structure and style of a possible criminal code;
- To consider the role of Consolidation and Statute Law Restatement legislation (by reference to the recently enacted Statute Law Restatement Act, 2002) in developing and maintaining the code;
- To make recommendations in relation to the above matters.

MEMBERSHIP

3. Professor Finbarr McAuley, Jean Monnet Professor of European Criminal Justice, University College, Dublin and Law Reform Commissioner, was appointed as Chairman of the Expert Group. The other members of the Expert Group were:

- Dr. Paul Anthony McDermott, B.L., Lecturer in Law, University College, Dublin;
- Ms Mary Keane, B.L., Deputy Director General, Law Society of Ireland;
- Professor Paul McCutcheon, University of Limerick;
- Mr Matthew Feely, Office of the Attorney General;
- Ms Elizabeth Howlin, Office of the Director of Public Prosecutions;
- Ms Geraldine Larkin, Department of Justice, Equality and Law Reform.

4. Mr John Byrne, B.C.L, LL.M, was appointed as legal research assistant to the Expert Group on a one-year contract with effect from 22nd February 2003. Ms Antoinette Doran, Administrative Officer, Department of Justice, Equality and Law Reform, acted as Secretary to the Expert Group.

MEETINGS AND WORKING METHOD

5. The Expert Group began work in January 2003 and met fortnightly for one hour at a time. The Group's fortnightly meetings concluded in December 2003 and were supplemented by three half-day sessions during the drafting of the Report. In total the Expert Group met 24 times.

6. The Expert Group's deliberations were guided by three key questions: *viz*.,

- Is codification of the criminal law a good idea in principle?
- To the extent that it is considered to be a good idea in principle, what form should codification take in Ireland?
- If it is decided to codify the criminal law, how should the process of codification be managed?

7. Throughout the period of his involvement with the Expert Group, the legal research assistant prepared a series of position papers designed to facilitate the detailed exploration of these questions. These papers formed the basis for the Group's fortnightly discussions. By and large, the papers prepared for the Expert Group probed the international literature on codification, described the population of common law criminal codes enacted since the beginning of the nineteenth century, and surveyed the current state of Irish criminal law from the perspective of codification.

8. Members of the Expert Group also contributed position papers according as the Group's deliberations touched on their particular areas of expertise. The corpus of research papers produced in this way, together with the minutes of the Expert Group's discussions of them, provided the building blocks for this Report.

CONSULTATION

9. In order to complement its own research efforts, the Expert Group consulted widely within Ireland and internationally. The consultation process was both formal and informal. Informal consultation took the form of extensive correspondence with codification experts around the world, especially in the Departments of Justice in common law jurisdictions with experience of codification, and discussions with leading figures in the Irish criminal law community. The individuals (and agencies) who assisted the Expert Group in the course of its deliberations are acknowledged in the Foreword to this Report.

10. A process of formal consultation was conducted through the medium of two major conferences on codification. The National Conference on codification of the criminal law took place in Dublin Castle on 26th July 2003 and was attended by a representative cross-section of the Irish legal community which included leading members of the judiciary, the Bar, the solicitors' profession, the universities, and key personnel from within the state apparatus. The objective of the National Conference was to canvass local opinion on the value of codification in an Irish context and to disseminate basic information on the theory and practice of codification in the common law world. Details of the conference proceedings can be seen in Appendix 3.

11. The Expert Group also organised an International Conference on codification of the criminal law. The International Conference took place on 22nd November 2003 in the Radisson Hotel, Dublin. The purpose of the Conference was to add an international dimension to the discussions which had taken place at the National Conference in July. Accordingly, the International Conference was addressed by leading experts in criminal law codification from all of the principal common law jurisdictions and by a leading authority on civilian codification. Details of the conference proceedings can be seen in Appendix 3.

PRINCIPAL RECOMMENDATION

12. As will be seen from the text of the Report, the consultation process described in the immediately preceding paragraphs contributed significantly to the development of the model of codification being recommended by the Expert Group: *viz*., a programme of phased codification comprising an inaugural instrument dealing with the general principles of criminal liability and the core criminal calendar, followed by additional enactments incorporating the remainder of the common and statute law of crime into the code as and when it is modernised.

EXECUTIVE SUMMARY

THE ISSUE OF PRINCIPLE

1. Codification in the form of the recension of the sources of law in a single instrument has been a notable feature of the European legal landscape at least since Roman times *(para. 1.06)*.

2. Codification in this sense did not attempt to unify the pre-codified sources of law, nor did it purport to alter their contents. It merely compiled the pre-codified sources in one document *(para. 1.10)*.

3. The modern idea of codification is a creature of the European Enlightenment *(paras. 1.19–1.24, 1.26)*.

4. The modern idea is based on the democratic principle that the content of the criminal law is exclusively a matter for the legislature and should be declared by the legislature in a comprehensive instrument which is easy to access and understand, and whose provisions are mutually consistent and reasonably certain *(para. 1.27)*.

5. Although originally a civilian initiative, the modern trend towards criminal law codification has deep roots in the common law tradition going back to the age of codification in the early nineteenth century *(para. 1.28)*.

6. Although the modern concept of codification has several stable components, there is no such thing as a definitive, canonical model of codification. Rather there are several varieties of codification which emphasise different dimensions of the underlying concept *(paras. 1.31–1.44)*.

7. The principal varieties of codification include:

- the consolidation of the statute law governing the various categories of specific offences (the special part) in the form of a Crimes Act *(paras. 1.43–1.44)*;
- restatements of the common and statute law governing all or most of the principles of criminal liability (the general part) and the special part, in the form of a Criminal Code Act *(para. 1.39)*;
- radical reform of the entire domain of the criminal law in the shape of a Criminal Code Act *(paras. 1.45–1.63)*;
- incremental restatement or reform of the criminal law in a series of mini-codes dealing with discrete areas of the special part or the whole of the general part *(paras 1.64–1.67)*.

8. A decision as to which of these models of codification is most appropriate should be based on a detailed consideration of local needs and conditions *(para 1.76)*.

9. In particular, when approaching this question care should be taken to ensure that optimum use is made of codifying initiatives already undertaken by local agencies such as the Department of Justice, Equality and Law Reform, the Law Reform Commission and the Statute Law Revision Unit of the Office of the Attorney General *(paras. 1.64–1.75)*.

10. The principal virtues of codification include:

- confirmation of the paramountcy of legislation among the sources of the criminal law other than the Constitution;
- confirmation of the principle that, subject to the Constitution, the power to alter the parameters of the criminal law either by creating new offences or expanding the reach of existing ones rests exclusively with the legislature;
- improving the moral quality and credibility of the criminal law by making it more accessible, comprehensible, consistent and certain;
- improving the efficiency of the criminal justice system by addressing the serious problems posed by the haphazard, unsystematic and disorganised state of the sources of the criminal law *(paras. 1.90–1.102)*.

11. In light of the foregoing, the Expert Group is satisfied that the question of whether codification is a good idea in principle should be answered in the affirmative *(para. 1.115)*.

THE QUESTION OF FORM

12. As a result of the policy of modernisation being pursued by the legislature since 1991, Irish law now boasts a corpus of well-drafted statutes on many of the principal departments of the criminal law. The statutes in question can fairly be described as mini-codes in their respective domains *(para. 2.10)*.

13. By producing a set of well-drafted modern enactments, recent legislative policy has brought a much-needed measure of order to the sources of the criminal law and greatly improved its comprehensibility, thus fulfilling some of the key aims of codification *(para. 2.12)*.

14. Despite this signal achievement, the inherent limitations of current policy should not be overlooked *(para. 2.28)*.

15. In particular, it should be borne in mind that the fragmentary character of the mini-codes makes it difficult to achieve conceptual consistency across the entire terrain of the criminal law, hinders easy access to its sources, and hampers the development of a system of proportionate grading and homogeneous classification of offences *(paras. 2.28–2.38)*.

16. Only a single instrument constructed as an integrated legislative scheme from the raw materials provided by the mini-codes can fully and effectively realise these objectives *(para. 2.44)*.

17. Recommendation: Accordingly, the Expert Group recommends the fashioning of a codifying instrument which consists of an exhaustive statement of the general principles of criminal liability and a streamlined criminal calendar based on mutually exclusive and internally exhaustive offence categories, a fully integrated system of offence grading, a rational definition policy, and a clear anti-scatter strategy *(para. 2.86)*.

18. Recommendation: The rules and principles included in the general part should be shorn of the extraneous procedural matter with which they are often accompanied in ordinary legislation *(para. 2.89)*.

19. Recommendation: The special part of the codifying instrument should be comprehensive rather than exhaustive, *i.e.*, it should be confined to the core offences in the criminal calendar *(para. 2.102)*.

20. Recommendation: There should be separate codes of criminal procedure and sentencing *(paras. 2.119–2.127)*.

21. Recommendation: For purely pragmatic reasons having to do with the realities of the political system and the legislative process, the Expert Group favours a programme of phased, as opposed to single instance, codification *(paras. 2.128–2.134)*.

22. Recommendation: The inaugural codifying instrument should consist of the general part and the core of the special part (in the form of a consolidation of the recently enacted mini-codes), while later stages of the codification process should be devoted to incorporating the remainder of the common and statute law of crime as and when it is modernised *(para. 2.138)*.

23. Given the wide scope of the inaugural codifying instrument as contemplated by the Expert Group, the general part need not be applied to non-code offences until such time as they have been modernised and aligned with its provisions *(paras. 2.149–2.150)*.

24. In the nature of things, the process of statute law modernisation, of which codification may be regarded as a highly specialised form, has led to the abolition of many common law offences *(para. 2.160)*.

25. Codification does not however trench upon the interpretative role of the courts or the growth of an interpretative jurisprudence on the criminal code *(para. 2.156)*.

26. Nor does codification entail the conclusion that the exculpatory defences cannot be allowed to develop at common law *(para. 2.163)*.

MANAGING THE PROCESS

27. Codification is a resource-intensive exercise *(para. 3.05)*.

28. The most cost-effective way of achieving codification in Ireland is to organise the process around the ongoing programme of criminal law reform being undertaken by the Department of Justice, Equality and Law Reform *(para. 3.07)*.

29. Codification should not however be fully integrated into the ordinary programme of criminal law reform *(para. 3.09)*.

30. Complete integration would expose the codification project to the risk of losing out in the competition for scarce resources with other aspects of the criminal law reform programme *(para. 3.13)*.

31. Were this to arise on a regular basis, the credibility of the codification process would be put in jeopardy *(para. 3.15)*.

32. Recommendation: Codification should however be carried out within the broad framework of the state apparatus, thus ensuring the direct involvement in the project of experts actively engaged with the policy, advisory, prosecutorial and drafting aspects of the legislative process and the Government's overall legislative programme *(para. 3.35)*.

33. Recommendation: By way of avoiding direct competition with other aspects of the Government's legislative programme, codification should take the form of a free-standing, discretely funded, initiative designed to complement the ordinary programme of criminal law reform by incorporating its fruits into the codification process *(paras. 3.19–3.20)*.

34. Recommendation: A statutory committee known as the Criminal Law Codification Advisory Committee should be established to take charge of this initiative, although the Advisory Committee might be allowed to begin its work prior to being placed on a statutory footing *(paras. 3.33–3.34)*.

35. Recommendation: Membership of the Advisory Committee should be drawn from the key centres of criminal law expertise within the legal community *(para. 3.35)*.

36. Recommendation: Having established best international practice, the Advisory Committee should be charged with developing and overseeing an action plan for the implementation of the programme of phased codification recommended in Chapter 2 *(para. 3.37(i))*.

37. Recommendation: The work of the Advisory Committee should include the preparation of a draft general part for inclusion in an inaugural Criminal Code Bill, the design and preparation of the inaugural Criminal Code Bill and its successor instruments, and the development and implementation of procedures for ensuring the timely enactment, amendment and proper maintenance of the criminal code *(para. 3.37(ii))*.

38. Recommendation: In respect of the problem of timely enactment, the Advisory Committee, in consultation with the Minister for Justice, Equality and Law Reform and the Houses of the Oireachtas, should give serious consideration to the possibility of developing a procedure which would enable the reform and consolidation components of the projected Criminal Code Bill to be processed simultaneously within the framework of a single Act of the Oireachtas *(para. 3.72)*.

39. Recommendation: In respect of the issues of amendment and maintenance, the Advisory Committee should play an ongoing monitoring role designed to ensure that the process of amendment does not lead to code degradation, thus undermining the net gains of orderly presentation, ease of access and clarity of expression achieved by the original codifying instrument *(paras. 3.78–3.86)*.

Chapter 1 – THE ISSUE OF PRINCIPLE

A. INTRODUCTION

1.01 Is codification of the criminal law a good idea in principle? Plainly the answer to this question depends on what is meant by codification.

1.02 Although arguments in principle are essentially about intrinsic merits, debate about the value of codification cannot meaningfully be conducted in the abstract. Not least of the reasons for this is that codification is not a univocal concept; it has meant various things at various times and, even in its modern signification, continues to denote a variety of different legislative techniques and arrangements.

1.03 Moreover, we neither live nor codify on the moon. A particular approach to codification might have a distinguished historical pedigree and enjoy significant contemporary support in other common-law jurisdictions. However, unless it also succeeds in garnering the support of the local legal community and is seen as politically feasible, a codification proposal based on it is unlikely to prosper.

1.04 Accordingly, this Chapter (i) traces the evolution of the concept of codification from ancient to modern times; (ii) describes the main features of the modern idea of codification; and (iii) examines the principal arguments for and against codification in the context of a discussion of local needs and conditions.

B. DEFINING CODIFICATION

Evolution of the concept

1.05 In the beginning was the process and only later came the word.

1.06 Some early exemplars: Historically speaking, the practice of codification dates back at least to Babylonian times; the Code of Hammurabi is believed to have been promulgated *c.* 1700 BC and may have had Sumerian and Akkadian antecedents. In contrast, the *term* codification was coined as recently as 1815, by Jeremy Bentham in a letter to Tsar Alexander I.[1]

1.07 Etymologically the term derives from the Latin words *codex* (book) and *facere* (to make). In its broadest legal signification it can therefore be used to refer to the process of drawing up a written compilation of laws. In this sense the Ten Commandments are a sort of Code, as were the laws of Draco and Solon and the XII Tables.[2] Similarly, this usage comfortably comprehends the early medieval redactions of customary law, such as the *lex Salica* and the *lex Burgundionum*, whereby the laws of the Germanic tribes which overran the ruins of the Roman Empire were originally written down, as well as the Roman practice of digesting

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1 Letter from Jeremy Bentham to Tsar Alexander I (June 1815) in Stephen Conway (ed.), *The Correspondence of Jeremy Bentham* (Oxford, 1988), p. 464.

2 For discussion of the characteristics of early codes, see Maine, *Ancient Law* (10th edn., London, 1884), pp. 12 et seq.

the sources of law in a single, unifying text or set of texts. As is well known, Justinian's celebrated compilation of Roman legal materials completed in 534 is often referred to as Justinian's Code.

1.08 The idea of a written compilation of laws also covers the collections of royal ordinances characteristic of early modern France, such as the *Code criminel* of 1670 dealing with criminal procedure. In substance these codes were comprehensive compilations of the different kinds of legal sources relevant to a particular branch of law: *viz*., legislative dispositions, praetorian solutions, customary rules and doctrinal writings. In this they resembled Justinian's Code which, in addition to Roman common law and imperial statute law, also included the learned commentaries of the jurisconsults.[3]

1.09 Interestingly, some modern criminal codes – the American Model Penal Code[4] is perhaps the best known example; others include the recently published *Draft Criminal Code for Scotland with Commentary*[5] – continue this tradition by including ancillary material designed to shed light on the meaning of some of the key terms used in the general and special parts.

1.10 Viewed historically, the principal attribute of codification might thus be described as an attempt to state a defined body of law in an organised, systematic and comprehensive fashion. Perhaps the most striking illustration of this phenomenon is Gratian's celebrated compilation of the entire corpus of canon law published in Bologna in the twelfth century. Known as the *Decretum*, this work was a brilliant attempt to recast the unwieldy mass of canon law rules as a coherent whole using the new method of scholastic dialectics – broadly speaking, the development of distinctions and contrasts designed to resolve inter-textual conflicts.

1.11 Strictly speaking, an exercise of this kind does not necessarily involve the creation of an authoritative legal text. Gratian's *Decretum* began life as a private compilation, although it later acquired authoritative status when, in 1234, Pope Gregory IX promulgated a new code of canon law known as the *Liber extra*, so-called because it was designed as an addition to the corpus of law already contained in the *Decretum*.[6]

1.12 Moreover, there are examples of famous codes which were never enacted; and of others which never acquired the force of law. Although officially commissioned, Justinian's Code was a casualty of the break-up of the Roman Empire, and so did not become a living legal document. In the Eastern Empire it was perceived as extraneous to local custom and was never applied, whilst in the West it was effectively ignored by the new *regna* which had emerged from the ruins of the old empire.[7]

3 See Tamm, *Roman Law and European Legal History* (Copenhagen, 1997), pp. 7-10.

4 See below, paras 1.57-1.63.

5 Scottish Law Commission, 2003.

6 See Brundage, *Medieval Canon Law* (London and New York, 1995), pp. 47-49.

7 Bellomo, *L'Europa del diritto commune* (Rome, 1989), p. 39.

1.13 Likewise, notwithstanding the support of the Criminal Law Commissioners of the day, the first attempt to codify English criminal law, which had been initiated by the Lord Chancellor, Lord Brougham, in 1833, failed to reach the statute book, having fallen foul of a sceptical judiciary; and, albeit for different reasons, a similar fate was to befall the second attempt to do so, in the form of Stephen's Criminal Code Bill of 1878.[8]

1.14 However, the historical record shows that most codes were either originally conceived as legislative measures or later adopted as such, and in this sense the idea that they typically replace and repeal pre-existing sources of law by means of a single, authoritative instrument can be regarded as an essential feature of codification.

1.15 From the Middle Ages to the French Revolution: Although the basic parameters of the concept of codification were well established in the European legal tradition by the thirteenth century, there is little doubt that the meaning of the term was dramatically altered during the so-called age of codification ushered in by the enactment of the *Code Napoléon* in 1804.

1.16 From the Middle Ages to the French Revolution codification was essentially a form of recension or restatement. Broadly speaking, it was conceived as the process of re-enacting the existing corpus of legal rules governing a particular department of law in a single, dedicated instrument. As already indicated, this exercise was sometimes accompanied by a systematic attempt to remove inconsistencies and reconcile conflicts of principle. Hence the revealing official title of Gratian's *Decretum – Concordia discordantium canonum*[9] (A harmonisation of conflicting canons).

1.17 It is important to stress that under this form of codification there was no question of making new law. Conflicts of principle had to be resolved and inconsistencies explained without compromising, much less jettisoning, the substantive content of the law as found in the pre-codified sources. Although the analogy is not perfect, the limitations surrounding the modern legislative technique of consolidation can be regarded as a contemporary common law equivalent: the creation of new law is permissible only to the extent that it is absolutely essential to the removal of anomalies in the pre-consolidated statutes.

1.18 It should also be borne in mind that the codes of this period did not recognise the modern principle of the unity and equality of the juridical subject. On the contrary, they tended faithfully to reflect prevailing social and political divisions even to the extent of codifying the different sets of rules applying to the various social orders or estates. Thus the Prussian *Landrecht* of 1794 included different sets of rules for the nobility, the bourgeoisie and the peasantry, respectively.

The modern idea

1.19 The influence of the Enlightenment: All this changed with the coming of the age of codification in the nineteenth century. Reflecting the influence of Enlightenment ideas and, in particular, the principle of equality before the law,

8 For discussion, see below, paras. 1.39, 1.45-1.51.

9 Bologna, *c.* 1140.

codification came to be seen as one of the great engines of legal and social change.[10] Following the terms of reference given by Napoleon to his commissioners,[11] codifiers were henceforth set the task of conducting a general review of the law as part of the process of codification. Moreover, to the extent that review disclosed the need for reform, they were generally given *carte blanche* to rewrite the substantive law accordingly.

1.20 They were also charged with fashioning instruments which gave substance to the natural law dogma that there was a rule of eternal reason governing human affairs. Accordingly codes were conceived as bodies of general and permanent rules. The governing idea was to create an enduring framework within which the orderly development of the law would be secured for the foreseeable future. Codes were thus assigned a prospective life way beyond that envisaged for 'mere' legislation. Napoleon expressed this clearly in a famous lament:

> My true glory is not that I have won forty battles. Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally is my Civil Code.[12]

1.21 The paramountcy of legislation: By the same token, codification was explicitly founded on the principle that legislation was the only true source of law.[13] The rules proclaimed in the code were to be applied by the judges as enacted. In the new order of things, the *ius commune* was to be stripped of the mantle of authority it had hitherto enjoyed. Henceforth it would have the status of a legal-historical archive, available – albeit, to the limited extent that it was readily accessible – for consultation by those seeking guidance on the rules and principles embodied in the code, but in itself having no residual precedential force.[14]

1.22 Moreover, although quintessentially a legislative enactment, its character as a body of general and permanent rules was intended to confer upon the code a symbolic significance greater than that enjoyed by ordinary legislation. The latter is often a product of isolated and sporadic parliamentary activity, whereas the code was seen as the supreme example of the search for consensus and compromise that the legislative process represents.

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[10] Under the *ancien régime* there had been many local variations in French law (there was a total of 60 general systems of law and 300 particular systems before 1789), with the result that, from the beginning of the Revolution, codification was perceived as a means of accelerating the goal of unification which hitherto had depended on the work of the legal treatise writers and the occasional *ordonnance.* This pressure was absent in Ireland and England as a result of the early establishment of a single common law administered over the whole country by the King's judges, which helps to explain the historic lack of enthusiasm for codification in both countries.

[11] See below, para. 1.27. Napoleon presided over many of the sittings of the *Conseil d'État* at which the drafts of the Code of 1804, originally entitled *Code Civil des Français*, were discussed. The Code became the *Code Napoléon* in 1807, the *Code Civil* in 1816, the *Code Napoléon* again in 1852 and, finally, the *Code Civil* in 1870.

[12] Cited in Mazeaud et al, *Leçons de droit civil* (8th edn., Paris, 1986), p. 45.

[13] Cornu, *Droit civil, introduction* (4th edn., Paris, 1990), p. 222.

[14] But see below, paras. 1.32-1.38.

1.23 Hence the moratorium on judicial legislation associated with the modern concept of codification. Although judges were free to interpret the code, they were to be encouraged to seek answers to their problems within its four corners. The code was a symbolic statement about the respective roles of parliament and the courts and should be construed accordingly:[15]

> A code should not attempt to provide rules that are immediately applicable to every conceivable concrete case, but rather an organised system of general rules which will be easy to discover so that from these rules, through an easy process, judges and citizens may deduce the manner in which this or that practical difficulty may be resolved.[16]

1.24 In the famous words of Portalis, one of the four draftsmen of the French Civil Code:

> the task of legislation is to determine the general maxims of the law, taking a large view of the matter. It must establish principles rich in implications rather than descend into the details of every question which might possibly arise...There is a legislative skill as well as a judicial skill, and the two are quite distinct. The skill of the legislator is to discover the principles in each area which must conduce to the common weal; the skill of the judge is to put these principles into action, and to extend them to particular circumstances by wise and reasoned application.[17]

C. CODIFICATION AND THE TWO TRADITIONS

1.25 Although originally of civilian provenance, codification in the modern sense has long been a flourishing technique in the common law tradition. Transplanted to the common law during the age of codification in the nineteenth century, its reception was genuine and has proved to be long-lasting. In the two hundred years since the enactment of the *Code Napoléon*, in 1810, common law criminal codes have proliferated with the fecundity of their European counterparts. There is therefore nothing alien or inappropriate about the process of codification in a common law context.

1.26 Historically speaking, modern codification is a child of the European Enlightenment. The ideas which inspired it were derived from the new ideology of universal reason and natural law characteristic of eighteenth-century thought. As such they showed no respect for national borders and easily straddled the divide between the two great European legal traditions.

1.27 Even in countries which failed to enact a criminal code, the legal and political debate about the value of codification has always been conducted in terms which would have been familiar to Napoleon and his original codification commissioners:[18] *viz.*, the primacy of legislation as a source of law; the

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15 For discussion, see Demogue, *Les notions fondamentales de droit privé* (Paris, 1911), p. 207; Sacco, 'Codificare: modo supezato di legiferare?' (1983) *Rivista di Diritto Civile* 117 et seq.

16 David, *Les grands systèmes de droit contemporains* (8th edn., Paris, 1982), p. 70.

17 Fenet, *Recueil complet de travaux préparatoires du Code civil* (Paris, 1836), pp. 470, 475.

18 ibid., pp. 450 et seq.

paramountcy of the code among legislative enactments; the exclusivity of codes with respect to other legal sources; the importance of systematic review and reform as constituent elements of codification; the ideal of a complete, gapless and, therefore, entirely prospective instrument; the value of comprehensiveness, logical order and clarity of structure and presentation within the various departments of law; and the necessity for a theory of adjudication binding judges to the code.[19]

1.28 Like the central tenets of the overarching legal and political philosophy of which they were a subset, these ideas formed part of a blueprint for the radical democratisation of the legal order in the modern era, quickly establishing themselves as the eternal verities of the codification movement, and winning acceptance as the basic intellectual framework for codifying initiatives everywhere. In this fundamental sense, the idea of codification is part of a common European legal heritage; it is a *res nullius*, belonging to no one in particular and, therefore, to everyone, common lawyer and civilian alike.

D. VARIETIES OF CODIFICATION

General considerations

1.29 The components of the modern idea of codification were not however conceived as a rigid set of rules. They were not intended to function as a binding code of practice, and there was no question of recognising an instrument as a code if and only if it conformed to the template they embodied.

1.30 As the history of European codification demonstrates, a large part of their attraction lay in their generality and inherent flexibility, in the fact that they were sufficiently broadly drawn to accommodate significant differences of emphasis from one codifying initiative to the next. In other words, far from being seen as a Procrustean bed, the modern idea of codification was originally conceived as a sort of cluster-concept, as a set of interlocking variables or dimensions which, depending on local needs and conditions, might be emphasised to a greater or lesser extent in any particular case.

1.31 Seen from this perspective, there is no such thing as a definitive, canonical model of codification. Irrespective of the differences between them, codifying instruments should be seen as variations on a theme rather than as deviations from the norm. As the discussion below illustrates, there is no right way of doing codification and neither legal tradition has a monopoly of wisdom on how best to achieve it. Indeed, arguably the most consistent lesson to be drawn from an historical and comparative review of codification is that both the form and substance of individual codifying initiatives are best determined by reference to local conditions rather than the seeming imperatives of an abstract scheme.

[19] For discussion, see generally Bergel, 'Principal Features and Methods of Codification' (1988) 48 *Louisiana Law Review* 1073.

The civilian model

1.32 General observations: Even within the civilian tradition, the technique of codification has always been seen more as an ideal type than a set of fixed conditions which have to be satisfied before an instrument qualifies as a code. Contrary to a popular common law misconception, the civilian concept covers a broad spectrum of legal instruments which differ significantly from one another in respect of many of the classic *indicia* of codification.[20]

1.33 For example, civilian criminal codes vary considerably in scope and are far from uniform in structure. Some of the prototypes were little more than systematic restatements of pre-codified law, while others were radically reformist in aim and effect.[21]

1.34 Relevance of non-code sources: Nor are civilian criminal codes unanimous on the relevance of non-codified sources or the vexed question of the role of judges in a code system. Common lawyers are naturally fond of F.H. Lawson's memorable image of the judge working with a code as being like a man who has been told he could walk about more or less as he liked in a room, but could not go outside.[22] Yet the reality is that many code regimes take a permissive line on the role of case law when interpreting the code.[23] Although formally classified as merely persuasive authority, the case law is frequently seen as putting flesh on the bare bones of the provisions of the code and, where the courts have developed a consistent line of decisions, is increasingly accepted as determinative, albeit in the guise of a new interpretation of the *lex scripta* as distinct from a deviation from it.[24]

1.35 On the question of reliance on pre-codified sources, suffice it to recall Lord Campbell's observations made, in 1819, following a visit as a young lawyer to the *Palais de Justice* in Paris, where he found:

> advocates and judges, in the discharge of their duty, necessarily referring to the Civil Law, to the *droit coutumier* before the Revolution, to the works of Daguesseau and Pothier, and to a body of recent decided cases little less bulky than the Reports which load the shelves of an English lawyer.[25]

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20 Zweigert and Dietrich, 'System and Language of the German Civil Code 1900', reprinted in Stoljar (ed.), *Problems of Codification* (Canberra, 1977), pp. 34-62.

21 For discussion, see Weiss, 'The Enchantment of Codification in the Common Law World' (2000) 25 *Yale Journal of International Law* 434 at 466-467.

22 *The Rational Strength of English Law* (London, 1951), p. 21.

23 In France it is accepted that *la jurisprudence* can be a source of general legal principles such as respect for the rights of the defence: *Cassation criminelle*, 12 June 1952, J.C.P., 1952, II, 7241, note Brouchot. For further discussion, see Pradel, 'France' in Van den Wyngaert, Gane, Keuhne and McAuley, (eds.), *Criminal Procedure Systems in the European Community* (London and Brussels, 1993), p.108.

24 For discussion, see Saleilles 'Introduction to Geny, *Méthode d'interprétation'* (2nd edn., Paris, 1932); Goodhart, 'Precedent in English and Continental Law' (1934) 50 *Law Quarterly Review* 40.

25 *Life of Lord Campbell*, vol. i (London, 1881), p. 363. The German experience following the enactment of the Civil Code was similar: Honsell, *Historische Argumente im Zivilrecht* (1982), pp. 108 et seq, 116 et seq.

1.36 **Judicial legislation:** Moreover, from the very beginning of the age of codification, some civilian systems even went as far as permitting judicial legislation as a means of filling *lacunae* in the text of the codifying instrument. Indeed, on one reading of the ideal of completeness,[26] judges were required to develop what became known as a *sistema iuris*, a repertoire of interpretative techniques for ensuring that the code could be made to comprehend situations that had been overlooked by the drafters. Somewhat paradoxically, the basis for this doctrine was that the code would otherwise be incomplete. Hence the widespread reliance on:

> Analogy, extensive interpretation, and arguments *a fortiori, a maiori*, and other *modi arguendi* ... as a way of enlarging existing legislative provisions and filling possible *lacunae*. The idea of a 'system' was thus joined to the idea of the 'code' because both notions promised completeness, certainty, and definitiveness to the codified law ...[27]

1.37 **The role of the commentaries:** The role played by extra-judicial and extra-legislative doctrine in French and Italian criminal law affords a vivid illustration of the argument of this section. For although the *Code penal*[28] and the *Codice penale* incorporate the principle of the primacy of codified law, the great commentaries on both instruments enjoy the status of indispensable supplements for practitioners and judges. Without the illumination provided by these tomes, many of the key provisions contained in the codes would strike the reader as little more than Delphic abstractions. The doctrine of legislative supremacy notwithstanding, the commentaries are regarded as the true Pandects of the law, for in them is to be found 'not only the provisions of the law itself but the historical accretions which are inseparable from it'.[29]

1.38 Like the case law, the commentaries do not enjoy the status of formally binding authority. However, so influential is this body of learning in civilian practice that it frequently sees itself, sometimes in language that would bring a blush to the cheeks of a common law writer, and is also deferred to by the judges, as comparable to or of even greater weight than the jurisprudence. At the very least, as the decisions of the *Cour de Cassation* in France,[30] and those of the *Corte di Cassazione* in Italy,[31] illustrate, it is perceived as a font of authority which no conscientious court can afford to ignore.[32]

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26 See above, para. 1.27.

27 Bellomo, *L'Europa del diritto commune* (Rome, 1989), p. 12.

28 Originally this doctrine meant that in the event that they found a gap in the law as stated in the code French judges had to refer to the legislature for guidance before deciding a case. Not surprisingly, this scheme quickly proved unwieldy – the predictable delays badly affected suitors – and it was soon abolished without regrets. For discussion, see Geny, *Méthode d'interprétation*, vol.i (2nd edn., Paris, 1932), pp. 78-79.

29 Allen, *Law in the Making* (Oxford, 1964), p. 178.

30 See generally Ancel, 'Case law in France' (1934) *Journal of the Society of Comparative Legislation* 1.

31 For example, see generally Brancaccio e Lattanzi, *Esposizione di giurisprudenza sul codice penale dal 1976 con referimenti di dottrina* (Milan, 1988).

32 Some civilian codes place legal doctrine on a par with the case law. Thus Article 1 of the Swiss Civil Code states that, in the absence of a code provision or customary rule governing the case, the judge 'must be guided by approved legal doctrine and case law.'

The common law approach

1.39 Restatement: The common law approach to codification is no less heterodox. Whilst there has long been broad agreement on the framework principles of codification within the common law tradition, the principles themselves have always been interpreted, prioritised and combined in different ways. For example, several early common law initiatives – that of the English criminal law commissioners of 1833 is a leading example[33] – gave pride of place to the task of digesting the entire corpus of the criminal law, both statutory and judge-made, into a single, authoritative source. In the result, they more or less ignored the issue of systematic review and reform and, consequently, were essentially exercises in restatement.[34]

1.40 It would however be a mistake to see restatement as a poor relation of codification, much less as the only realistic common law alternative to it. There is no necessary connection between restatement and common law methodology. As already indicated, some of the fabled exemplars of civilian codification were in large part restatements of pre-codified law.[35]

1.41 Moreover, given that the early common law restatements, like their civilian equivalents, were primarily inspired by a concern to bring unity and order to the chaotic state of the sources of the criminal law – two of the principal aims of codification, they can quite properly be regarded as species of that genus.

1.42 Nor is this point of purely historical relevance. It also holds true for one of the most significant examples of modern codification: the Australian Commonwealth Criminal Code enacted in 1995. Commenting on the projected codification of the general principles of criminal responsibility in the early stages of that project, the Review Committee (a forerunner of the Model Criminal Code Officers Committee) observed that:

> [T]he most convenient course...is to codify all relevant principles relating to criminal responsibility. This course should achieve uniformity of principle throughout Australia in Commonwealth criminal trials and should make the relevant principles more readily accessible and, it is hoped more clear and certain. It should be noted that codification does not necessarily involve radical reform. The Review Committee would not propose to depart widely from existing principles, but would rather propose generally to restate existing principles whilst at the same time to fill gaps, remove obscurities and correct anomalies.[36]

1.43 Crimes Acts: By parity of reasoning, even the relatively modest technique of consolidating the calendar of criminal offences into a single crimes act may also be said to qualify as a species of codification. In the nature of things, an exercise of this kind is confined to the statute law of crime. Moreover, save where the

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33 For discussion, see Ilbert, *Legislative Methods and Forms* (Oxford, 1901), pp. 50-52, 122-155.

34 The term restatement is sometimes used to refer exclusively to the reformulation of the *statute law*; see below, paras. 1.74-1.75.

35 See above, para. 1.33.

36 Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibilities and Other Matters* (1990), para. 3.12. And see below, Appendix 1(K)(iii).

principles of criminal liability have been reduced to statutory form, crimes acts do not typically contain a general part. (See Appendix 1, (C, G, H)(iii))

1.44 Despite these shortcomings, however, they should not be equated with ordinary consolidating measures. At least in the criminal law context, the latter tend to be confined to a particular category of offence, whereas crimes acts seek to effect a comprehensive sweep of the entire terrain of the special part. To that extent they, too, can be said to partake of one of the key objectives of the codification process. Indeed, the best known examples of the genre – such as the (original) New Zealand Crimes Act 1893 – began life as watered-down versions of one of the most thoroughgoing and influential codifying instruments of the Victorian period: Stephen's Criminal Code Bill of 1878.

Codification and law reform

1.45 **Stephen's Digest and Criminal Code Bill:** Mention of Stephen's Criminal Code Bill points up what is arguably the most important feature of common law methodology in this area: its close connection with the reformist strand in codification theory and practice. Although an emphasis on systematic review and reform in the context of codification is sometimes mistakenly seen as a quintessentially civilian phenomenon, it also has deep roots in the common law and continues to be an abiding feature of codifying initiatives throughout the common law world.

1.46 In 1877, in an attempt to dispel the fog of ignorance and misinformation surrounding the English judiciary's attitude to codification, Stephen published *A Digest of the Criminal Law (Crimes and Punishments)*,[37] in which he showed the form that a complete code might take. In particular, Stephen was anxious to dispel the myth, which had scuppered the efforts of the criminal law commissioners of 1833, that any attempt to reduce the common law to written form would effectively emasculate its flexibility and adaptability at the point of application.

1.47 In the nature of things, the result was much more than a traditional exercise in statutory consolidation and revision; it also incorporated provisions on the hitherto uncodified defences to a criminal charge. Nor was the *Digest* a straightforward attempt at restatement. While some of the codified rules faithfully reflected the common law, there was also a significant attempt at reform and rationalisation.

1.48 For example, the provisions on insanity went beyond the common law by recognising volitional disorder as an independent head of the defence (finally accepted in Ireland in 1974, but not, as yet, in England); those on homicide effectively abolished the felony-murder rule (which survived in English and Irish law until 1957 and 1964, respectively) and allowed words as well as deeds to constitute provocation (adopted in England in 1957 and accepted in Ireland in 1978); whilst those on offences of dishonesty sought to combine larceny and other offences of dishonest appropriation in a single offence of theft (implemented in England in 1968 and in Ireland in 2001).

[37] London, 1877. See, in particular, Stephen's 'Introduction', which was omitted from later editions of the *Digest*.

1.49 There was however no suggestion that the provisions of the criminal code, once enacted, were henceforth to be interpreted without reference to the common law sources from which they had been gleaned. Nor was there any entailment that novel provisions having no basis in the common law would not be permitted to generate an accompanying explanatory jurisprudence under a code regime. As can be seen clearly from the drafting style he employed, Stephen conceived of his code scheme in ordinary legislative terms, as presupposing both the continued existence of the common law insofar as it had not been repealed by the code, and the possibility, where necessary, of judicial clarification of the terms and concepts included in the new instrument.[38]

1.50 Stephen's draft scheme was eventually adopted as the core of the Criminal Code (Indictable Offences) Bill 1878. However, despite being given two readings in the House of Commons, in April and May 1879, the Criminal Code Bill was never enacted, having fallen victim to the drain on parliamentary time occasioned by the struggle for home rule in Ireland, on the one hand, and the enervating effects of the continuing preference within the judiciary and the legal profession for the technique of consolidation over that of codification, on the other.

1.51 It was, however, to receive a fair wind internationally where, albeit in a revised version, it provided the template for some of the best-known criminal codes and crimes acts adopted in the New World, including Canada,[39] New Zealand,[40] Queensland[41] and Western Australia, and in many of the British territories in East and West Africa. Moreover, many of the resultant instruments followed Stephen's lead by codifying some of the common law rules pertaining to the defences to a criminal charge. However, lest the sky might fall, this was generally done without repealing the pre-codified law.

1.52 The Indian Penal Code: Perhaps the historical example *par excellence* of the reformist approach is to be found in Macaulay's Draft Indian Penal Code, completed in 1835. Commenting on its disorganised state in 1818, Macaulay had described English criminal law as:

> a penal code at once too sanguinary and too lenient, half written in blood like Draco's, and half-undefined and loose as the common law of a tribe of savages...the curse and disgrace of the country.[42]

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38 See below, paras. 1.51, 1.55, 1.108-1.113. Lest there be any doubt on this point, the Royal Commission emphasised it strongly in the Report on Stephen's draft scheme which formed the basis of the Criminal Code (Indictable Offences Bill) 1878: *Report of the Royal Commission Appointed to Consider the Law relating to Indictable offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (London, 1879), pp. 9-10.

39 See Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto, Buffalo, London, 1989), p. 12 et seq.

40 See White, 'The Making of the New Zealand Criminal Code Act of 1893: A Sketch' (1986) 16 *Victoria University of Wellington Law Review* 353.

41 For a recent exploration of Stephen's influence on the original Queensland Criminal Code, see Cadoppi, 'The Zanardelli Code and Codification in the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 116 at 131.

42 Cross, 'The Making of English Law: Macaulay' [1978] *Criminal Law Review* 519-528 at 520.

1.53 Inspired by the Benthamite principle that the content of the law should be fully accessible to all educated citizens, and modelled on Edward Livingston's Draft Code for Louisiana, completed in 1826, and on the French *Code penal*, Macaulay's new code would later be described by no less an authority than Stephen as 'the first specimen of an entirely new and original method of legislative expression.'[43]

1.54 The work of a great prose stylist, 'concise, lucid and free of legal jargon',[44] the code was in large measure an attempt to recast contemporary English criminal law – it was intended to apply to the entire population, native and expatriate, of British India – around the utilitarian principle of the felicific calculus – the idea that the penal sanction should be invoked if, and only to the extent that, it was necessary to deter unwarranted harm to others.

1.55 In the event, Macaulay's draft was greeted with gusts of judicial hostility and its progress was slowed. Being largely composed of English lawyers doing a tour of duty abroad, the contemporary Indian judiciary disliked its radicalism and, echoing the concerns that had derailed the more modest proposals of the mother country's criminal law commissioners of 1833, were vehemently opposed to any reduction of the common law to written form. Once again the cry was that such a move would drastically curtail its traditional virtues of flexibility and adaptability.[45]

1.56 In the result, Macaulay's code was not enacted until 1860, and probably would not have been enacted at all but for the Indian Mutiny of 1857. Despite its difficult birth, however, the code quickly established itself as a sturdy child and is still in force in India, Pakistan, Sri Lanka, the Sudan and Northern Nigeria.[46]

1.57 The American Model Penal Code: The reformist approach to codification continued to flourish in the common law tradition into the twentieth century. In the United States of America it was the inspiration behind the American Model Penal Code promulgated by the American Law Institute in 1962. Writing in 1974, Herbert Weschler, the guiding spirit behind the project since its revitalisation in 1950, explained why the Institute had decided not to pursue the goal of restatement:

> the ... need was less for a description and reaffirmation of existing law than for a guide to long delayed reform.[47]

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43 *A History of the Criminal Law of England*, vol. 3 (London, 1883), p. 299.

44 Glazebrook, 'Criminal Law Reform: England', *International Encyclopaedia of Criminal Justice*, vol. i (2nd edn., New York, 2001), p. 400 at 407. 'The Indian Penal Code is the consummation of drafting excellence, towering above all Codes in the world. It is the *magnum opus* of Macaulay celebrated for his literary craftsmanship. Inscribed on the statute book in 1860, the Code is now more than a century old but time can write no wrinkles on its brow': Nelson., ed., *The Indian Penal Code* (6th edn., 1970), vol. 1, p. iii.

45 See below, paras. 1.108-1.113.

46 See Kadish, 'Codifiers of the Criminal Law: Weschler's Predecessors' (1978) 78 *Columbia Law Review* at 1106.

47 'The Model Penal Code and the Codification of American Criminal Law' in Hood (ed.), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (New York, 1974), p. 421.

1.58 The result was a triumphant realisation of the reformist objective. The Code was divided into four parts dealing, respectively, with general principles, specific offences, treatment and correction, and organisation of correction, each of which contained significant departures from the status quo.

1.59 In substance the first two parts were an elaboration of the principle that the criminal law's sole purpose is to deter blameworthy conduct. Thus the potpourri of terms used to designate *mens rea* at common law and by statute were reduced to four: *viz*., purposely, knowingly, recklessly and negligently, each of which was comprehensively defined. The imposition of criminal liability was made to depend on proof beyond reasonable doubt of one of these blameworthy mental states (§2.02). Reflecting the strategy adopted by many modern civilian penal codes, strict liability offences were accordingly reclassified as non-criminal violations punishable only by fines.

1.60 By parity of reasoning, the limits of defensive force were redefined in terms of reasonable belief (§3.04); a defence of reasonable mistake was affirmed for crimes such as bigamy (§230.1); and a limited plea of *ignorantia legis* was made available to defendants who had relied in good faith on official opinion regarding the lawfulness of their conduct (§2.02, §2.04).

1.61 In respect of the special part, perhaps the Model Penal Code's most significant innovation was its substitution of a unified offence of theft for the common law miscellany of larceny, larceny by trick, false pretences, embezzlement and fraudulent conversion.

1.62 The Code also proposed a scheme of determinate sentencing. Felonies were classified into three categories and misdemeanours into two. Maximum and minimum sentences were then prescribed for these categories, the exact sentence in each case being left to the discretion of the judge (§6.06, §6.08).

1.63 The Model Penal Code has had a seminal influence on the criminal policy and legislation of the states, the vast majority of which have now adopted revised codes whose form and content bear its imprint. Indeed, some of the states have recently embarked on recodification projects designed to take account of the process of piecemeal accretion which the original instruments have undergone in the decades since commencement.[48]

Quasi-codification: the Irish experience

1.64 Recent legislative policy: Just as codification does not presuppose systematic reform, so the latter does not necessarily involve codification. At all events, it need not necessarily give rise, at least in the short to medium term, to the drafting and enactment of a comprehensive codifying instrument. As recent Irish experience illustrates, systematic review and reform can also be achieved incrementally by producing what is, in effect, a series of mini-codes dealing with specific categories of offence: *viz*., the Criminal Damage Act 1991; the Criminal Justice (Public Order) Act 1994; the Non-fatal Offences against the Person Act 1997; and the Criminal Justice (Theft and Fraud Offences) Act 2001.

48 See, for example, *Final Report of the Kentucky Penal Code Revision Project of the Criminal Justice Council*, 2 vols. (Frankfort, Kentucky, 2003); *Final Report of the Illinois Criminal Code Rewrite and Reform Commission*, 2 vols. (Chicago, 2003).

1.65 Nor should this process be confused with consolidation. The latter is confined to collecting in a single measure the whole of the statute law on a particular topic, and so does not affect the common law insofar as it has not been reduced to statutory form. In contrast, the enactments listed in the preceding paragraph set out to modernise the law by creating entirely new legal regimes in their respective domains. By and large, the technique employed has been to abolish existing offences, both common law and statutory, and replace them with new ones, although there was also some measure of consolidation and restatement involved in the process.

1.66 For example, in the case of the Criminal Justice (Theft and Fraud Offences) Act 2001 the accent was on radical reform: the Act abolished larceny and kindred offences and replaced them with a unified offence of theft; whereas the Non-fatal Offences against the Person Act 1997, while containing many innovations, effectively restated the common law rules on assault and battery, albeit under the shared rubric of assault.

1.67 Moreover, it is clear from *Tackling Crime: A Discussion Paper*, published by the Department of Justice, Equality and Law Reform in 1997, that the prospect of eventual codification has been a key motivating factor behind the legislative policy which produced the aforementioned enactments; and that it is envisaged that, resources permitting, the continuing fruits of this policy might eventually be gathered in as component parts of a more comprehensive codifying instrument:

> A further development which would be in aid of and constitute a step towards codification would be a renewed impetus towards the consolidation of existing statutes in specific areas of law... codification of the criminal law in our circumstances, while certainly a desirable and worthwhile objective, would not be easily achieved because of a number of factors, chief among them being the question of resources, both human and financial ... In view of the resource implications in going down the road of comprehensive codification, the approach to date has much to recommend it – *that is to tackle, as a priority, the individual areas of criminal law that are most in need of attention and modernisation*.[49]

1.68 The role of the Law Reform Commission: The activities of the Law Reform Commission should also be noticed in this connection. The Law Reform Commission Act, 1975, section 4(1) places the Commission under a duty 'to undertake examinations and conduct research with a view to reforming the law and formulating proposals for law reform', which is defined in section 1 as including 'codification'.

1.69 In recent years the Commission's recommendations for the reform and modernisation of the criminal law have formed the basis of three of the mini-codes discussed in the preceding section: *viz*., the Criminal Damage Act 1991; the Non-fatal Offences against the Person Act 1997; and the Criminal Justice (Theft and Fraud Offences) Act 2001.

[49] *Tackling Crime: A Discussion Paper* (Dublin: Stationery Office, 1997), para. 8.25. Emphasis in original. And see below, Appendix 2.

1.70 In addition, under the auspices of its *Second Programme* (for examination of certain branches of the law with a view to their reform: 2000-2007),[50] the Commission is currently working on a series of research papers designed to lay the groundwork for a comprehensive Homicide Bill. Consultation Papers on the mental element in murder and on provocation have already been published.[51] The central paper in the series will deal with the arguments for and against a radical overhaul of the structure of the law of homicide, as well as tackling the vexed question of the proper limits of manslaughter. More recently work has commenced on a Consultation Paper on the defences of duress and necessity; and a similar exercise has been scheduled for inchoate offences.

1.71 Reflecting the working methods of the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform, the Commission's approach to the reform and modernisation of the law in these areas has been heavily influenced by the prospect of eventual codification.

1.72 Individual projects – such as those on the mental element in murder and provocation – have been conceived and developed as pieces in a larger mosaic. In the case of provocation, care has been taken to ensure a proper division of labour between the reconfigured plea and the soon-to-be enacted partial defence of diminished responsibility.[52] Similarly, although the Commission has provisionally recommended that the mental element in murder should be widened to include reckless indifference as well as intention, it has also pledged itself to examining the possibility that some intentional killings do not deserve to be treated as murder on moral grounds.[53]

1.73 Moreover, a conscious effort has been made to provide additional building blocks for a future general part; hence the inclusion of duress and necessity and inchoate offences in the Commission's Second Programme. As matters stand, degrees of participation and insanity are the only components of the general part to have been reduced to statutory form, by virtue of the Criminal Law Act 1997 and the Criminal Justice (Insanity) Bill 2002, respectively.

1.74 Restatement and the Statute Law Revision Unit: Finally, also relevant to the broad theme of the modernisation of Irish criminal law is the potential impact of the restatement project being carried out by the Statute Law Revision Unit of the Office of the Attorney General. In a policy paper published in 2002, the Statute Law Revision Unit defined restatement as:

> the process whereby the Attorney General may make available updated versions of groups of Acts of the Oireachtas or earlier statutes. These versions (to be known as restatements) will not alter the substance of the law and accordingly will not require the approval of the Houses of the

50 (PN 9459) (December 2000).

51 *Seminar paper on Homicide: the Mental Element in Murder* (LRC SP1) (July 2001); *Homicide: the Mental Element in Murder* (LRC CP17) (March 2001); *Homicide: the Plea of Provocation* (LRC CP27) (October 2003).

52 See, respectively, Criminal Law (Insanity) Bill, 2002, section 5 and *Consultation Paper on Homicide: the Plea of Provocation* (LRC CP27) (October 2003) pp. 117-119.

53 *Seminar Paper on Homicide: the Mental Element in Murder* (LRC SP1) (July 2001), pp. 5-8.

Oireachtas. They may, however, be cited in court as accepted (*prima facie*) evidence of the legislation set out in them.[54]

1.75 To date the restatement project has confined its attentions to areas other than the criminal law. However, as will be seen presently, it has the potential to play a significant role in alleviating the difficulties besetting pre-independence statutes still applicable in Ireland.[55]

E. THE VALUE OF CODIFICATION

1.76 The wide variety of techniques and instruments associated with its many concrete forms should not be allowed to obscure the continuing relevance of the classic arguments in favour of codification. The point of the foregoing historical and comparative survey was to highlight the complexity of the concept of codification, not to deny its general properties. In the opinion of the Expert Group, provided the exercise is informed by an appreciation of local needs and conditions, the case for codifying the criminal law is best made by reference to the time-honoured *indicia* of codification.[56]

1.77 Bearing in mind the particulars of the Irish case as outlined in the preceding section, three types of supporting argument are relevant: *viz*., (i) constitutional arguments founded on the principle of the primacy of legislation as a source of law and on the need to reinforce the legitimacy of the criminal law through legislative approval; (ii) arguments of principle aimed at improving the moral quality of the criminal law; and (iii) practical arguments grounded on the objective of achieving greater efficiency in the administration of criminal justice.

The constitutional dimension

1.78 One key aspect of the primacy of legislation principle is well settled in Irish law: namely, the idea that the legislature, and the legislature alone, has the power to create new criminal offences. Although Article 15.5 of the Irish Constitution is confined to retrospective *legislation*, and thus in theory does not reach retrospection at common law, the Irish courts have not given effect to this distinction. Save where the courts are constrained by their constitutional obligation to protect fundamental rights, neither form of retrospection will normally be countenanced.[57]

1.79 The problem of the common law: Less well settled is the idea that a natural corollary of the doctrine of the primacy of legislation is that the common law should be reduced to statutory form and that, in the nature of things, this might best be done in the context of the sort of systematic review associated with codification.

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[54] Statute Law Revision Unit, Office of the Attorney General, *Modernising Legislation in Ireland: A Guide to Restatement* (Policy Paper No. 2, January 2002), p. 3. See also Statute Law (Restatement) Act, 2002, sections 1-2.

[55] See below, paras. 1.86-1.88, 1.95-1.96 and 3.49-3.54.

[56] See above, paras. 1.27-1.28.

[57] For discussion, see McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), pp. 45-50.

1.80 This point has particular force in Ireland where the common law remains the principal source of the general principles of criminal liability, and the exclusive source of the law governing many specific offences.

1.81 As already indicated, the inchoate offences of conspiracy, incitement and attempt are all common law creations, as are the definitions of many of the key terms of art governing the mental element in crime, the defences to a criminal charge and the bulk of the law of causation. In the result, significant portions of the criminal law lack the crucial element of democratic legitimacy conferred by legislation.

1.82 Moreover, this difficulty is compounded by the fact that the common law in these areas is beset by a serious legality deficit which nothing short of systematic review and reform would be capable of remedying. Broadly speaking, this deficit has three causes.

1.83 First, the calendar of common law offences is uncertain, not least because doubts remain as to the extent of which, if at all, pre-existing offences formed part of the *corpus iuris* inherited by the state on independence.[58]

1.84 Second, even where there is agreement that a pre-existing common law offence has been incorporated in this sense, difficulties can arise regarding its scope and ingredients.[59]

1.85 Third, there is a serious and continuing dearth of indigenous authority on all of the aforementioned matters which, in the nature of things, means that comparative jurisprudence is often the only source of guidance on key issues of criminal policy.

1.86 Pre-independence legislation: To make matters worse, the problems pertaining to applicable pre-independence legislation are no less acute. Surveying the legislative landscape which prompted Stephen to compile his *Digest*, Lord Chief Justice Cockburn observed that the criminal law appeared to be composed of 'statutes so imperfectly drawn as to be almost worse than unwritten law', adding that 'its present state of confusion' was in no small measure due to the fact that it was a product of three centuries of largely uncoordinated legislative activity and variable drafting styles, and had to be read against an equally uncertain common law background.[60]

1.87 Were he alive today, Lord Cockburn would doubtless be startled to find that, more than 130 years later, many of the offending specimens he identified are still in force in Ireland. Indeed, it is likely that his surprise would be compounded by the discovery that copies of these enactments cannot, in the nature of things, be obtained from the Government Publications Office in Dublin or, by virtue of the

58 For discussion, see McCutcheon and Quinn, 'Codifying Criminal Law in Ireland' (1998) 19 *Statute Law Review* 131 at 134.

59 See *Attorney General v. Edge* [1943] IR 115, where this point was raised in connection with the common law offence of kidnapping (since abolished and replaced by the statutory offence of false imprisonment in section 15 of the Non-Fatal Offences against the Person Act, 1997). See generally O'Malley, 'Common Law Crimes and the Principle of Legality' (1989) *Irish Law Times* (n.s.) 243.

60 Quoted in Stephen's Introduction to his *A Digest of the Criminal Law (Crimes and Punishments)* (London, 1877), p. *v.*

repeal process in England and Wales, in some cases even from the Stationery Office in London.[61]

1.88 It is no exaggeration to say that this state of affairs is entirely unsatisfactory in a modern democracy and requires urgent attention. Indeed, there are those who find it impossible to contemplate its continuance without a tinge of humiliation, the phenomenon of incremental codification as described earlier, and the promise held out in respect of pre-1922 legislation by the restatement initiative recently undertaken by the Attorney General, notwithstanding.

1.89 Hence the logic of codification.

Accessibility, comprehensibility, consistency and certainty

1.90 As the preceding paragraphs illustrate, constitutional arguments based on the need for democratic legitimacy and the principle of legality eventually intersect with more general concerns about the haphazard, unsystematic and disorganised state of the sources of the criminal law and thus with one of the great themes of the codification movement. Indeed, since Macaulay's withering description of early nineteenth century English criminal law as 'half undefined and loose as the common law of a tribe of savages',[62] the prospect that it would cure this chronic defect has been seen as one of the principal virtues of codification by all of the leading commentators on the subject.[63]

1.91 The aims of codification: Hence the justifying aims traditionally associated with codification in the common law tradition: *viz*.,

(i) that it brings order to the sources of the criminal law where formerly there was chaos and confusion;

(ii) that it improves access to the criminal law by digesting it into a single authoritative instrument;

(iii) that it provides an opportunity to reinforce the democratic legitimacy of the criminal law by recasting it in the form of a modern enactment binding judges and citizens alike;

(iv) that it enhances comprehension of the criminal law by rendering it in a uniform drafting style and intelligible idiom;

(v) that it promotes conceptual consistency and logical development throughout the general and special parts of the criminal law;

61 For discussion, see Chap. 2, paras. 2.35-2.37.

62 See above, para. 1.52.

63 Apart from Macaulay himself, the most distinguished architects of this thesis have included Frederick Pollock, 'The science of case law' in *Essays in Jurisprudence and Ethics* (London, 1882), p. 237; F.W. Maitland 'The Making of the German Civil Code' in Fisher (ed.) *The Collected Papers of Frederic William Maitland* (London, 1911) pp. 474, 487; John Austin, *Lectures on Jurisprudence* (4th edn. London, 1879) pp. 669-704, 1056-1074; and Sheldon Amos, *Codification in England and the State of New York* (London, 1867); *An English Code: Its Difficulties and the Modes of Overcoming Them* (London, 1873); *The Science of Law* (New York, 1874), pp. 360-379.

(vi) that it requires the moral ranking of criminal offences in terms of their relative seriousness and fixes the maximum levels of punishment accordingly;[64] and

(vii) that it engenders a process of systematic review leading to the identification and removal of uncertainties and *lacunae* in the criminal law.

1.92 Administrative efficiency: At one level these justifications for codification can be characterised as practical arguments about the need for greater efficiency in the administration of criminal justice. In an uncodified system the diversity and obscurity of the sources of the criminal law mean that legal research for both lawyers and judges is often more in the nature of an archaeological excavation of buried traces than a confident search for answers. In other words, it is frequently inconclusive, time-consuming and expensive when it should be relatively straightforward, and would be so under a criminal code.

1.93 Perhaps the most trenchant statement of this point of view in the literature of the common law is to be found in the writings of John Austin and Karl Llewellyn, leading advocates of codification in nineteenth-century England and twentieth-century America, respectively. The former likened codification to escaping 'from the empire of chaos and darkness to a world that seems by comparison the region of order and light'[65] (aim (i)); while the latter wrote that:

> No one who has never seen a puzzled Continental lawyer turn to his little library and then turn out at least a workable understanding of his problem within half an hour will really grasp what the availability of the working leads packed into a systematic Code can do to cheapen the rendering of respectably adequate legal service[66] (aims (ii) and (vii)).

1.94 More recently, similar sentiments were expressed by Lord Hailsham when, speaking as both judge and politician, he said that 'a good codification would save a great deal of anxiety, obscurity, consumption of judicial time and so of costs'[67] (aims (i), (ii), (iv), (v) and (vii)). In like vein, identifying the virtues of a criminal code as those of accessibility, (aim (ii)), comprehensibility (aim (iv)), consistency (aim (v)), and certainty (aim (vii)), the Code team which reported to the Law Commission of England and Wales in 1985 concluded that the:

> law should be capable of being readily understood not only by lawyers but also by lay magistrates, police and, indeed, the ordinary intelligent citizen.[68]

1.95 Moreover, this approach has recently been endorsed in Ireland:

> The Government has prepared *Regulating Better*, a Government White paper that will contribute to improving national competitiveness and better Government by ensuring that new regulations – Acts and Statutory Instruments (Orders) – are more rigorously assessed in terms of their

64 For discussion, see Robinson 'Reforming the Federal Criminal Code: A Top Ten List' (1997) 1 *Buffalo Criminal Law Review*, Part II.

65 *Lectures on Jurisprudence* (5th edn., London, 1885), p. 58.

66 'The Bar's Troubles and Poultices – and Cures?' (1938) 5 *Law and Contemporary Problems* 104 at 118.

67 '*Addressing the Statute Law*' (1985) *Statute Law Review* 2 at 8.

68 *Codification of the Criminal Law: A Report to the Law Commission* (Law Com. No. 143, 1985), para. 1.5.

impacts, more accessible to all [aim (ii)] and better understood [aim (iv)]. Existing regulations will be streamlined and revised, where possible, through a process of systematic review and by repealing, restating and consolidating them as appropriate[69] [aims (i), (ii) and (vii)].

1.96 As already indicated, this initiative has already begun to bear fruit through the activities of the restatement project being undertaken by the Statute Law Revision Unit in the Office of the Attorney General.[70]

1.97 Moral infrastructure of criminal law: It would however be a mistake to see the so-called virtues of codification exclusively from the perspective of judges, lawyers and administrators. At a more basic level, the case for codification is essentially an argument about the moral quality of the criminal law. Broadly speaking, it is predicated on the perceived need to infuse the criminal law with the ethical and constitutional standards implicit in the concepts of accessibility, comprehensibility, consistency and certainty. As the foregoing discussion of Irish criminal law illustrates,[71] the relative want of these virtues in the common and statute law raises issues of fundamental principle touching, in particular, the requirements of legitimacy, political accountability, legality, clear labelling and fair warning.

1.98 On this analysis, the case for codifying the criminal law is therefore much more than a plea for greater administrative efficiency. Insofar as it is based on the idea that there should be a fixed legislative starting point for ascertaining what the criminal law is, and that the rules and principles set out in such an instrument should be mutually consistent, reasonably certain and intelligible to the ordinary citizen, the case for codification should be regarded as an entailment of the concept of law in a democracy, and prioritised accordingly.

1.99 By the same token, to the extent that a code stands for the ideas of internal economy and logical structure (aims (v) and (vi)), it enhances the prospect of the orderly development of the criminal law by the legislature. A criminal code worthy of the name will have graded the offences in the criminal calendar according to their relative seriousness, ranging from the most to the least heinous, with the clear implication that additions or amendments to the calendar must be compatible with this basic scheme.

1.100 At the very least, the existence of a code acts as a check on the legislature's propensity to create new special interest offences in response to sporadic public pressure – what Robinson calls *crimes du jour*[72] – without giving due consideration to whether the targeted mischief is already covered by existing legislation, or without regard to the moral relativities built into the grading and classification system underpinning the criminal law as a whole.

69 *Regulating Better* (Government Publications Office, 2004), pp. 1-2.

70 See above, paras. 1.74-1.75.

71 See above, paras. 1.76-1.89.

72 Robinson, 'Codification, Recodification and the American Model Penal Code', Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, p. 6, Codification Archive, Department of Justice, Equality and Law Reform.

1.101 By establishing a clearly defined hierarchy of offences both within and between the various categories of wrongdoing, codes help to discourage the sort of needless repetition and confusion which has long disfigured the criminal calendar and opened it to public ridicule as a hodgepodge.[73] Similarly, they promote awareness of the basic principle that, as a matter of logic, not all offences can be the worst or most heinous, irrespective of the level of public revulsion which particular forms of wrongdoing may from time to time provoke.

1.102 Although this feature of codification can be regarded as a simple matter of good legislative housekeeping, it also plays a crucial role in raising the level of public debate about the values at stake in the law-making process and, consequently, in establishing and maintaining the moral credibility of the criminal law with the community it serves.

The other side of virtue

1.103 Separation of powers: Some observers believe that the virtues of codification as described above would be offset by several undesirable side effects. For example, it is sometimes said that the tendency of codifiers to go for broad general definitions poses a threat to the principle of legality and, by giving 'unacceptably wide powers of interpretation and application to the judges', endangers the traditional balance of power between the legislature and the judiciary.[74]

1.104 Three considerations are relevant to this thesis. First, it must be conceded that overly broad definitions do indeed entail the risks it identifies; and, accordingly, that, within reason, precision and certainty are to be preferred when drafting criminal statutes.

1.105 Second, a preference for broad definitions is not a necessary by-product of codification. There is considerable variation both within and between civilian criminal codes as to the level of detail with which offences and defences are defined.[75]

1.106 Third, although drafting styles also vary considerably within the common law tradition, it is possible to discern a trend towards increasingly general, even open-textured, definitions in modern enactments.[76] For example, in Irish law the limits of lawful force are set by the concept of reasonableness; by virtue of section 18(1) of the Non-Fatal Offences against the Person Act, 1997, a person acting to protect life or property or to prevent crime or a breach of the peace is entitled to use such force 'as is reasonable in the circumstances as he or she believes them to be'. Similarly, by virtue of section 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 a person is not guilty of theft if he believed he was entitled

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73 For discussion, see McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000) pp. 63-66.

74 For a powerful statement of this position, see (Sir Michael) Kerr, 'Law Reform in Changing Times' (1980) 96 *Law Quarterly Review* 515 at 527-528.

75 For a recent illuminating comparative survey of the drafting techniques employed in the Austrian Criminal Code of 1803, the French Penal Code of 1810 and the various Italian penal codes leading up to and including the Codice Rocco of 1930, see Cadoppi, 'Il "Modello Italiano" di Codice Penale. Dalle "Origini Lombarde" ai Progetti di un Nuovo Codice Penale' (2003) 6 *L'Indice Penale* 19 at 23-26, 44-50, 70-72. See also Dale, *Legislative Drafting: A New Approach* (London, 1977), Chap. 2.

76 For discussion, see McAuley and McCutcheon, *op. cit.*, pp. 80-84, 769-777.

to appropriate the property which is the subject of the charge, notwithstanding that he was entirely mistaken in this assumption and that others would not have made it in the circumstances.

1.107 A preference for general definitions unencumbered by detail is therefore more a question of drafting style[77] than an entailment of codification.

1.108 Ossification of the criminal law: Contrariwise, it is sometimes said that codification gives rise to a search for overly precise definitions and that this in turn leads to the ossification of the criminal law by leaving little or no room for discretion when applying its provisions.[78]

1.109 Certainly overly precise definitions are just as counter-productive in the criminal law as overly vague ones. Whereas the latter threaten the values of legitimacy and legality, the former pander to the fiction that it is possible to anticipate all of the difficulties likely to arise when regulating a particular facet of human conduct. Very often the results of this fallacy can be unduly cumbersome and extremely difficult for juries to understand and apply even with the benefit of judicial direction.

1.110 As a general rule, it is unwise to be too prescriptive about the level of definitional detail appropriate in the criminal law. Provided a definition satisfies the principle of legality by being clear in substance and scope, more or less detail may be appropriate depending on the circumstances.[79]

1.111 However, it is a mistake to assume that criminal codes are more likely to contain overly detailed provisions than ordinary statutes or that this sort of prolixity removes the need for judicial interpretation. Irrespective of the level of detail involved in the articulation of its rules and principles by parliament, the criminal law is destined to proceed as a partnership between the legislature and the judiciary. Where definitions are necessarily complex, the courts will be required to rule on their meaning and explain their intricacies to juries. Similarly, where a definition is broad or open-textured in character, both kinds of guidance will perforce be necessary.[80] Moreover, as the discussion of the civilian experience illustrates,[81] the exigencies of interpretation necessarily lead to the emergence of an explanatory jurisprudence alongside the criminal code.

1.112 That said, the ossification thesis is correct to the extent that it entails the conclusion that a code system does not permit judges to alter the parameters of the criminal law either by creating new offences or expanding the reach of existing ones; these are exclusively matters for the legislature.

1.113 However, quite apart from the fact that Irish judges have themselves eschewed any such activism,[82] this is a notable strength of codification, not a weakness.

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77 See Atiyah, 'Common Law and Statute Law' (1965) 48 *Modern Law Review* 1 at 5.

78 See Farrar, *Law Reform and the Law Commission* (London 1974), pp. 150 et seq.

79 Dale, *Legislative Drafting: A New Approach* (London, 1977), p. 335.

80 For discussion, see Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1 at 5.

81 See above, paras. 1.32-1.38.

82 See above, para. 1.78; and below, Chap.2, paras. 2.77-2.81.

F. SUMMARY AND CONCLUSION

1.114 The key arguments of this Chapter may be summarised as follows:

(i) codification in the form of the recension of the sources of law in a single instrument has been a notable feature of the European legal landscape at least since Roman times;

(ii) codification in this sense did not attempt to unify the pre-codified sources of law, nor did it purport to alter their contents. It merely compiled the pre-codified sources in one document;

(iii) the modern idea of codification is a creature of the European Enlightenment;

(iv) the modern idea is based on the democratic principle that the content of the criminal law is exclusively a matter for the legislature and should be declared by the legislature in a comprehensive instrument which is easy to access and understand, and whose provisions are mutually consistent and reasonably certain;

(v) although originally a civilian initiative, the modern trend towards criminal law codification has deep roots in the common law tradition going back to the age of codification in the early nineteenth century;

(vi) although the modern concept of codification has several stable components (listed at **(iv)** above), there is no such thing as a definitive, canonical model of codification;

(vii) rather there are several varieties of codification which emphasise different dimensions of the underlying concept;

(viii) the principal varieties of codification include:

(a) the consolidation of the statute law governing the various categories of specific offences (the special part) in the form of a Crimes Act;

(b) restatements of the common and statute law governing all or most of the principles of criminal liability (the general part) and the special part, in the form of a Criminal Code Act;

(c) radical reform of the entire domain of the criminal law in the shape of a Criminal Code Act;

(d) incremental restatement or reform of the criminal law in a series of mini-codes dealing with discrete areas of the special part or the whole of the general part.

(ix) a decision as to which of these models of codification is most appropriate should be based on a detailed consideration of local needs and conditions;

(x) in particular, when approaching this question care should be taken to ensure that optimum use is made of codifying initiatives already undertaken by local agencies such as the Department of Justice, Equality

and Law Reform, the Law Reform Commission and the Statute Law Revision Unit of the Office of the Attorney General;

(xi) the principal virtues of codification include:

(a) confirmation of the paramountcy of legislation among the sources of the criminal law other than the Constitution;

(b) confirmation of the principle that, subject to the Constitution, the power to alter the parameters of the criminal law either by creating new offences or expanding the reach of existing ones rests exclusively with the legislature;

(c) improving the moral quality and credibility of the criminal law by making it more accessible, comprehensible, consistent and certain;

(d) improving the efficiency of the criminal justice system by addressing the serious problems posed by the haphazard, unsystematic and disorganised state of the sources of the criminal law.

1.115 In the opinion of the Expert Group, the burden of these arguments is that the net issue in Ireland is no longer whether the criminal law should be codified, but rather what form codification should take, and it is to the exploration of that question that the discussion now turns.

Chapter 2 – THE QUESTION OF FORM

A. INTRODUCTION

2.01 Insofar as codifying the criminal law is considered desirable in principle, what form should codification take in Ireland? Should the process of quasi-codification described in Chapter 1 be allowed to continue as a series of consolidating and restatement initiatives targeting specific parts of the criminal law? Or is there a need for decisive legislative intervention in the form of a dedicated codifying instrument?

2.02 If it is decided to develop a dedicated codifying instrument, what is the scale of the task involved?

2.03 And what form should such an instrument take? Should it be designed as a simple compendium of specific offences? Or should it be configured as a criminal code covering the general principles of criminal liability as well as specific offences?

2.04 How should the contents of the special part of a codifying instrument be determined? Should the instrument comprehend the entire criminal calendar? If not, which offences should be included and which excluded and why? For example, should regulatory offences and offences against the State be included or excluded? In the event that some offences are excluded from the codifying instrument, are these offences to be governed by the general principles set out in the instrument? Should criminal procedure and sentencing be included among the contents of a codifying instrument?

2.05 Should a dedicated codifying instrument be introduced all at once or on a phased basis? If it is decided that it should be phased in, how should the contents of a codifying instrument be prioritised? Should the special part be enacted first and the general part added on at a later date? Or should this process be carried out in reverse? Alternatively, should the general part and selected components of the special part be enacted simultaneously, and residual components added at a later date?

2.06 Once a codifying instrument has been brought into being, what is the nature of the relationship between it and uncodified offences? Would the general part also apply to these offences?

2.07 Finally, what is to be the fate of the common law following codification? Does codification entail the abolition of its rules and principles or is it envisaged that these would continue to exist in a parallel universe alongside the code?

B. THE FRUITS OF CURRENT LEGISLATIVE POLICY

2.08 Since 1991 the Oireachtas has enacted a series of statutes reforming discrete areas of the criminal law. The enactments in question have been drafted in a broadly similar fashion and have endeavoured to collect the law governing their respective domains in single instruments. As already indicated,[1] this process was initiated as a policy of quasi-codification designed to modernise the statute book and prepare the ground for the eventual enactment of a criminal code.

2.09 The result is a stock of legislation which is immediately available for incorporation into a code and which, with the passage of time, is likely to be augmented through the ordinary process of criminal law reform,[2] the beneficial influence of current restatement policy as articulated in the Government White Paper, *Regulating Better*,[3] and the continuing activities of the Law Reform Commission in the areas of homicide and the general defences.[4]

The criminal calendar

2.10 The more important enactments currently in stock include the Criminal Damage Act, 1991, the Criminal Justice (Public Order) Act, 1994, the Non-Fatal Offences against the Person Act, 1997 and the Criminal Justice (Theft and Fraud Offences) Act, 2001. Cumulatively these enactments have abolished the common law offences of arson, rout, riot, affray, unlawful assembly, assault, battery, false imprisonment, kidnapping, larceny, robbery, burglary, cheating (other than cheating the public revenue), extortion under colour of office and forgery, and replaced them with modern statutory equivalents.

2.11 In addition, a significant body of older legislation has been repealed as a result of the new enactments. Thus large parts of the Malicious Damage Act, 1861, of the Offences against the Person Act, 1861[5] and of the Larceny Act, 1861, all of the Larceny Acts, 1916 and 1990, the Forgery Acts, 1861 and 1913, the Coinage Offences Act, 1861, the Falsification of Accounts Act, 1875 as well as sections 6 and 7 of the Conspiracy and Protection of Property Act, 1875, have been excised from the statute book to make way for their modern counterparts.

2.12 Moreover, unlike the enactments they replaced, the bulk of which were written in the style of a bygone age, the new legislation has been drafted in a modern, accessible idiom. In the result, Irish law now boasts a corpus of well-drafted statutes on what, with the notable lacuna of homicide,[6] may fairly be described as the principal departments of the criminal law: *viz.*, non-fatal offences against the person, theft and dishonesty, criminal damage and public order.

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1 See above, Chap. 1, paras. 1.64-1.67.

2 Additions in the medium term are likely to include modernising legislation on explosive substances, to replace the Explosive Substances Act, 1875 and the Explosive Substances Act, 1883, and on the prevention of corruption, to replace the Prevention of Corruption Acts 1889-1916, as amended by the Prevention of Corruption (Amendment) Act, 2001; and see below, paras. 2.14, 2.39-2.41.

3 Government Publications Office, 2004, pp.1-2, discussed above, Chap. 1, at paras. 1.95-1.96

4 For discussion, see above, Chap. 1, paras. 1.68-1.73.

5 Notably, section 57, dealing with bigamy, and sections 58-59, dealing with abortion, have been retained.

6 For discussion of the activities of the Law Reform Commission in this area, see above, Chap. 1, paras. 1.68-1.73.

The general principles of criminal liability

2.13 The policy of quasi-codification has also reached into the general part. The Criminal Law Act, 1997 abolished the age-old categories of felony and misdemeanour and recast the law governing liability for secondary participation[7] and for concealing an arrestable offence.[8] The 1997 Act also expunged penal servitude, hard labour, prison divisions and corporal punishment from the law, thus reconciling the sentence options available to the courts with current penal practice.

2.14 By virtue of sections 18 to 20 of the Non-Fatal Offences against the Person Act 1997, the law on legitimate defence, at least as far as the use of non-fatal force is concerned, is now exclusively regulated by statute; while the age of criminal responsibility is now provided for by section 52 of the Children Act 2001, although that section has not yet been commenced. Similarly, there are now several modern statutory provisions dealing with the application (or non-application) of the general principles of criminal liability to individual offences,[9] or restating general common law principles in the context of a particular offence.[10]

2.15 Cognisance should also be taken of developments which are likely to add to the process of legislative reform of the general part in the foreseeable future. For example, the Criminal Law (Insanity) Bill 2002, which has completed (on 8th April 2004) the Committee Stage in the Seanad, proposes to place the law on insanity and fitness to plead on a statutory footing and to introduce the long-awaited partial defence of diminished responsibility. Moreover, as already indicated in Chapter 1,[11] the Law Reform Commission is committed to reviewing the law on necessity and duress and inchoate liability as part of its Second Programme.

C. CURRENT POLICY AND THE AIMS OF CODIFICATION

2.16 It is also important to emphasise that the legislative programme outlined in the preceding paragraphs has made a significant contribution towards securing the aims of codification as set out in Chapter 1.[12] As already suggested, by digesting its rules and principles in a series of well-drafted, more or less homogeneous statutes, the principal effect of recent legislative policy has been to bring a much-needed measure of order to the sources of the criminal law – aim (i),[13] while simultaneously improving access to the criminal calendar – aim (ii).[14]

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7 Section 7(1) covers aiding, abetting, counselling and procuring (what was previously known as accessories before or at the fact). Section 7(2) covers assistance after the commission of the offence (formerly accessories after the fact).

8 Known in the old law as compounding a felony.

9 Thus while criminal jurisdiction is normally confined to the territory of the State, some statutes provide for extra-territorial application. See, for example, Misuse of Drugs Act, 1977, s 20; Sexual Offences (Jurisdiction) Act, 1996.

10 For example, the Criminal Justice Act, 1964, s 4 defines the mental element in murder but also codifies the presumption that a person intends the natural and probable consequences of his or her actions.

11 See above, Chap. 1, para. 1.70.

12 See above, Chap. 1, para. 1.91.

13 See above, Chap. 1, para. 1.91 (i).

14 See above, Chap. 1, para. 1.91 (ii).

2.17 Similarly, by adopting a uniform drafting style, while at the same time couching the new enactments in a modern, accessible idiom, the legislature has ensured that the aims of improved comprehension – aim (iv)[15] – and enhanced conceptual consistency throughout the general and special parts – aim (v)[16] – have been given due prominence in modern Irish criminal law.

2.18 Two examples will suffice to make this point. Since 1991 intention and recklessness have been adopted by the legislature as the normal fault requirements for criminal offences, thus beginning the process of decommissioning the confusing array of overlapping archaisms – including such terms as 'maliciously', 'wilfully' and 'fraudulently' – traditionally used for that purpose.

2.19 By the same token, the Non-Fatal Offences against the Person Act, 1997 has greatly simplified the law of assault. As generations of law students learned to their chagrin, the Offences against the Person Act, 1861 employed a triumvirate of expressions, not all of which were co-terminous, to describe the action of bringing about the prohibited result in the various assault and aggravated assault offences comprehended by its provisions – *viz*., 'causing', 'inflicting' and 'occasioning'. In contrast the drafters of the 1997 Act decided to make do with the single term 'causing' for this purpose.[17]

2.20 No less important a consideration is that the enactments of the past decade have involved the systematic review and reform – aim (vii)[18] – of significant portions of the substantive criminal law,[19] and have been characterised by a conscious attempt on the part of the legislature to develop a rational grading system for offences[20] – aim (vii)[21] – whereby individual items in the criminal calendar are ranked (and their associated penalties fixed) according to their relative heinousness.[22]

2.21 Finally, account should be taken of the fact that long-standing concerns about the democratic legitimacy of Irish criminal law[23] have been greatly eased as a result of these developments: the aforementioned enactments are all of recent vintage and, as such, their cumulative effect has been to restore the law-making function of the Oireachtas in respect of the core of the substantive criminal law – aim (iii)[24] – while at the same time sweeping away a large body of outdated statute law – aim (i)[25] – inherited on independence.

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15 See above, Chap. 1, para. 1.91 (iv).

16 See above, Chap. 1, para. 1.91 (v).

17 See sections 3 and 4 of the Act.

18 See above Chap. 1, para. 1.91 (vii).

19 In the case of the Criminal Damage Act, 1991, the Criminal Justice (Theft and Fraud Offences) Act, 2001 and the Non-Fatal Offences against the Person Act, 1997, the review process was carried out by the Law Reform Commission. See Law Reform Commission, *Report on Malicious Damage* LRC 26-1998; *Report on the Law relating to Dishonesty* LRC 43-1992; *Report on Non-Fatal Offences against the Person* LRC 45-1994.

20 For discussion of the post-codification aspect of this problem, see Chap. 3, paras. 3.83-3.86.

21 See above, Chap. 1, para. 1.91 (vi).

22 See, for example, sections 2-5 of the Non-fatal Offences against the Person Act, 1997, setting out the hierarchy of assault offences from simple assault up to and including threats to murder.

23 For discussion, see above, Chap. 1, paras. 1.78-1.89.

24 See above, Chap. 1, para. 1.91 (iii).

25 See above, Chap. 1, para. 1.91 (i).

2.22 Indeed, it should perhaps also be noticed that this development has coincided with a policy of retrenchment on the part of the courts. As already indicated in Chapter 1,[26] in recent decades the judges have repeatedly signalled that the making and unmaking of the criminal law is a matter for the legislature and the legislature alone.

2.23 Examples of this policy include the refusal to recognise the existence at common law of the partial excuse of diminished responsibility;[27] to expound on the ingredients of the crime of blasphemy;[28] and to reshape the partial defence of provocation,[29] the fact that the last-named is entirely the product of judicial legislation notwithstanding.[30]

D. THE CASE FOR A COMPREHENSIVE CODE

The provisional character of quasi-codification

2.24 Despite these signal achievements, the limitations of current legislative policy should also be acknowledged.

2.25 As we have seen, if left to its own devices, a policy of systematically recasting the substantive criminal law as a series of well-drafted, modern enactments will eventually ameliorate many of the problems associated with the status quo. Moreover, if allowed to run its course, such a policy will help to alleviate the want of legitimacy, legality, consistency and accessibility occasioned by the residue of antiquated statute law and uncertain common law which continues to disfigure the landscape of Irish criminal law.[31]

2.26 However, it is important to remember that current policy was originally conceived, and continues to be pursued, as a partial solution to these problems. As is clear from *Tackling Crime: A Discussion Paper*, published by the Department of Justice, Equality and Law Reform in 1997, that policy was seen as a prelude to codification, not as a substitute for it:

> The systematic updating of separate areas of the criminal law which are in need of modernisation, as is happening at present, is a process that will facilitate and assist eventual codification of the criminal law. The research and work that was necessary, for example, to replace the Malicious Damage Act of 1861 by the Criminal Damage Act of 1991, to prepare the Criminal Law Act, 1997 or to largely replace the Offences against the Person Act, 1861…is work that would have had to be done by a codification team. The more completely all areas of the law have been scrutinised and modernised, in this way, the more will codification be facilitated. On this view codification almost becomes a process of simply slotting in each updated area of the law into a single comprehensive document leaving the general part of the criminal law, perhaps, to be tackled by the codification team.[32]

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26 See above, Chap. 1, para. 1.78.

27 *People (DPP)* v. *O'Mahony* [1985] IR 517.

28 *Corway* v. *Independent Newspapers* [1999] 4 IR 484.

29 *People (DPP)* v. *Davis* [2001] IR 146.

30 See McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), pp. 872-877.

31 For discussion, see above, Chap. 1, paras. 1.78-1.89.

32 Dublin: Stationery Office, 1997, para. 8.29.

2.27 Moreover, while underlining the Department's ongoing commitment to the programme of modernisation and consolidation described in the preceding section, *Tackling Crime* candidly acknowledged that the adoption of this strategy was dictated by resource considerations, 'both human and financial', and was not intended to detract from the view that what is described in the document as 'comprehensive' codification remains 'a desirable and worthwhile objective'.[33]

The importance of an integrated legislative scheme

2.28 Not least of the limitations affecting current policy is that it will not, by itself, lead to comprehensive codification of the kind contemplated in *Tackling Crime*. By definition, a plurality of individual enactments, however well crafted, is not the same thing as comprehensive codification. On any reasonable view, the latter presupposes an integrated instrument which can meaningfully be described as a conceptual whole, incorporating both the general principles of criminal liability and the law governing specific offences,[34] whereas the former does not.

2.29 Nor is this a distinction without a difference. For while the legislature can strive for conceptual consistency and uniformity of drafting style from one enactment to the next, the risk of unevenness across a series of discrete enactments is obviously greater than it would be in a unitary legislative scheme.

2.30 The role of the general principles: Indeed, as matters stand, this risk is compounded by the fact that the general principles of criminal liability, normally one of the principal sources of conceptual consistency in the criminal law,[35] continue to be beset by the uncertainties engendered by their largely common law status.[36]

2.31 Admittedly, this problem will to some extent be alleviated as the general principles are gradually reduced to statutory form.[37] However, not even the enactment of a consolidating statute on the general part will solve the underlying problem that a multiplicity of independent enactments is less likely to promote conceptual consistency, not to mention the key democratic value of enhanced accessibility, than a comprehensive code.

2.32 It should also be borne in mind that consolidation of the general part would mean that, since they already form an integral part of the definition of the specific offences contained in the mini-codes currently comprising the special part, the fault elements of criminal liability would effectively be condemned to a double life – appearing in one incarnation in the general principles enactment and in another as an embedded component of each item in the criminal calendar,[38] thus adding to the potential for confusion and further frustrating ease of access and user comprehension in the context of the criminal law as a whole.

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33 Ibid., para. 8.25, and see above, Chap. 1, para. 1.67.

34 For discussion, see above, Chap. 1, 1.97-1.102.

35 For an illuminating discussion of this point, see Andrews, 'Codification of Criminal Offences' [1969] *Criminal Law Review* 59 at 62.

36 See below, paras. 2.72-2.76.

37 See below, Chap. 3, paras. 3.49-3.54.

38 On the related issue of the difficulties involved in aligning the general and special parts of a criminal code, see below, Chap. 3, paras. 3.45-3.46.

2.33 **The integrity of the grading system:** By parity of reasoning, the critically important task of developing and maintaining a stable system of proportionate grading within the criminal calendar is also more difficult within a fragmentary system. Given the inevitability of occasional special-interest legislation in a democracy,[39] the discipline imposed by a unitary legislative scheme is more likely to protect the integrity of the criminal calendar than a series of scattered enactments.

2.34 In a unified scheme the proper ranking of offences and their associated punishments is explicit and comprehensive and, accordingly, more difficult for law makers to discountenance; whereas, in the nature of things, the moral judgments involved in an exercise of this kind are more difficult to make, and therefore easier for the legislature to shirk, in a system of scattered enactments.[40]

2.35 **The incompleteness of the mini-codes:** Similarly, while modern statutes are, by and large, easier to decipher, and unquestionably easier to access,[41] than their historical precursors, the understandable profusion of new enactments necessitated by the current policy of modernisation does not always sit easily with the goal of enhanced intelligibility.

2.36 Quite apart from the sheer volume of new legislation involved, there is also the fact that several of the more ambitious consolidating and reforming measures of recent years cannot accurately be described as comprehensive in their respective domains and, consequently, must be read against a background of complementary provisions contained in older enactments, many of which continue to be beset by the very problems current policy is designed to eradicate.

2.37 Thus while the bulk of the applicable law on criminal damage, public order, non-fatal offences against the person and theft and fraud offences is now contained in the series of dedicated mini-codes listed above,[42] anyone navigating in these waters should be wary of the continuing presence of the now partially submerged remains of several venerable Victorian hulks, in the form of the Malicious Damage, Offences Against the Person, and Larceny Acts of 1861.[43]

2.38 **Homogeneity of content:** Moreover, voyagers to these parts should also be advised that, albeit for understandable reasons, the principle of homogeneity of content has not always been observed in the consolidation process. Thus some assault offences have been housed in the Criminal Justice (Public Order) Act, 1994,[44] when many will feel that the more appropriate vessel would have been the Non-Fatal Offences against the Person Act, 1997.

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39 For discussion, see above, Chap. 1, paras. 1.99-1.102; and below, Chap. 3, paras. 3.83-3.86.

40 For discussion of the international experience of this problem, see the material cited and discussed below, Chap. 3, paras. 3.83-3.86 and accompanying footnotes.

41 For discussion, see above, Chap. 1, paras. 1.86-1.88.

42 See above, paras. 2.08-2.09.

43 For example, the following sections, *inter alia*, of the Malicious Damage Act, 1861, remain on the statute book: sections 35-36, dealing with railway obstruction; sections 40-41, dealing with the killing or maiming of cattle or other animals, and section 48, dealing with the removal or concealment of buoys and other sea marks. Similarly, in addition to those of bigamy and abortion (above, footnote 5), the statutory offences of conspiracy to murder (s. 4) and concealing the birth of a child (s. 60) continue to be governed by the Offences against the Person Act, 1861 (See also Appendix 2).

44 See sections 18 and 19 of the Act.

2.39 **The persistence of piecemeal reform:** There is also fact that, even if judged by its own standards, recent legislative policy in the criminal law area has not been an unblemished success. For example, notwithstanding the restraining influence of a policy designed to bring greater clarity and simplicity to the sources of the criminal law, the legislature has, since 1990, seen fit to add no fewer than six separate enactments to the corpus of statute law on sexual offences, thus bringing the number of applicable statutes in the area to the grand total of *twelve*.

2.40 In the result, the law governing sexual offences in Ireland is now spread over the following enactments: *viz*., the Criminal Law Amendment Act, 1885, the Punishment of Incest Act, 1908, the Criminal Law Amendment Act, 1912, the Criminal Law Amendment Act, 1935, the Criminal Law (Rape) Act, 1981, the Criminal Law (Rape) (Amendment) Act, 1990, the Criminal Law (Sexual Offences) Act, 1993, the Criminal Law (Incest Proceedings) Act, 1995, the Sexual Offences (Jurisdiction) Act, 1996, the Child Trafficking and Pornography Act, 1998, the Sexual Offences Act, 2001 and the Child Trafficking and Pornography (Amendment) Act, 2004.

2.41 Doubtless the unhappy effects of this miscellany will eventually be ameliorated by the ongoing policy of systematic consolidation being pursued by the Department of Justice, Equality and Law Reform, so it would be inappropriate to conclude this section by dwelling on them.[45]

Conclusion

2.42 However, without wishing unduly to detract from the achievements to date of the aforementioned policy, or, indeed, to gainsay its importance in the continuing attempt to modernise the statute book, the Expert Group is firmly of the view that the state of affairs described in this section can scarcely be regarded as a suitable alternative to eventually digesting the main body of the criminal law in a single authoritative instrument.

2.43 Given that the justifying aims of the programme of statutory modernisation being pursued by the Department of Justice, Equality and Law Reform[46] (and, on the larger legislative canvas, by the Government through the mechanism of *Regulating Better*,[47]) largely coincide with those of codification,[48] the Expert Group is satisfied that a decision to produce such an instrument would represent a natural and desirable progression for current policy by helping it to realise its full potential as a force for greater clarity, consistency and accessibility in the criminal law.

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[45] '…our law on sexual offences is contained in a number of different pieces of legislation including some pre-independence statutes. There would be benefit in bringing all of these provisions together in one statute so that people could see at a glance what our complete law on these offences is': Department of Justice, Equality and Law Reform, *Tackling Crime: A Discussion Paper* (Dublin: Stationery Office, 1997), para. 8.30.

[46] See above, Chap. 1, paras. 1.64-1.67.

[47] See above, Chap. 1, para. 1.95.

[48] See above, Chap. 1, para. 1.91.

2.44 In short, the Group is satisfied that, in the final analysis, quasi-codification is no substitute for comprehensive codification and strongly endorses the sentiments voiced to that effect in *Tackling Crime*.[49]

E. THE SCALE OF THE TASK

Harvesting the fruits of modernisation

2.45 Without minimising the scale of the task of producing a comprehensive criminal code of the kind we have been discussing, it is important to emphasise at the outset that the striking achievements of the legislature over the past decade and a half have firmly moved the undertaking from the realm of theoretical possibility to that of practical realisation.

2.46 As a result of the policy of modernisation described in the opening section of this chapter, the foundations for a comprehensive criminal code have already been laid in Irish law. Save for the want of a modern statute on homicide, the basic building-blocks needed for the construction of such an instrument are now to hand in the form of the series of mini-codes on the various departments of the substantive criminal law which have been enacted since 1991.[50]

2.47 Moreover, the happy coincidence of several modernising forces within (or closely linked to) the state apparatus is likely to yield important additions to the existing array of mini-codes in the foreseeable future, thus nourishing the realistic hope that the outstanding ingredients needed for the assembly of a comprehensive codifying instrument worthy of the name will be available to the legislature in the medium term.

2.48 As already indicated, the programme of consolidation and reform being conducted by the Department of Justice, Equality and Law Reform is ongoing and, while its future direction is a matter for the Minister and his Departmental officials, may reasonably be expected eventually to comprehend, *inter alia*, the law on sexual offences and explosive substances.[51]

2.49 Similarly, mention has already been made of the fact that the Law Reform Commission is currently engaged on a comprehensive review of the law of homicide designed to recast the entire body of law in that area in the form of a modern (draft) statute;[52] and of the Commission's ongoing work on key aspects of the general part.[53]

2.50 Finally, there is the fillip provided by the Government's commitment to modernising the statute book as a whole, with a view, in particular, to rendering it more accessible and comprehensible to the citizenry at large.

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49 See above, Chap. 1, para. 1.67.

50 See above, paras. 2.08-2.15; and below, Appendix 2.

51 See above, paras. 2.39-2.41, and 2.09, respectively, and accompanying footnotes.

52 See above, Chap.1, para. 1.70.

53 See above, Chap.1, para. 1.73.

2.51 Although less tangible than the developments alluded to in the immediately preceding paragraphs, there can be little doubt that, by explicitly linking it to the process of democratisation, Government policy on statute law modernisation has helped to create a favourable environment for codification both within the state apparatus and in the wider political system.[54]

Incorporating the mini-codes

2.52 The nature of the exercise: The problems of incompleteness and lack of homogeneity notwithstanding,[55] the task of incorporating the existing stock of modern statutes into a unified criminal code is likely to be *relatively* straightforward.

2.53 Without wishing in any way to minimise the painstakingly technical nature of the work entailed in an exercise of this kind, or the range of skills and disciplines needed to carry it off successfully,[56] the fact remains that the technique involved is essentially that of consolidation and, consequently, will not necessitate a radical departure from existing legislative methodology.

2.54 As in the case of the ordinary process of category-specific consolidation in the criminal law field, the object of the exercise will be to bring the applicable statute law of crime within the framework of a single enactment, while at the same time ensuring that the resultant instrument is free of ambiguity and inconsistency, and drafted in a uniform and accessible modern idiom.

2.55 In the nature of things, the issue of uniformity and accessibility of style and expression is unlikely to prove unduly taxing; the raw materials are all of recent vintage and were drafted with precisely these considerations in mind.[57]

2.56 Moreover, as already indicated, from the outset of the current programme of modernisation, the legislature has been at pains to ensure a high level of conceptual consistency across the entire spectrum of enactments in the criminal law area, and has achieved a notable measure of success in the process.[58]

2.57 The expanding role of interpretation sections: Similarly, following modern legislative best practice,[59] care has been taken to introduce the newer enactments with a comprehensive interpretation section containing the definitions of key terms, and to ensure an appropriate division of labour between the interpretation section and the substantive provisions which follow it, thus avoiding needless repetition, and the clutter that goes with it, throughout the main body of the consolidating instrument.[60]

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54 See above, para. 2.43 and Chap. 1, paras. 1.95-1.96.

55 For discussion, see above, paras. 2.35-2.37 and 2.38, respectively.

56 For discussion, see below, Chap. 3, paras. 3.39-3.58.

57 See above, paras. 2.12 and 2.16-2.23.

58 See above, paras. 2.17-2.19.

59 See Bennion, *Bennion on Statute Law* (3rd edn., London, 1990), pp. 46, 131-135.

60 For example, section 1 of the Non-Fatal Offences against the Person Act, 1997 defines, among others, the key terms 'harm' and 'serious harm'; while section 2 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 does likewise for the principal constitutive concepts used throughout that enactment, albeit that the content of many of the resultant definitions can only be gleaned by reading the detailed provisions governing the specific offences to which they refer.

2.58 In other words, without conflating the idea of an interpretation section with the concept of a general part, to the extent that it determines the meaning and scope of the substantive provisions governing the specific offences contained in an enactment, the former clearly contains the lineaments of the latter.

2.59 In the result, the challenge of weaving the general provisions contained in the interpretation sections of the existing stock of statutes into a comprehensive definitional scheme at the beginning of a criminal code and, by extension, the task of creating a general part properly so called, is likely to be much less daunting than it would be if the legislature were working from an unconsolidated statutory canvas.

2.60 Three examples will suffice to underline the significance of this point. Although it has pursued a policy of standardisation in respect of the fault elements of criminal liability since 1991,[61] the legislature has thus far chosen to leave the meaning of several of the key terms involved in this exercise at large. Thus although they have general application throughout both enactments, the concepts of intention and recklessness are not defined in the Criminal Damage Act, 1991 or in the Non-Fatal Offences against the Person Act, 1997, with the result that their effective meaning has been left to float between ordinary usage and the common law.

2.61 However, in the event that it was decided to enact a comprehensive criminal code, it is highly likely that, in light of current international practice, these terms would be statutorily defined as part of the codification process, and the resultant definitions included in the interpretation section, or general part as it would then be styled, at the beginning of the codifying instrument.[62]

2.62 Similarly, the interpretation section of several modern enactments already contain important material pertaining to the defences to a criminal charge, thus fulfilling one of the classic functions of the general part of a criminal code.

2.63 For example, while section 2 of the Criminal Law (Rape) Act, 1981, which reduces the ingredients of the offence of rape to statutory form, deals with the relationship between reasonable and honest belief as part of the definition of the offence,[63] the Non-Fatal Offences against the Person Act, 1997 provides for this matter, in the context of legitimate defence, in almost identical language, in the interpretation section – section 1(2)[64] – rather than in the main body of the enactment.

2.64 Finally, it is increasingly commonplace for particularly voluminous modern consolidating enactments to include an interpretation section at the beginning of each of their constituent parts, often for the purpose of defining, much like a conventional general part, the mental element in a discrete group of offences.

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61 See above, para. 2.18.

62 For discussion, see below, paras. 2.87-2.96; and Appendix 1(A-L)(iii).

63 'It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.'

64 '…it is immaterial whether a belief is justified or not provided it is honestly held but…the presence or absence of reasonable grounds for the belief is a matter to which the court or jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief.'

2.65 Thus Part 3 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 provides for a series of related offences dealing with the handling and possession of stolen property and other proceeds of crime, in respect of which recklessness is regarded as a fault element. However, the concept of recklessness is defined in the interpretation section – section 16 – *not* in the provisions detailing the elements of the offences in question.

2.66 In conclusion, without pressing the analogy too far, the role currently played by the interpretation section in a modern enactment is not fundamentally different from that discharged by a general part in a criminal code, and to that extent serves to demystify both the character of the adjustment, and the scale of the undertaking, involved in moving to a regime of comprehensive codification.

2.67 While the transition to comprehensive codification cannot be equated with anything that has been attempted to date in Irish criminal law, it is far from being a voyage into the unknown. To the extent that the process can be managed within the broad framework of consolidation, and bearing in mind that the *principle* of a general part has been accepted in modern legislative practice, it is more in the nature of a planned expedition which, while requiring courage and conviction on the part of those who set out upon it, may be undertaken in the knowledge that it has been preceded by a series of successful explorations by the Oireachtas in the form of the so-called mini-codes discussed above.

Harnessing the common law

2.68 General considerations: On the other hand, it would be vain to deny that the continuing presence of a significant common law element in Irish criminal law presents special difficulties in the context of codification.

2.69 To the extent that the applicable rules and principles of the criminal law have yet to be reduced to written form, the process of codification cannot be managed within the framework of statutory consolidation, but will require, as an additional component, an admixture of restatement and reform.

2.70 That being the case, it should perhaps be said at the outset that, from the point of view of codifying the common law, these two processes – restatement and reform – are not co-extensive. The former involves the recension of more or less settled rules and, consequently, is relatively straightforward. Broadly speaking, by re-enacting them in the code, restatement changes the form of the common law rules as found, but does not alter their content.[65]

2.71 By contrast, reform often entails wholesale revision following systematic review, and therefore goes to content as well as form. In the result, it is also more time-consuming, and has a much greater potential to arouse controversy, both within and beyond the legal and political systems, than restatement.[66]

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[65] Although originally a strong advocate of reform as an ingredient of codification: see above, Chap. 1, paras. 1.45-1.51, Stephen also sang the virtues of restatement, arguing that a key aim of codification was to reduce existing law 'to an orderly written system, freed from needless technicalities and obscurities': *A History of the Criminal Law of England* (London, 1883), Chap. 34.

[66] For discussion, see France's remarks on the failure of the New Zealand Crimes Bill, 1989, below, Chap. 3, para. 3.05, footnote 3.

2.72 **The principles of liability:** The importance of this distinction cannot be overstated in the context of codifying the general principles of criminal liability. Although the preponderance of the general part continues to be governed by common law, many of the rules and principles which make it up are well settled and uncontroversial and, accordingly, can be regarded as ripe for restatement.

2.73 Although this is not the place for a definitive assessment of the veracity of this conclusion, or the range of material to which it might apply,[67] the Expert Group is satisfied, at least provisionally, that the rudiments of actus reus, the principal heads of criminal fault,[68] the rules of causation,[69] and several of the defences to a criminal charge, including mistake[70] and duress,[71] would be comprehended by it.

2.74 In reaching this conclusion, the Expert Group was especially mindful of the fact that the technique of restatement was recently employed by the legislature when reducing the defence of insanity to statutory form;[72] and that many common law jurisdictions have already codified the common law rules on the matters listed in the preceding paragraph without substantially altering their original content.[73]

2.75 In respect of the remaining aspects of the general principles of liability, the accent will be more on legislative creativity than on restatement; the task will be to frame a positive rule either to fill a lacuna or fashion an entirely new legal regime on a particular matter. In the result, as it will have to be presaged with wide-ranging systematic review, the process of codification is likely to be more time-consuming in cases of this kind.

2.76 However, given that the unsettled reaches of the general part are comparatively few in number and, with the notable exception of the plea of intoxication,[74] have been more or less free of controversy in this jurisdiction, the scale of the task involved in codifying them should not be regarded as unduly burdensome. Moreover, assuming the codification process is properly resourced and managed, it should be possible to spread what burden there is across several centres of

67 For discussion of the context in which such a review might be undertaken, see below, Chap. 3, paras. 3.49-3.54.

68 See above, para. 2.18.

69 In any event, the rules on causation will be codified, albeit in draft form, in the course of the Law Reform Commission's ongoing review of the law of homicide: see above, Chap. 1, paras. 1.68-1.73.

70 In effect the plea of mistake has already been codified by virtue of the combined effect of section 2 of the Criminal Law (Rape) Act, 1981 and section 1(2) – the interpretation section – of the Non-Fatal Offences against the Person Act, 1997: see above, para. 2.63 and accompanying footnotes.

71 As already indicated, the Law Reform Commission is currently preparing a Consultation Paper, which will include draft provisions, on the defences of necessity and duress: above, Chap. 1, para. 1.70 and below, Chap. 3, para. 3.50.

72 Section 4(1) of the Criminal Law (Insanity) Bill, 2002 defines insanity as a mental disorder such that, at the time of the act, the accused '(i) did not know the nature and quality of the act, or (ii) did not know that what he or she was doing was wrong, or (iii) was unable to refrain from committing the act', thereby combining in a unified test the common law rules as laid in *R.* v. *M'Naghten* (1843) 4. St. Tr. (n.s.) 847 at 931 (limbs (i) and (ii)) and *Doyle* v. *Wicklow County Council* [1974] I.R. 55 at 71 (limb (iii)).

73 See above, Chap. 1, para. 1.42.

74 McAuley, 'The Intoxication Defence in Criminal Law' (1997) 32 *Irish Jurist* 243 at 292-296 and McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), pp. 630-634.

expertise,[75] thus making it possible to tackle a range of different problems simultaneously while at the same time ensuring the timely completion of the project as a whole.

2.77 Common law offences: Although the full catalogue of common law offences in Ireland is uncertain,[76] there is little doubt that contempt of court,[77] conspiracy to defraud,[78] cheating the revenue,[79] public nuisance,[80] attempting to pervert the course of justice[81] and breach of the peace[82] can be included in it. Accordingly, to the extent that it was thought to be desirable to do so, these offences could be codified relatively easily by employing the technique of restatement described in the preceding section.

2.78 Indeed, that technique has recently been used to good effect by the legislature in respect of the common law offences of assault and battery. By virtue of section 2(1) of the Non-Fatal Offences against the Person Act, 1997, those offences have been combined under the rubric of a new statutory offence of assault which can take the form either of the direct or indirect use of unlawful force against another (common law battery) or the threatened use of such force (common law assault).

2.79 On the other hand, there is a plethora of common law offences which have been recognised by the courts in England and Wales, but in respect of which Irish authority is scant to non-existent. Although the list is not exhaustive, this category includes barratry,[83] maintenance,[84] champerty,[85] embracery,[86] misconduct in public office,[87] buying and selling public offices,[88] various offences relating to dead bodies,[89] escape and prison breach,[90] rescue,[91] committing acts prejudicial

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75 For discussion, see below, Chap. 3, paras. 3.32-3.38.

76 See above, Chap. 1, paras. 1.78-1.89 and accompanying footnotes.

77 *Keegan* v. *De Burca* [1973] I.R. 223 (S.C.); *Re MacArthur* [1983] I.L.R.M. 355 (H.C.); *Desmond* v. *Glackin* (No. 1) [1993] 3 I.R. 1.

78 *A.G.* v. *Oldridge* [2000] I.R. 593; [2001] 2 I.L.R.M. 125.

79 As confirmed by section 3(2) of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and see *A.G.* v. *Anthony Karl Frank Baird Hilton*, Unreported, High Court, 13th January 2004.

80 *Trulock Ltd.* v. *District Judge McMenamin* [1994] I.L.R.M. 151 (H.C.); *Re Article 26 and the Employment Equality Bill* 1996 [1997] 2. I.R. 321.

81 *People (DPP)* v. *Murtagh* [1999] I.R. 339.

82 *A.G.* v. *Cunningham* [1932] I.R. 28.

83 1 Hawk PC ch. 81.

84 1 Hawk PC ch. 83.

85 1 Hawk PC ch. 84.

86 1 Hawk PC ch. 85.

87 *Russell on Crime* (12th edn., London, 1964), p. 361.

88 Ibid., p. 374.

89 Ibid., pp. 1413-1422; O'Connor, *The Irish Justice of the Peace*, vol. ii (2nd edn., Dublin, 1915), p. 241. The want of indigenous authority was raised in a recent hearing before Listowel District Court where the accused was charged with disinterring, disturbing or otherwise interfering with a dead body 'contrary to common law': *Irish Times*, 25 February 2004.

90 1 Hale PC 607-612.

91 1 Hale PC 606-607.

to the administration of justice,[92] eavesdropping, nightwalking and being a common scold.[93]

2.80 Leaving aside the question of whether these offences form part of Irish law, it goes without saying that the task of codifying them, to the extent that it was considered worthwhile, would involve an extensive process of review followed by sweeping reforms.

2.81 However, as will be seen in due course,[94] given that, by and large, they do not form part of the traditional core of the criminal law, offences of this kind are unlikely to feature in the inaugural codifying instrument as envisaged by the Expert Group, and thus will not act as a brake on the codification process.

F. DESIGN OF CODIFYING INSTRUMENT

Preliminary observations

2.82 In the nature of things, the question of form ultimately comes down to the issue of instrument design, *i.e.*, to the problem of determining what sort of codifying instrument best suits the needs of the codification project being contemplated.

2.83 As the argument of this chapter illustrates, the Expert Group is strongly of the view that the answer to this question should be guided by the exigencies of the concept of comprehensive codification, not least because that concept is central to the challenge of bridging the gap between the achievements of current legislative policy and the modernising aims and objectives which underpin it.[95]

2.84 Two aspects of the concept of comprehensive codification are especially relevant to the issue of instrument design.

Streamlining the criminal calendar

2.85 First, we have seen that that concept entails digesting the bulk of the criminal calendar in a single enactment cast in the form of a rationally integrated legislative scheme. In other words, the concept of comprehensive codification presupposes an instrument designed to give effect to the core democratic values of ease of access and comprehension and, accordingly, which has been shorn of the defects which continue to disfigure even the most successful of the existing stock of mini-codes, on the one hand, and which is more than a mere necklace of individual enactments strung together in the manner of a traditional Crimes Act, on the other.

92 *R.* v. *Bailey* [1956] NI 15.

93 Eavesdropping, nightwalking and being a common scold were abolished in New South Wales by sections 580A, 580B and 580C of the Crimes Act, 1900, although other common law offences were expressly retained by the Act.

94 See below, paras. 2.101-2.110.

95 In particular, see above, paras. 2.28-2.44.

2.86 In practical terms, this implies fashioning an instrument which, in addition to the modernising characteristics introduced by the mini-codes,[96] exhibits the following structural features:

(i) **mutually exclusive and internally exhaustive offence categories:** constituent offence categories should be mutually exclusive and internally exhaustive, thus avoiding the problems of incompleteness and lack of homogeneity associated with the status quo,[97] while at the same time facilitating the orderly amendment of the criminal calendar as and when the need arises;[98]

(ii) **a fully integrated system of offence grading:** the criminal calendar *as a whole*[99] should be explicitly graded according to a clear hierarchy running from the most to the least serious offence, thus helping to promote a culture of proportionate grading within the legal and political systems and, in the process, to bolster the integrity and credibility of the criminal justice system in the eyes of society generally;

(iii) **a rational definition policy:** definitional policy should aim for clarity and simplicity of expression and should be based on the principle that the general includes the particular, thus helping to eliminate, or at least reduce to an acceptable minimum,[100] the potential for confusion occasioned by the presence of overlapping and conflicting provisions dealing with the same pattern of anti-social conduct, as well as the proliferation of specific-instance offences already covered by an existing general provision;[101]

(iv) **adherence to an anti-scatter strategy:** while making due allowance for the role of the general part,[102] the incidence of scatter within the codifying instrument,[103] as well as between the instrument and other sources of law,[104] should be kept to a necessary minimum, thus ensuring that the law on a particular topic can be found in one place, rather than being spread over several different places.

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96 See above, paras. 2.16-2.23.

97 See above, paras. 2.35-2.38.

98 For further discussion of this point, see below, Chap. 3, paras. 3.83-3.86.

99 See above, footnote 22 and accompanying text, discussing proportionate grading within the confines of the Non-Fatal Offences against the Person Act, 1997.

100 See above, para. 2.33.

101 An egregious example of this phenomenon can be seen in section 6 of the Non-Fatal Offences Against the Person Act, 1997, which, albeit in response to the normal process of democratic amendment, creates a separate offence, punishable on indictment with ten years imprisonment, of threatening another with a syringe, notwithstanding the fact that section 5 of the Act, which deals with threats to kill or cause serious harm, also carries a maximum sentence of ten years imprisonment.

102 See below, paras. 2.87-2.96.

103 Schedules constitute a prime source of internal scatter in modern enactments. For discussion, see Bennion, *Bennion on Statute Law* (3rd edn., London, 1990), pp. 227-229.

104 Such as the enactment of relevant legislation outside the framework of the criminal code; and the drafting of code provisions whose meaning can only be fathomed by reference to external sources. For discussion of the latter, see below, paras. 2.97-2.100.

The structure of the general part

2.87 Introduction: Similar considerations apply to the design of the general part. Just as it entails the streamlining of the criminal calendar, so the concept of comprehensive codification implies a systematic statement of the general principles of liability within the body of the codifying instrument.

2.88 As the discussion of the role of interpretation sections illustrates,[105] one of the main reasons for striving for systematisation in this context is to encourage conceptual consistency across the entire spectrum of offences, thereby strengthening the integrated character of the codifying instrument while at the same time contributing to the goals of clear labelling and ease of comprehension.

2.89 Accordingly, the general part should embrace, in particular, the constituent elements of a criminal offence and the defences, as well as matters such as jurisdiction, limitations, the classification of offences, relational liability, participation and general burdens and presumptions.[106]

2.90 Inculpation and exculpation: There is however an important distinction to be made here. To the extent that they mark the limits of permissible conduct, the general principles of criminal liability should be defined in a manner which is demonstrably compatible with the requirements of the principle of legality; citizens are entitled to clear notice as to what the law expects of them and to be given a fair opportunity to act in conformity with its provisions.[107]

2.91 On this view, the heads of criminal fault, especially intention and recklessness, should be defined in detail rather than, as at present, left to the mercy of the common law.[108] As the modern history of these concepts illustrates, the common law is no guarantee of conceptual consistency when it comes to interpreting and applying them.[109]

2.92 Following the example of the American Model Penal Code,[110] the practice of comprehensively defining the heads of criminal fault is now the preferred approach in the common law world and has recently been followed in the (Australian) Commonwealth Criminal Code (1995)[111] and the Australian Capital Territory Criminal Code (2002).[112]

2.93 By parity of reasoning, the so-called justification defences – those which permit the use of force, including lethal force, in certain circumstances – should also be comprehensively defined since they, too, seek to mark the limits of what the citizen may or may not lawfully do.

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[105] See above, paras. 2.57-2.67.

[106] For discussion of the proper scope of the general part, see Horder, reviewing McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), (2001) 36 *Irish Jurist* 355-357.

[107] For a stimulating discussion of this issue, see Robinson, et al., 'The Five Worst (and Five Best) American Criminal Codes' (2000) 95 *Northwestern University Law Review* 1 at 6.

[108] See above, para. 2.60.

[109] See generally, McAuley and McCutcheon, op. cit., Chap. 6.

[110] See above, Chap. 1, para. 1.59.

[111] See section 5 of the Code.

[112] See sections 18-21 of the Code.

2.94 In other words, rather than be made to rely, as at present, on the all-purpose concept of reasonableness,[113] these defences should specify the conditions in which force may be used, as well as the *quantum* which may be employed, and by whom, detailing, where appropriate, the different standards which may apply to the use of force by public officials in this context.[114]

2.95 In contrast, leaving to one side, at least for the moment, the problem of scatter, a less exacting approach to definition is appropriate in respect of exculpatory defences which do not go to the issue of permissibility and which, as a result, are not constrained by the requirements of the legality principle.

2.96 Thus although stated in general terms in section 4(1) of the Criminal Law (Insanity) Bill, 2002, the criteria of criminal insanity are not defined in that measure, either in the body of the Bill or in the interpretation section, it being clear from the language employed that they are intended as restatements of the relevant common law tests.[115]

2.97 The problem of scatter: Finally, it goes without saying that the principle that the relevant law on any given topic should, where possible, be compactly arranged in a single location, also applies to the contents of the general part.

2.98 Broadly speaking, this principle requires a clean division of labour between the general and special parts, on the one hand, as well as the elimination of scatter between the general part and non-code sources of law, on the other.

2.99 In respect of the former, it follows – to give but two examples – that the rules on inchoate liability and legitimate defence, given that they are quintessential features of the general part, should not be replicated elsewhere in the codifying instrument; and, accordingly, that some of the existing mini-codes will need to be adjusted in order to take account of this fact prior to being incorporated into the criminal code proper.[116]

2.100 Similarly, the practice of defining key concepts in a way that requires recourse to the common law in order to establish their meaning may need to be reconsidered. As the case of the Criminal Law (Insanity) Bill, 2002, illustrates, even where this practice is entirely consistent with the principle of legality, it militates against the goal of maximising access to the sources of law by digesting them in one place.[117]

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[113] See, for example, sections 18-20 of the Non-Fatal Offences against the Person Act, 1997.

[114] These issues are discussed in detail in the Law Reform Commission's forthcoming Consultation Paper on Legitimate Defence in Homicide.

[115] See above, footnote 72 and accompanying text.

[116] Thus in a properly designed criminal code the reference to attempting to commit an arrestable offence in the definition of burglary as set out in section 12(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, would be omitted. Similarly, assuming that justification defences were comprehensively defined in the general part of the codifying instrument, sections 18-20 of the Non-Fatal Offences against the Person Act, 1997, which deal with legitimate defence, should be excised prior to the incorporation of that enactment into the code.

[117] See above, para. 2.96 and footnote 72.

G. SCOPE OF THE SPECIAL PART

General considerations

2.101 While it would be inappropriate to be unduly prescriptive about the proper content of the special part at this stage of the codification process, several important considerations should be borne in mind when this issue is eventually being determined.[118]

2.102 The meaning of comprehensive codification: Not least of these is that the concept of comprehensive codification does not entail the conclusion that a criminal code must contain every single offence in the criminal calendar. 'Comprehensive' is not a synonym for 'exhaustive'; the term also denotes something which is large in scope or content,[119] and has always been understood in this sense in the context of criminal law codification.

2.103 Thus, while there are considerable variations within and between the two legal traditions, the practice in code jurisdictions throughout the common law and civil law worlds is to leave a substantial body of criminal law outside the framework of the code. For example, in Canada, drugs offences are contained in the Controlled Drugs and Substances Act rather than in the Criminal Code.

2.104 Core offences: By the same token, there is general agreement that what might be described as the traditional core of the criminal law should be included in the code: *viz*., homicide offences, non-fatal offences against the person, sexual offences, offences against property, public order offences, and offences against the administration of justice.[120]

2.105 Non-core offences: When it comes to deciding the fate of non-core offences, arguments from convenience,[121] prompted by a desire to maintain "thematic coherence",[122] often come into play.

2.106 One such argument is that offences which form part of a more general regulatory regime should be excluded from the criminal code, on the grounds that it would be impracticable, and possibly counter-productive, to disentangle offences of this kind from the body of regulatory law in which they are embedded and which determines their meaning and scope.

2.107 On this view, it would follow that environmental offences, health and safety offences, road traffic offences, company law offences, drugs offences and firearms offences would be better dealt with in separate statutes outside the criminal code.

[118] See below, Chap. 3, paras. 3.35-3.36.

[119] *Shorter Oxford English Dictionary*, vol. i (5th edn., 2002), p. 471.

[120] See below, Appendix 1, for a survey of common law codes on this point.

[121] For discussion of these issues in the context of the ongoing attempt to codify the criminal law in England and Wales, see Law Com No 177, para. 3.3; Law Com No 143, para. 2.10.

[122] Létourneau and Cohen, 'Codification and Law Reform: Some Lessons from the Canadian Experience' (1989) 10 *Statute Law Review* 183 at 188.

2.108 A related argument might be that bringing regulatory offences within the criminal code would be like adding a fifth wheel to the coach; in effect, offences of this kind have already been codified, albeit in statutes relating to the departments of law to which they belong.[123]

2.109 On the other hand, arguments from symbolic significance invite the conclusion that serious regulatory offences should be included in the code as a mark of society's abhorrence of the anti-social conduct they comprehend.[124] Not all regulatory offences are minor in nature and it is increasingly difficult to agree with Wright J's conclusion that they are "not criminal in any real sense, but [are rather] acts which in the public interest are prohibited under penalty."[125]

2.110 As recent Irish experience confirms, the statute book contains a growing number of health and safety offences and environmental offences which match the core offences in the criminal calendar both in terms of gravity and severity of punishment.[126] Arguably leaving them outside the criminal code would run the risk of diluting the legislature's message that they are serious offences and should be treated as such.

2.111 **The decodification thesis:** In view of the foregoing, it follows that what has become known as the decodification thesis should be treated with circumspection in the context of the criminal law. According to this thesis, the growing tendency for legislation to proliferate outside the framework of the classic European codes poses a serious threat to their integrity, and has effectively undermined their historic claim to pre-eminence among the sources of law. Indeed, some observers have described this phenomenon as a watershed in the history of codification which may even presage its eventual demise as a legislative technique.[127]

2.112 To the extent that the practice of locating material outside the criminal code ignores the importance of the anti-scatter principle discussed earlier,[128] the argument from decodification will strike a chord with anyone thinking seriously about the problem of designing an effective codifying instrument. However, it should not be forgotten that insofar as what is left outside the code is properly extrinsic to it, the decodification argument has no purchase and is little more than an academic distraction.

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[123] See McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), p.96.

[124] Ashworth, *Principles of Criminal Law* (4th edn., Oxford, 2003), p.61.

[125] *Sherras v De Rutzen* [1895] 1 QB 918 at 922.

[126] For example, by virtue of section 10(1)(b) of the Waste Management Act, 1996, persons charged with certain offences under the Act are liable, 'on conviction on indictment, to a fine not exceeding £10,000,000 or to imprisonment not exceeding 10 years, or to both such fine and such imprisonment.' Relatively severe penalties also attach to offences under the Sea Pollution (Amendment) Act, 1999 (£10,000 or 5 years' imprisonment or both), the Dumping at Sea Act, 1996 (fine or 5 years imprisonment or both), the Safety, Health and Welfare at Work Act, 1989 (fine or 2 years' imprisonment or both), the International Carriage of Perishable Foodstuffs Act, 1987 (£10,000 or 12 months' imprisonment or both), the Public Health (Tobacco) Act, 2002 (€125, 000 or 2 years' imprisonment or both).

[127] For discussion, see Irti, *L'età della codificazione* (Milan, 1979), pp. 613 et seq.; Sacco, 'La codification, forme dépassée de législation?' in *Rapports nationaux italiens au XI^e Congrès International de Droit Comparé á Caracas 1982* (Milan, 1982), pp. 85 et seq.

[128] See above, paras. 2.97-2.100.

2.113 For example, bearing in mind that they are essentially procedural in character, and tend to be both complex and prolix, it would be perfectly in order for the legislature to make special provision outside the code for the regimes governing the disposition and treatment of mentally ill offenders or juvenile offenders, while leaving the lineaments of the defences of insanity and infancy *inside* the code.[129] In other words, good legislative housekeeping should not be confused with decodification.

Offences against the State

2.114 Similar considerations apply to the issue of whether, and to what extent, offences against the state should be included within the criminal code. Given their "special" nature, and the large body of adjective law associated with them,[130] these offences might be considered sufficiently distinctive to warrant their being left outside the code.

2.115 On the other hand, it should not be forgotten that the category to which they belong is more extensive than the calendar of offences contained in the Offences against the State Acts: it comprehends several matters, including treason, sedition and official secrets offences, which many would regard as part of the traditional core of the criminal law. On the assumption that these offences would be incorporated in any event, it may be thought that the more sensible course would be to include the entire category in the code, albeit stripped of the adjective law currently embedded in its constituent enactments.[131]

2.116 As it happens, this is the preferred approach in code jurisdictions throughout the common law world.

2.117 For example, the Australian Commonwealth Criminal Code contains several terrorism-related offences including directing the activities[132] and being a member of a terrorist organisation.[133] Similarly, the Northern Territory Criminal Code includes the offences of being a member of an unlawful organisation,[134] committing acts of terrorism,[135] contributing towards terrorism,[136] and administering unlawful oaths,[137] as well as a number of offences against the executive and legislative powers.

[129] The Criminal Law (Insanity) Bill, 2002, nicely illustrates this point. Of the Bill's twenty sections only three deal with the mental condition defences introduced by the measure: *viz*., section 3 (fitness to be tried), section 4 (insanity), and section 5 (diminished responsibility). Broadly speaking, the remaining seventeen sections deal with appeals and review powers and procedures. Moreover, the accountability rules contained in section 3, and the liability rules contained in section 4, represent only a small portion of the content of those sections, thus reducing still further the components of the measure that it would be proper to include in the general part of a criminal code.

[130] Dealing with such matters as arrest, re-arrest, verdicts, appeals, jurisdiction and forfeiture. For a survey of common law codes on this issue, see below, Appendix 1(A-L)(v).

[131] See previous footnote.

[132] Section 102.2. For a survey of the extent of the coverage of offences against the state afforded by common law codes, see below, Appendix 1(A-L)(iii).

[133] Section 102.3.

[134] Section 51.

[135] Section 54.

[136] Section 55.

[137] Section 49.

2.118 Finally, several code jurisdictions also penalise unlawful drilling[138] and unlawful military activities.[139]

Criminal procedure and sentencing

2.119 Criminal procedure: The Expert Group is favourably disposed in principle to the idea of codifying criminal procedure. Given the multifariousness of its sources, and bearing in mind its complexity, not to mention its prolixity, there is no doubt that the law of criminal procedure would benefit from being streamlined and assembled in a single instrument.

2.120 The case for embarking on such a course of action is, however, less compelling than the argument for codifying the substantive criminal law. Unlike their substantive law counterparts, the rules of adjective law do not seek to set limits to what the citizen may lawfully do and, consequently, are not charged with the issues – of accessibility, clarity, fair warning and comprehensibility – which lie at the heart of the codification debate.

2.121 Moreover, apart from the danger that the enormity and complexity of the task of codifying the law of criminal procedure would spread the resources of the codification team too thinly, there is the associated risk that the effort involved might jeopardise the primary task of codifying the substantive criminal law.

2.122 There is therefore much to be said in favour of following international example and enacting a separate code of criminal procedure.[140]

2.123 Accordingly, the Expert Group recommends that priority should be given to the codification of the substantive criminal law and that the enactment of a code of criminal procedure should be left for another day.

2.124 However, the Expert Group accepts that certain procedural matters are likely to be included in a code of substantive criminal law. For example, it is conceivable that a drafting team might find it prudent, pending the enactment of a code of criminal procedure, to include general provisions governing presumptions and burdens of proof; and, where appropriate, to make special provision for these matters in the context of particular offences and defences.[141]

2.125 Sentencing: Similar considerations apply to sentencing. It, too, is a branch of adjective, as distinct from substantive, law and, accordingly, does not fall within the purview of the legality principle and its entailments.[142]

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[138] Queensland Criminal Code, section 51; Canadian Criminal Code, section 70.

[139] Criminal Code of Western Australia, section 51.

[140] See below, Appendix 1(A-L)(v), for a survey of common law codes on this point.

[141] Thus in respect of the defence of mental impairment section 7.3(3) of the Australian Commonwealth Criminal Code provides that 'a person is presumed not to have been suffering from such an impairment' unless and until the contrary is proved 'on the balance of probabilities'. Similarly, section 7 of the Commonwealth Criminal Code establishes an irrebuttable presumption of innocence in respect of children under ten years of age (section 7.1) and a rebuttable presumption in respect of children over ten but under fourteen years of age.

[142] See above, paras. 2.90 and 2.120.

2.126 Moreover, while the superior courts have been both active and effective in this area in recent years, such that there now exists 'a reasonably substantial body of sentencing jurisprudence,'[143] it is fair to say that sentencing law in Ireland is still inchoate and lacking in detailed guidance on a wide range of important questions including the nature and scope of aggravating and mitigating factors, the circumstances in which a custodial as opposed to other sorts of sentence should be imposed, and hierarchies of gravity within offence categories.[144]

2.127 In the result, the Expert Group is satisfied that any attempt to codify the law of sentencing at this juncture would be premature; and that, if this body of law is to be codified at all, the exercise should take the form of a separate sentencing enactment.[145]

H. CHOREOGRAPHY

General considerations

2.128 In an ideal world a comprehensive criminal code would make its *debut* in the form of a single enactment. However, the Expert Group is satisfied that the realities of political life, especially when combined with the vicissitudes of the legislative process, suggest that a grand entrance of this kind should be abjured in favour of a more cautious approach.

2.129 Arguably the principal difficulty with a single instrument approach is its all or nothing quality: the code would have to be finalised in its entirety before it could be presented to the Oireachtas for enactment. Accordingly, the vital element of positive reinforcement normally provided by a series of concrete results in the short to medium term, would be missing, with potentially serious consequences for the morale of the code team and the credibility and momentum of the codification process during such a long period of gestation.

2.130 Moreover, there is the danger that, precisely because of its long-term, prospective character, a single instrument project would be easily trumped in competition for scarce resources by more immediately pressing short-term legislative initiatives.

2.131 A single instrument approach would also be vulnerable to sharp changes in the ambient political temperature. To the extent that successful codification depends on the patronage of a political champion,[146] there is a risk that a key supporter might lose office before the project is completed, or that a change of administration might lead to a change of heart on the issue of codification, with catastrophic consequences for the project as a whole.

2.132 The fate of the Queensland Criminal Code Act, 1995, is instructive in this regard. Although it successfully passed all stages in parliament that instrument did not

[143] Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Government Publications, 2003), para. 655.

[144] See Working Group on the Jurisdiction of the Courts, *ibid*., para. 668.

[145] See below, Appendix 1(A-L)(v) for a survey of common law codes on this point.

[146] Head, 'Codes, Cultures, Chaos, and Champions: Common Features Of Legal Codification Experiences in China, Europe, and North America' (2003) 13 *Duke Journal of Comparative and International Law* 1.

come into force as the government fell following its enactment and the new administration, on foot of an election pledge to repeal it, decided against commencement.[147]

2.133 By the same token, even if a change of government did not lead to its abandonment, the length and complexity of a single instrument project might eventually prove unappealing to a new administration with different priorities. In other words, the temptation to divert resources away from codification to other legislative proposals might prove irresistible in the face of new political pressures.[148]

2.134 Accordingly, the Expert Group does not favour the adoption of a single instrument approach to codification.

2.135 However, in the event that such an approach were to be adopted, the Expert Group is firmly of the view that, as an absolute minimum, it would need to be predicated on a carefully wrought business plan designed to monitor output and delivery dates according to a strict timetable.

Phased codification

2.136 In the opinion of the Expert Group, the most effective antidote to the dangers associated with a single instrument approach is to break the codification process down into a series of more 'manageable chunks'[149] or units.

2.137 Broadly speaking, the object of the exercise should be to ensure that the foundation-stone of the criminal code is laid as soon as possible, in the form of a credible inaugural instrument capable of being added to incrementally as the work of restatement and reform being carried on by the codification team and the other agencies of law reform bears fruit.[150]

2.138 Bearing in mind the importance attached to the notion of a properly integrated legislative scheme as developed in this chapter,[151] this suggests that the inaugural instrument should consist of the general part and the core of the special part (in the form of a consolidation of the recently enacted mini-codes), while later stages of the codification process would be devoted to incorporating the remainder of the common and statute law of crime as and when it is modernised.[152]

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147 See below, Chap. 3, footnote 3 and Appendix 1(J).

148 Ibid.

149 See Piragoff, 'Recodification of Canadian Criminal Law: a View from inside the Department of Justice', Conference Paper to the Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, at p. 46, Codification Archive, Department of Justice, Equality and Law Reform.

150 For discussion, see above, paras. 2.09, 2.39-2.41, and 2.45-2.51.

151 See, in particular, paras. 2.28-2.44 and 2.52-2.56.

152 This is consistent with the view expressed by the Department of Justice, Equality and Law Reform in 1997, prior to the enactment of the mini-codes on offences against the person and theft and fraud offences: 'codification…should await the time when there will have been an opportunity to scrutinise and modernise all our old statute law': *Tackling Crime: A Discussion Document* (Dublin: Stationery Office, 1997), para. 8.29. And see below, Appendix 2.

2.139 In the nature of things, a phased programme of this kind is apt significantly to reduce the risks associated with the long-term, all-or-nothing character of the single instrument approach: *viz*., a catastrophic loss of political support, the diversion of legislative resources, changing political priorities, *ennui* and loss of morale occasioned by the absence of concrete results, the possibility of single-issue derailment,[153] and so on.

2.140 The phased approach to codification was recently adopted in the Australian Capital Territory which enacted a Criminal Code in 2002. Thus the inaugural codifying instrument consisted of a general part, modelled on the Australian Commonwealth Criminal Code, and one set of offences.[154] Since then theft and related offences have been inserted into the code[155] and other offence categories are to be added at a later date.

2.141 A similar strategy is being pursued in respect of the enactment of the Australian Commonwealth Criminal Code. In this instance, the inaugural instrument, which was enacted in 1995,[156] was confined to the general part on the understanding that the special part would subsequently be added incrementally.[157]

2.142 As will be seen in due course, the importance of careful project management as a vital element in a strategy of phased codification was emphasised by speakers at the Expert Group's international conference in November 2003.[158]

2.143 Drawing on these accounts, the Expert Group has developed a model for managing the process of phased codification in Ireland. The model is outlined in Chapter 3.[159] A key objective of the model is to ensure that the momentum towards the enactment of a comprehensive criminal code is maintained following the introduction of the inaugural instrument incorporating the general part and selected elements of the special part.

[153] See France's discussion of the impact of the proposal to abolish the murder-manslaughter distinction on the ill-fated New Zealand Crimes Bill, 1989: 'Reforming Criminal Law – New Zealand: 1989 Code' [1990] *Criminal Law Review* 827 at 829-830.

[154] See *Criminal Code 2002: Explanatory Memorandum*, p.2 at www.legislation.act.gov.au/es/db_2263/current/pdf/db_2263.pdf, and see below, Appendix 1(L).

[155] Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act 2004.

[156] And amended in 1998, 1999 and 2000. See below, Appendix 1(K).

[157] Thus Offences against the Integrity and Security of the International Community and Foreign Governments, and Offences against Humanity and Related Offences were added to the Code in 1999. In 2000 Offences against the Proper Administration of Government (Theft and Fraud Offences) and Offences against National Infrastructure (Money Laundering, Postal and Telecommunications Offences and Computer Offences) were added to the instrument; and in 2002 the special part was further expanded to include Offences against the Security of the Commonwealth (including Treason and Terrorism) and Firearms Offences. For further information, see below, Appendix 1(K).

[158] See, in particular, Piragoff, 'Recodification of Canadian Criminal Law: a View from Inside the Department of Justice', Conference Paper to the Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, at p. 36, Codification Archive, Department of Justice, Equality and Law Reform.

[159] See below, Chap. 3, paras. 3.59-3.75.

I. PROBLEM OF OFFENCES OUTSIDE THE CODE

General considerations

2.144 As already indicated, an inevitable consequence of the decision to opt for a programme of phased codification is that some offences will be left outside the inaugural codifying instrument pending eventual incorporation following the normal process of criminal law reform.

2.145 In the result, the nature of the relationship between the inaugural instrument and non-code offences will require careful consideration. In particular, clear guidance will be needed on whether the general part of the inaugural instrument should be applied to such offences.

2.146 Although the final decision on this issue will be a matter for those charged with developing and drafting the inaugural code instrument,[160] the Expert Group is firmly of the view that the approach taken to it should not be unduly doctrinaire.

Immediate application of the general part

2.147 Thus it is far from clear that an Irish drafting team should follow Andrews' advice to the effect that the general part should apply to all offences including those already in existence prior to the enactment of the code:

> If it were not to have general application to existing legislation then for what might prove a longish period we would have two types of crime: the newly enacted offences subject to the general principles [contained in] the code and [existing] common law and statutory offences…governed by the old general principles.[161]

2.148 Apart from the fact that these remarks were essayed in the context of the possible enactment of a stand-alone general principles instrument,[162] it should also be remembered that, as envisaged in this chapter,[163] the inaugural Irish instrument will contain the core of the special part, thus leaving a relatively insignificant segment of the criminal calendar *outside* the criminal code.

Delayed application pending alignment

2.149 That being the case, the more prudent course may be to leave the residue of non-code offences to its own devices pending systematic review and eventual incorporation into the criminal code as the programme of phased codification is gradually rolled out.

2.150 Given the potential for conflict between the general part and the 'raw' or 'untreated' offences outside the code, a policy of immediate 'general application'

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[160] See below, Chap. 3, para. 3.37.

[161] 'Codification of Criminal Offences' [1969] *Criminal Law Review* 59 at 62-63.

[162] According to Andrews, the 'advantage of prefacing the revision of particular offences with an enacted code of general principles is that the revision of the particular offences might well be easier, once the general framework is established': ibid., at 62.

[163] See above, paras. 2.01-2.23.

effectively puts the cart before the horse. Bearing in mind that the point of codification is to create an integrated legislative scheme,[164] alignment of the general and special parts should precede general application not follow it.

2.151 **The Australian Commonwealth Criminal Code:** Arguably this conclusion is strengthened by the precedent of the Australian Commonwealth Criminal Code. Although that instrument was enacted in 1995, with the intention that it would apply to all criminal offences without exception,[165] it should not be forgotten that its commencement was delayed for six years, in part to facilitate a review of existing offences in order to ascertain whether, and to what extent, they were in need of amendment prior to being brought within the purview of the code.

2.152 **The Australian Capital Territory Criminal Code:** It should also be borne in mind that the Australian Capital Territory Criminal Code, which was enacted in 2002, contains an express provision to the effect that the general part is to apply only to offences created *after* the enactment of the code.

2.153 Moreover, this strategy was considered necessary because existing offences had been drafted in light of a different set of general principles;[166] and was supported by an undertaking on the part of the Australian Capital Territory Government to embark on a review exercise designed to harmonise the criminal calendar with Code principles prior to subjecting it to them.[167]

J. THE FATE OF THE COMMON LAW

Introduction

2.154 The fate of the common law following codification is an emotive subject. To the extent that it raises the spectre of outright abolition, discussion of this topic marks a psychological boundary which common lawyers, steeped in the tradition of pragmatic, case-by-case judicial legislation, are naturally disinclined to cross.

2.155 Indeed, at a purely psychological level, it may well be that the historic tendency to see codification in abolitionist terms,[168] as a sort of ravenous omnivore which devours everything in its path, ordinary legislation and the common law included, accounts for the continuing hostility, both manifest and subliminal, which many common lawyers feel towards criminal codes and anyone associated with them.[169]

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[164] See above, paras. 2.28-2.44.

[165] See Leader-Elliott, *The Commonwealth Criminal Code: a Guide for Practitioners* (Canberra, Commonwealth Attorney General's Office, 2002), p.3.

[166] See *Criminal Code 2002: Explanatory Memorandum*, p.2 at www.legislation.act.gov.au/es/db_2263/current/pdf/db_2263.pdf.

[167] *Ibid*.

[168] See above, Chap. 1, paras. 1.45-1.56.

[169] Roscoe Pound thought this attitude reflected an even deeper antipathy to legislation *tout court*: 'the common lawyer is at his worst when confronted with a legislative text': *Future of the Common Law* (Cambridge, Mass., 1937), p.18. As already indicated (see above, Chap. 1, footnote 10), common law attitudes to codification may ultimately be bound up with the fact that, by the time the age of codification began at the end of the eighteenth century, the problem of significant local variation in the law, one of the principal attractions of codification in Revolutionary France, had already been solved in a system which had been centralised since the Middle Ages.

Codification and the role of interpretative jurisprudence

2.156 As already indicated in Chapter 1, a good deal of this hostility is misplaced. Not only does codification not trench upon the interpretative function of the courts,[170] it actually stimulates the development of an accompanying jurisprudence designed to elucidate the contents of the criminal code. As one observer has mordantly remarked:

> The modern codes have not prevented the perpetual refinement of the conditions of the judicial duel any more than did the ancient…The codes might well never have been written so far as the attempt to escape from the men of law is concerned.[171]

2.157 In the common law world, the traditional judicial role is guaranteed by the imperative of explaining the provisions of the code to juries, on the one hand, and the need to resolve conflicts of interpretation between opposing counsel, on the other. Similarly, as the discussion of French and Italian criminal law illustrates, even in civil law countries the exigencies of legislative drafting ensure that criminal codes are destined to operate by way of a partnership between parliament and the judiciary: in short, between the authors and interpreters of the *lex scripta*.[172]

The demise of judicial legislation

2.158 Moreover, it should be remembered that Irish judges have been at pains to disavow any form of activism in respect of fixing the limits of criminal liability, and have done so without having to reckon with the reality of codification.[173]

2.159 Reflecting the central importance of the doctrine of the separation of powers in Irish constitutional law and culture, the right to determine the content of the criminal law is perceived by the superior courts as the exclusive province of the legislature, quite independently of the fact that this conclusion also happens to be an entailment of codification.[174]

The abolitionist strand in current legislative policy

2.160 Nor should it be overlooked that the ongoing policy of modernisation which the Oireachtas has been pursuing since 1991, again without the constraining influence of a criminal code, has resulted in the abolition of a raft of common law offences,[175] as well as several venerable common law rules and principles,[176] and that the sky has not fallen as a result of this process.

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[170] See above, Chap. 1, para. 1.111.

[171] Seagle, *The Quest for Law* (London, 1942), p. 298.

[172] For discussion, see above, Chap. 1, paras. 1.32-1.38.

[173] See above, paras. 2.22-2.23 and Chap. 1, para. 1.78.

[174] See above, Chap. 1, para. 1.91(iii).

[175] See above, para. 2.10.

[176] For example, section 38 of the Criminal Justice Act, 1999, abolished the ancient common law rule (known as the year-and-a-day rule) that, for the purposes of the law of causation in homicide, the victim's death had to occur within a year and a day of the defendant's unlawful act.

The retentionist aspect of codification

2.161 **Phased and comprehensive codification:** On the other hand, neither should it be forgotten that the programme of phased codification being recommended by the Expert Group expressly countenances the continuance of a subset of common law rules and principles pending their incorporation into the criminal code,[177] and that the concept of comprehensive codification, bearing in mind that it does not necessarily entail exhaustive coverage of the criminal calendar, allows for the possibility that some of these rules and principles may *never* be incorporated.[178]

2.162 While it would be idle to speculate at this stage of the codification process as to which, if any, of the rules and principles known to the common law might not be incorporated into the criminal code,[179] the Expert Group is satisfied that any suggestion that unincorporated rules should never be allowed to continue in their original common law form is unwarranted, and is certainly not an entailment of codification.

2.163 **Exculpation rules and principles:** In particular, the Expert Group is anxious to stress that there is no compelling reason why the rules and principles amplifying the code provisions on the exculpatory defences should not be allowed to develop at common law, or why the jurisprudence on such matters should not continue to enjoy precedential force.

2.164 As the discussion of the sweep of the legality principle illustrates, insofar as they do not go to the issue of what the citizen may or may not lawfully do, there is nothing in the concept of codification which ordains that legal rules must take the form of primary legislation.[180]

K. SUMMARY AND CONCLUSION

2.165 The principal arguments in this Chapter may be summarised as follows:

(i) as a result of the policy of modernisation being pursued by the legislature since 1991, Irish law now boasts a corpus of well-drafted statutes on many of the principal departments of the criminal law;

(ii) the statutes in question can fairly be described as mini-codes in their respective domains;

[177] See above, para. 2.138.

[178] See above, paras. 2.77-2.81.

[179] Some of the older criminal codes expressly preserved the summary jurisdiction enjoyed at common law to punish for contempt of court. Thus section 9 of the Canadian Criminal Code states that 'nothing…affects the power, jurisdiction or authority that a court, judge, justice or provincial judge had…to impose punishment for contempt of court; and similar provisions can be found in section 8 of the Queensland Criminal Code Act, 1889 and section 10 of the Tasmanian Criminal Code Act, 1924. Two more recent examples are contained in section 9 of the New Zealand Crimes Act, 1961 ('nothing in this section shall limit or affect the power or authority of the House of Representatives or of any Court to punish for contempt'); and section 8 of the Northern Territory Criminal Code (1983), which preserves 'the authority of a court of record to punish a person summarily for the offence commonly known as 'Contempt of Court".

[180] See above, paras. 2.90-2.96. But see also above, paras. 2.97-2.100.

(iii) by producing a set of well-drafted modern enactments, recent legislative policy has brought a much-needed measure of order to the sources of the criminal law and greatly improved its comprehensibility, thus fulfilling some of the key aims of codification;

(iv) despite this signal achievement, the inherent limitations of current policy should not be overlooked;

(v) in particular, it should be borne in mind that the fragmentary character of the mini-codes makes it difficult to achieve conceptual consistency across the entire terrain of the criminal law, hinders easy access to its sources, and hampers the development of a system of proportionate grading and homogeneous classification of offences;

(vi) only a single instrument constructed as an integrated legislative scheme from the raw materials provided by the mini-codes can fully and effectively realise these objectives;

(vii) accordingly, the Expert Group recommends the fashioning of a codifying instrument which consists of an exhaustive statement of the general principles of criminal liability and a streamlined criminal calendar based on mutually exclusive and internally exhaustive offence categories, a fully integrated system of offence grading, a rational definition policy, and a clear anti-scatter strategy;

(viii) the rules and principles included in the general part should be shorn of the extraneous procedural matter with which they are often accompanied in ordinary legislation;

(ix) the special part of the codifying instrument should be comprehensive rather than exhaustive, *i.e.*, it should be confined to the core offences in the criminal calendar;

(x) there should be separate codes of criminal procedure and sentencing;

(xi) for purely pragmatic reasons having to do with the realities of the political system and the legislative process, the Expert Group favours a programme of phased, as opposed to single instance, codification;

(xii) the inaugural codifying instrument should consist of the general part and the core of the special part (in the form of a consolidation of the recently enacted mini-codes), while later stages of the codification process should be devoted to incorporating the remainder of the common and statute law of crime as and when it is modernised;

(xiii) given the wide scope of the inaugural codifying instrument as contemplated by the Expert Group, the general part need not be applied to non-code offences until such time as they have been modernised and aligned with its provisions;

(xiv) in the nature of things, the process of statute law modernisation, of which codification may be regarded as a highly specialised form, has led to the abolition of many common law offences;

(xv) codification does not however trench upon the interpretive role of the courts or the growth of an interpretive jurisprudence on the criminal code;

(xvi) nor does codification entail the conclusion that the exculpatory defences cannot be allowed to develop at common law.

2.166 Accordingly, the Expert Group now turns its attention to the problem of managing the process of phased codification as recommended in this chapter.

Chapter 3 – MANAGING THE PROCESS

A. INTRODUCTION

3.01 Having decided the form codification of the criminal law should take in Ireland, how should the process of codification be managed? How should the programme of phased codification recommended in Chapter 2 be implemented? Is the ordinary legislative process adequate for this purpose? Or is there a need for alternative arrangements? If alternative arrangements are necessary, what form should they take and who should be charged with overseeing them? Is there a need for a statutory scheme? What impact are these arrangements likely to have on the ordinary programme of criminal law reform?

3.02 What sort of expertise is needed to bring a criminal code into being? From which sectors of the legal community should the requisite expertise be drawn and how should it be harnessed? Given the scale of the task, how should the process of consultation involved in preparing the inaugural codifying instrument be handled? How should the balance be struck between the need for law reform, on the one hand, and the requirements of consolidation and restatement, on the other? Is there a need to give special consideration to the drafting style to be employed throughout the codification process?

3.03 Given the experience of other jurisdictions, is it possible to overcome the difficulties associated with enacting a measure as voluminous as a Criminal Code Bill? Is there a ready-made legislative mechanism which can be adapted for this purpose? Or will it be necessary to fashion an entirely new legislative mechanism in order to achieve codification? Is the hybrid nature of the projected inaugural instrument – the fact that it will contain an admixture of restatement and reform – likely to present difficulties at enactment stage?

3.04 Finally, how should the post-enactment phase of codification be managed? What arrangements need to be made for keeping the criminal code under review? How should the process of amending the code be organised? What steps need to be taken to ensure that the amendment process does not result in the gradual degradation of the criminal code?

B. OVERVIEW OF MANAGEMENT STRATEGY

General

3.05 In the nature of things, codification is a resource-intensive exercise.[1] Given the scale and complexity of the task involved, codes are difficult to draft and time-consuming to enact. Moreover, as the historical record shows,[2] the spectre of failure should not be discountenanced.[3]

3.06 In the result, governments are apt to view the prospect of codification with modified rapture, fearing the disruptive influence a large-scale project of this kind might have on their overall legislative programme. Accordingly, if codification is to succeed in Ireland, it is absolutely essential that apprehension on these scores is taken seriously; otherwise the high level of political support needed to see the project through to completion will not be forthcoming.

3.07 In the opinion of the Expert Group, these objectives will only be achieved by means of a carefully choreographed management strategy designed to co-ordinate the process of codification with the ongoing programme of criminal law reform being undertaken by the Department of Justice, Equality and Law Reform. As will be seen presently, the Group is strongly of the view that these processes should be treated as complementary, and that allowing them to feed into one another is the most effective way of implementing the programme of phased codification recommended in Chapter 2.[4]

3.08 Moreover, bearing in mind that, as a rule of thumb, the smaller the jurisdiction the higher the proportionate cost of codification, the Expert Group is satisfied that this strategy also represents an efficient use of available resources in a small jurisdiction like Ireland.

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1 'Four or five officers from inside the [Canadian] Department of Justice worked full-time on the recodification effort in the early 1990s, and many others worked part-time: Piragoff, 'Recodification of Canadian Criminal Law: a View from Inside the Department of Justice', Conference Paper to the Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, at p. 32, Codification Archive, Department of Justice, Equality and Law Reform.

2 For discussion, see Chap. 1, paras. 1.39-1.51.

3 Loss of political support for codification following a change of administration is often the reason for such failure. This factor sealed the fate of the Queensland Criminal Code Bill 1995 which, though enacted, never came into force, and was subsequently repealed, on foot of an election pledge, by the incoming administration; source: correspondence received by the Expert Group from the Queensland Department of Justice, 10 May 2003. Similarly, in Canada, '[I]n June 1993, the then Minister for Justice, Pierre Blais, produced a White Paper on the renewal of the General Part entitled ''Proposals to Amend the Criminal Code: General Principles''. However, on October 25, 1993, the Conservative Government of Kim Campbell was swept aside in a general election and a new Liberal Government came to power. Although the new government gave some initial support to the idea of reforming the General Part of the Code, that support soon faded': Piragoff, Expert Group's International Conference, above, footnote 1, at p. 15. According to France, the New Zealand Crimes Bill 1989 failed because of insufficient consultation prior to the measure's introduction, and because it included too many controversial proposals, including the dropping of the murder-manslaughter distinction: 'Reforming Criminal Law – New Zealand: 1989 Code' [1990] *Criminal Law Review* 827 at 829-830. For commentary on the reasons for the failure of the Law Commission's 1968 codification initiative in England and Wales, see Dennis, 'The Critical Condition of Criminal Law' [1997] CLP 213 at 241-246.

4 See above, Chap. 2, paras. 2.136-2.143.

The in-house option

3.09 Arguably codification should proceed as a separate strand in the ordinary legislative programme being undertaken by the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform. This is now the preferred approach to codification in the common law world, having been adopted in recent years, albeit with qualified success, in New Zealand,[5] Canada[6] and Australia.[7]

3.10 The practical advantages of this approach are obvious. It enables codification to proceed within a tried and trusted framework designed to ensure that the policy underlying an implementing measure is given due consideration and adequate legislative expression: *viz.*, following Government approval, general legislative schemes are prepared by the Department of Justice, Equality and Law Reform and presented to Government for consideration, while the Bills associated with these schemes are drafted by the Parliamentary Counsel's Office in consultation with the Department and the legal advisory side of the Office of the Attorney General.

3.11 Moreover, by placing codification at the heart of the legislative process, this approach is likely to be more efficient and less expensive than either of its two principal competitors: the options of asking a law reform agency or a team of independent consultants to prepare the requisite draft measures. As recent experience in England and Wales,[8] and Scotland illustrates, the successful development of a codifying instrument by either of these means is no guarantee that the measure will be adopted by Government, much less that it will eventually see the light of legislative day.

3.12 Even if adopted by Government, codifying instruments prepared outside the state apparatus must eventually be channelled through the legislative process and, as the history of codification shows,[9] this often leads to the wholesale re-opening of the policy issues thought to have been settled by the original drafters, and thus to the inevitable delay and expense involved in re-drafting the original Criminal Code Bill.

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5 See France, 'Reforming Criminal Law – New Zealand: 1989 Code', [1990] *Criminal Law Review* 827.

6 Piragoff, commenting on developments between 1990 and 2003, Expert Group's International Conference, above, footnote 1 at 14.

7 The Northern Territory Criminal Code (1983) and the Australian Capital Territory Criminal Code (2002) were both prepared by their respective Departments of Justice. The Australian Commonwealth Criminal Code (1995) was also developed within the state apparatus, albeit by a committee composed of officers mandated by the Attorneys General of the various Australian States and Territories: Goode, 'Codification of the Criminal Law: the View from Australia', Conference Paper to the Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, pp. 2-3, Codification Archive, Department of Justice, Equality and Law Reform; 'Codification of the Australian Criminal Law' (1992) 16 *Criminal Law Journal* 5 at 9.

8 Commenting on the reasons why the Law Commission's 1968 codification initiative has not, as yet, borne legislative fruit, Dennis has observed that the 'Commission's lack of resources, shifting strategies, and vulnerability to urgent governmental law reform initiatives have all played a part': 'Codification of the Criminal Law: the English Experience', Conference Paper to the Expert Group's International Conference of Codification of the Substantive Criminal Law, Dublin, 22 November 2003, p. 2, Codification Archive, Department of Justice, Equality and Law Reform.

9 For discussion, see above, Chap. 1, paras. 1.45-1.51 (dealing with Stephen's Digest and Criminal Code Bill) and Chap. 1, paras. 1.52-1.56 (dealing with Macaulay's Draft Indian Penal Code).

The problem of resources

3.13 However, its undoubted advantages notwithstanding, the Expert Group is satisfied that the management model described in the preceding paragraphs has one serious drawback in the context of codification. To the extent that it presupposes that the process of codification and the ordinary programme of criminal law reform would both be drawing from the same pool of scarce resources within the Department of Justice, Equality and Law Reform, there is a danger that progress in one might be possible only at the expense of lack of progress in the other.[10]

3.14 In the nature of things, the deployment of resources within the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform is governed by the exigencies of the Government's overall legislative programme. In this scheme of things, it is not inconceivable that other, more immediately pressing aspects of the Government's legislative programme might from time to time be given priority over work on the development of the criminal code, and that this in turn might have serious implications for the momentum of the codification project as a whole as well as for the timely completion of its individual phases.

3.15 Were this state of affairs to arise on a regular basis, the credibility of the codification process would be put in jeopardy and its success imperilled.

3.16 By parity of reasoning, it is equally possible that the demands occasioned by the need to adhere to a realistic timetable of phased codification could put pressure on other aspects of the Department's criminal law reform agenda.

3.17 Mindful of these difficulties, the Expert Group is satisfied that the normal process of legislative incubation – stretching from the conception of a legislative scheme through to its eventual enactment – does not provide a suitable framework for overseeing the programme of phased codification outlined in Chapter 2.[11]

Searching for an alternative

3.18 The outsourcing option: For the reasons already stated,[12] the Expert Group does not recommend the option of going outside the state apparatus and asking the Law Reform Commission or a team of independent consultants to prepare the codifying instruments needed to implement the programme of phased codification set out in Chapter 2.

3.19 Modifying the traditional incubation process: Instead the Group recommends a management strategy which seeks to build on the strengths of the traditional incubation process while at the same time avoiding its weaknesses. Broadly speaking, the essence of the proposed strategy is that codification should proceed by way of a free-standing initiative designed to complement the ongoing programme of criminal law reform within the Department of Justice, Equality and Law Reform.

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10 See above, footnote 8.

11 See above, Chap. 2, paras. 2.136-2.143.

12 See above, paras. 3.11-3.12 and accompanying footnotes.

3.20 It is envisaged that the initiative should be free-standing in the sense that it should not constitute an additional charge on the resources of the Department of Justice, Equality and Law Reform but should be funded independently by Government.

3.21 It will be recommended that this two-track approach should govern the drafting and enactment of the inaugural codifying instrument and its successor instruments, and should be carried through to the maintenance and development phase following codification.

3.22 In reaching this conclusion, the Expert Group was cognisant of the existence of two recent Irish precedents for broad representative involvement in a large-scale legislative project of a kind roughly comparable to codification.

3.23 **The Taxes Consolidation Act 1997:**[13] The first pertains to the arrangement which governed the preparation of the Bill which became the Taxes Consolidation Act 1997. That measure was designed and drafted by a full-time group consisting of a small team from the Office of the Revenue Commissioners, a private sector consultant and a (retired) draftsman from the Parliamentary Counsel's Office.[14]

3.24 This arrangement was designed to facilitate the fullest possible level of consultation prior to and during the drafting process as well as serving as a guarantee of the accuracy of the consolidation exercise. An additional safeguard of the accuracy and integrity of the project was provided by the appointment of a panel of expert referees for the express purpose of proofing the provisions of the draft consolidating measure.

3.25 **The Company Law Review Group precedent:** The second precedent relates to the statutory committee[15] – known as the Company Law Review Group – set up by the Minister for Enterprise, Trade and Employment to oversee the review, amendment and consolidation of company law legislation. The Review Group consists of a Steering Committee with a core membership of company law experts drawn from across the spectrum of the state apparatus, as well as from the practising legal profession.

3.26 The Steering Committee is chaired by a company law expert from the private sector and serviced by a permanent secretariat drawn from the Department of Enterprise, Trade and Employment.

3.27 The Group is supported by over a dozen sub-committees which were set up by the Steering Committee to deal with discrete aspects of company law review and consolidation. Membership of these sub-committees is also broadly representative of the range of company law expertise available across the various constituencies of the legal community.

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13 Consolidating the Income Tax Act, 1967, annual amendments to various Finance Acts and other fiscal legislation including the Capital Gains Tax Act, 1975, and the Corporation Tax Act, 1976.

14 Taxes Consolidation Bill, 1997, Second Stage Speech of the Minister of State at the Department of Finance, Dáil Debates Official Report, 14 October 1997: www.irlgov.ie/debates-97/14oct97/sect4.htm.

15 Established by Part 7 of the Company Law Enforcement Act, 2001, pursuant to recommendations made in the *Report of the Working Group on Company Law Compliance and Enforcement* (the McDowell Report), Government Publications Pn. 6697, 30 November 1998.

3.28 The task of generating legislative proposals is discharged by the Steering Committee with assistance from the Review Group as a whole. Having been exhaustively considered by the Group, proposals are then adopted in draft form and posted on the Group's website. Comments received as a result of this process are in turn considered by the Group before its proposals are presented to the Government for approval.

3.29 The Steering Committee of the Review Group thus has a dual role: it operates both as the Group's Bureau for the purpose of co-ordinating the consultation process as well as serving as a dedicated consultative committee charged with generating new legislative proposals and making recommendations for their implementation.[16]

3.30 Initially the Review Group decided to prepare two draft measures dealing, respectively, with reform and restatement issues. However, this approach was subsequently abandoned in favour of fashioning a unified instrument combining both elements, the Group having concluded that the latter approach made more sense given the extent of the reforms necessary and the degree of interdependence between the reform and restatement components of the projected consolidating measure.

3.31 The Review Group's work on the new unified Companies Bill has been ongoing for the past two years.

The Advisory Committee model

3.32 Although mindful of the very different context in which it has been developed, and making due allowance for the uniqueness of the challenge of reducing the general part to statutory form,[17] the Expert Group is satisfied that the management model associated with these precedents can be adapted for the purposes of criminal law codification as follows.

3.33 The task of overseeing the programme of phased codification recommended in Chapter 2[18] should be assigned to an advisory committee known as the Criminal Law Codification Advisory Committee. The Advisory Committee should be appointed by the Minister for Justice, Equality and Law Reform. It should have a permanent secretariat and be adequately resourced for the purposes of realising its research, consultation and drafting mission.

3.34 In order to ensure that it has a permanent role in the codification process, and is thus in a position to counter the fact that codification is apt to be perceived as a relatively low political priority, the Expert Group recommends that the Advisory Committee be put on a statutory footing. Ideally this should happen as soon as possible, although it need not necessarily happen prior to the Committee commencing its work.

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16 Update on work of the Company Law Review Group, 23 March 2004, Codification Archive, Department of Justice, Equality and Law Reform.

17 See below, paras. 3.48-3.53.

18 See above, Chap. 2, paras. 2.136-2.143.

3.35 Membership of the Advisory Committee should be multi-disciplinary and, consequently, should be drawn from the key centres of criminal law expertise within the legal community: *viz*., the state apparatus (especially the policy, advisory, prosecution and drafting sides thereof), the practising profession and the universities.

3.36 The Advisory Committee should have the flexibility to appoint specialist sub-committees to assist in the discharge of its workload; in the nature of things, the variety of matters under discussion at any given time will necessitate multiple expert representation from participating Government Departments and professional bodies.

3.37 Suggested terms of reference: Using best international practice as a guide, the Advisory Committee should be asked:

(i) to develop an action plan for the implementation of the programme of phased codification adumbrated in Chapter 2;

(ii) to produce a Draft General Part for inclusion in an inaugural Criminal Code Bill;

(iii) to design an inaugural Criminal Code Bill;

(iv) to advise on the content and timing of each successive stage in the programme of phased codification following the enactment of the inaugural instrument;

(v) to fashion a suitable mechanism for maintaining and developing the criminal code on completion of the programme of phased codification;

(vi) to oversee the review, maintenance and development of the criminal code following enactment; and

(vii) to devise and implement a consultation strategy for facilitating the achievement of the aforementioned objectives.

3.38 Bearing in mind that the enactment of the inaugural codifying instrument will mark the beginning rather than the end of the process of codification, and in view of the provision for continuing review of the criminal code set out in the preceding paragraph, the Advisory Committee should also be required to draw up an annual report detailing its progress to date and outlining its programme of work for the coming year. The report should be presented to the Minister for Justice, Equality and Law Reform, both with a view to providing the Minister with an overview of the Committee's work and ensuring that there is ongoing two-way communication between the Minister, *via* his Departmental representative, and the Advisory Committee.

C. BENEFITS OF ADVISORY COMMITTEE MODEL

Multi-disciplinarity and enhanced communication

3.39 In the opinion of the Expert Group, the principal advantage of the Advisory Committee model is that it will enable the state apparatus to play a central role in the codification process as it develops, without running the risks associated with directly incorporating the exercise into the ordinary programme of criminal law reform. As has already been pointed out, direct incorporation is apt to lead to competition for scarce resources between codification and the ongoing process of criminal law reform.[19]

3.40 By bringing together under a single umbrella the various kinds of expertise required to master the technical complexities of codification, the Advisory Committee model thus creates the conditions for a multi-disciplinary approach to the problem which avoids the dangers attendant on trying to develop code instruments outside the legislative process.[20]

3.41 By the same token, it provides a mechanism for ensuring that the principles and methodology of codification can be filtered through to the ordinary programme of criminal law reform, thus facilitating the orderly development of the special part when the fruits of that programme come to be incorporated into the criminal code.

3.42 In other words, the Advisory Committee model provides a mechanism whereby the two main protagonists in the codification process – the architects of the various codifying instruments and the Minister for Justice, Equality and Law Reform and his Departmental officials – can be kept abreast of developments in each other's spheres of activity, while at the same time enabling both parties to settle important issues of policy as and when they arise.

Assembling the general part[21]

3.43 An arrangement of this type is likely to be especially beneficial when the Advisory Committee turns its attention to designing and drafting the general principles component of the inaugural Criminal Code Bill.[22] In view of the number of contentious issues likely to arise in the course of this exercise, the alternative strategy of completing the draft instrument *before* sending it to the Minister for consideration would carry a serious risk that the entire measure might have to be re-drafted to take account of objections raised.

3.44 Given that the bulk of the general part of Irish criminal law continues to be governed by common law, and bearing in mind the dearth of indigenous jurisprudence in point, it would be unwise to underestimate the scale of the task involved in reducing it to written form, much less to discount the importance of a *modus operandi* which maximises the resultant instrument's chances of eventual legislative success.

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19 See above, paras. 3.13-3.17.

20 See above, para. 3.11.

21 See above, Chap. 2, paras. 2.72-2.76, 2.87-2.96.

22 See above, para. 3.37 (ii).

Aligning the general and special parts[23]

3.45 By the same token, the Advisory Committee model is likely to be particularly well suited to managing the difficult problem of aligning the provisions of the newly enacted general part with the blocks of quasi-codified law earmarked for inclusion in the inaugural codifying instrument, as well as with the various classes of offence subsequently targeted for incorporation into the Criminal Code following enactment.[24]

3.46 Broadly speaking, this process involves managing the fit between the mental elements set out in the general part and those already embedded in the offences scheduled for incorporation into the codifying instrument, as well as effecting a rational division of labour between the general and special parts. As can readily be imagined, the surgery involved in an exercise of this kind is of a highly technical nature and cannot be effectively carried out without the direct input of experts working at the heart of the legislative process.[25]

Drafting technique

3.47 Similar considerations apply to the technical issues involved in drafting a criminal code:[26] *viz.*, the level of detail required in the definition of code offences[27]; the level of generalisation appropriate when setting out the principles of criminal liability;[28] the problem of how to handle offences – such as strict liability offences and offences of 'short-measure' *mens rea* – which do not fit the normal pattern of criminal liability; the question of whether the drafting techniques employed should be different from those ordinarily used by the legislature in the criminal law context – to name only the most important.

3.48 As already indicated in Chapter 1, there is a substantial international literature on many of these aspects of codification. Suffice it to say here that the burden of research strongly suggests that matters of this kind are best resolved by legislative practitioners rather than by theoreticians; and that the multi-disciplinary aspect of the Advisory Committee model amply provides for this outcome.

23 See above, Chap. 2., paras. 2.101-2.103.

24 See above, Chap. 2, paras. 2.35-2.44.

25 For discussion of the technical nature of this exercise, see above, Chap. 2, paras. 2.101-2.103.

26 See Bennion, *Bennion on Statute Law* (3rd ed., 1990), pp. 74-77, 217-223.

27 Ilbert took a minimalist line on this point, defining a code as 'an orderly and authoritative statement of the *leading* rules of law on a given subject' (emphasis added): *Legislative Methods and Forms* (Oxford, 1901), p. 28. In contrast, Sir Mackenzie Chalmers, who drafted the Sale of Goods Act, 1893, took the maximalist view, arguing that the point of codification was 'to reproduce as exactly as possible the existing law: *Chalmers' Sale of Goods Act 1893* (London, 1894), p. viii.

28 ''…simplicity, clarification, and accessibility of the law do not necessarily mean fewer legislative provisions. Indeed, if anything, they require much greater detail than we presently have. You do not simplify by oversimplifying": Friedland, 'The Process of Criminal Law Reform' (1969-70) 12 *Criminal Law Quarterly* 148 at 150.

Balancing restatement and reform

3.49 Another key benefit of the Advisory Committee model is the opportunity it provides for classifying the contents of the criminal law with a view to streamlining the process of codification. In the final analysis, there is no denying the reality that codification of the general part is going to be more than a mere exercise in restatement; given the uncertainties which continue to beset the law in this area, a substantial element of law reform will also be involved.[29] Accordingly, at least as far as the general part is concerned, the Advisory Committee will not have the luxury of following the current orthodoxy[30] of eschewing law reform in favour of a policy of restatement.

3.50 However, neither should the difficulties of codifying the general part be exaggerated. The law of participation has already been reduced to statutory form and the defence of insanity will shortly follow suit.[31] As already indicated,[32] the Law Reform Commission is currently working on duress and necessity and is scheduled to tackle relational liability during the lifetime of its current Programme. As is its custom and practice, the Commission is committed to producing draft clauses on each of these matters at consultation and report stages specifically with a view to facilitating the process of criminal law codification.

3.51 Moreover, it is important to remember that a not insignificant portion of the remainder of the general part consists of a body of well settled and relatively uncontroversial rules and principles which, though unwritten, could be codified without giving rise to anguished debates on matters of fundamental principle or policy. The law of causation is surely a case in point, as are the rules on mistake of fact and mistake of law.

3.52 Given these realities, and bearing in mind the expertise that it is envisaged will be at its disposal,[33] the Advisory Committee might begin its work in this area by classifying the contents of the general part according to the degree of difficulty they are likely to present at the drafting and enactment stages of codification, identifying those issues which are more or less amenable to straightforward restatement, on the one hand, and those requiring substantial law reform, on the other; and then prioritise work on these elements accordingly.

3.53 In this regard, consideration might be given to a ranking system running from high priority to medium priority to low priority reforms, which would have the objective of keeping the reform component of the Criminal Code Bill to an absolute minimum, thereby significantly reducing the risk of the measure becoming ensnared in a web of amendments following its introduction.

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29 'As a common law jurisdiction moves to codification, it should do so with full knowledge of the sheer number of controversial matters of social policy and morality that it will be required to face at the same time': Piragoff, 'Recodification of Canadian Criminal Law: a View from Inside the Department of Justice', Expert Group's International Conference, above, footnote 1 at 28.

30 '[Codification] is seen primarily as the restating of the present law in a coherent and consistent manner coupled with the suggestion of limited reforms where the law is seen to be defective': Law Commission: Eighteenth Annual Report 1882-1983 (Law Com., No. 131, para. 2.26).

31 See above, Chap. 1, para. 1.73.

32 See above, Chap. 1, paras. 1.68-1.73.

33 See above, paras. 3.32-3.38.

3.54 A device of this kind could also be applied to the drafting and enactment of the successor instruments to the inaugural Criminal Code Bill.

Consultation, ease of user and interpretation

3.55 Finally, as already indicated,[34] the Advisory Committee should be given responsibility for ensuring that there is proper consultation with all of the stakeholders in the criminal justice system throughout the codification process.

3.56 While it would be inappropriate to be unduly prescriptive at this stage, the Expert Group is strongly of the view that the consultation process should include, over and above the normal canvassing of expert opinion within and beyond the legal community, the organisation of public seminars on the value of codification, wide circulation of legislative proposals and draft instruments and, where possible, imaginative use of information technology as a means of facilitating consultation with the various target constituencies.[35]

3.57 The Advisory Committee's responsibilities in this regard might profitably be extended to considering how best to ease the 'transition anxiety' associated with the introduction of a radically new legislative regime. In the nature of things, codification will involve the systematic reorganisation of the contents of the criminal law and, depending on the current state of the applicable statute law in a given area, this will entail, to a greater or lesser degree, the removal and reclassification of material with a view to achieving greater homogeneity within offence categories.[36]

3.58 In the opinion of the Expert Group, if properly constituted, the Advisory Committee will be in a strong position to ease practitioner anxiety on this score by drawing on the burgeoning array of interpretation aids – such as detailed statutory memoranda on the structure and layout of criminal codes, the use of examples and illustrations to explain the meaning of key terms and provisions, and reliance on annotations indicating the origins of consolidated provisions[37] – specifically designed to guide the user through the new instrument.[38]

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34 See above, para. 3.37 (vi).

35 'It is far preferable to work towards consensus in advance of codifying rather than to make unilateral choices, or to consult exclusively with the professionals, and to be put in the position of justifying choices to the public for years after the fact. Consultation lends legitimacy to the project and demonstrates that the government is accessible and democratic and responsive to the needs of its citizens. You will have to ascertain which are the key populations in Ireland you need to consult with': Piragoff, reflecting on recent Canadian experience, Expert Group's International Conference, above, footnote 1 at 35.

36 See above, Chap. 2, para. 2.38.

37 This device was used to good effect in the Taxes Consolidation Act, 1997.

38 See *Codification of the Criminal Law: A Report to the Law Commission* (Law Com., No. 143, 1985), pp. 172 et seq.; Bennion, 'The Technique of Codification' [1986] Criminal Law Review 295 at 299-300; and generally, *Dan-Cohen, Harmful Thoughts: Essays on Law, Self and Morality* (New York, 2002); Leader-Elliot, (2003) 28 *Australian Journal of Legal Philosophy* 123.

D. ENACTING THE CODE

3.59 The management issues surrounding the enactment and maintenance of the criminal code are well documented. Those pertaining to enactment are considered in this section, while those affecting future maintenance will be discussed in the next.[39]

Time and resources

3.60 In respect of the former, the scarcity of parliamentary time is a key issue.[40] Irrespective of the level of resources committed to their preparation, codifying instruments cannot be enacted faster than the *quantum* of available parliamentary time permits. By reason of the pressure exerted by the Government's overall legislative programme, only a limited number of Bills sponsored by any given Minister, including the Minister for Justice, Equality and Law Reform, have a realistic chance of being considered by the Oireachtas in any given parliamentary session.

3.61 Accordingly, Bills have to be prioritised and, given their potential length and complexity, this means that codifying instruments are at risk of being categorised as low priority for enactment purposes.

3.62 Moreover, this risk is likely to be exacerbated to the extent that a codifying instrument may be perceived as less urgent from a social or economic point of view than the other legislative measures vying with it for scarce parliamentary time.

3.63 It should also be borne in mind that current parliamentary procedure requires that Bills are considered by both the Dáil and the Seanad on three occasions: at Second, Committee and Report Stages, respectively.[41] Again because of the instrument's length and complexity, and bearing in mind the cycle of debate and consultation this is likely to engender at each successive stage of its passage through the Oireachtas, the process of enacting a criminal code is likely to be especially time-consuming and, consequently, particularly resource-intensive from the perspective of those sectors of the state apparatus responsible for managing it: *viz.*, the Department of Justice, Equality and Law Reform and the Offices of the Attorney General and Parliamentary Counsel.

Accelerating the process

3.64 In light of these difficulties, it is vitally important that consideration be given to fashioning a legislative mechanism which would enable a codifying instrument to be channelled through the Oireachtas as efficiently as possible, while at the same time preserving the democratic role of both Houses in ensuring that the measure is adequately debated.

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39 See below, paras. 3.78-3.86.

40 '[A] full [government] programme inevitably leads to great difficulty in finding parliamentary time for the implementation of law reform Bills': *Law Commission: Fifteenth Annual Report 1979-1980* (Law Com. No. 107), para. 1.6. See also Bennion, 'The Technique of Codification' [1986] *Criminal Law Review* 295 at 298.

41 Dáil Éireann Standing Orders 118-126, Seanad Éireann Standing Orders 99-118.

3.65 Consolidation on certification from Attorney General: One possibility would be to use the device provided for in Dáil Eireann Standing Orders 137-146, whereby existing statute law on a particular subject may be consolidated on certification from the Attorney General to the effect that there are no substantive amendments in the consolidating measure; and that such amendments as have been included are restricted to removing ambiguities and inconsistencies, substituting modern for obsolete machinery, achieving uniformity of expression or accommodating to existing law and practice.[42]

3.66 Arguably this device could be used to unify the existing blocks of quasi-codified law in a single codifying instrument, which could then be added to incrementally as the programme of phased codification continued to yield up its progeny.[43]

3.67 The obvious difficulty with this approach is that, given that it is envisaged that it will also include a general part incorporating, *inter alia*, the common law rules and principles in point, the inaugural codifying instrument cannot accurately be described as a consolidating measure for the purposes of Dáil Eireann Standing Orders 137-146.

3.68 In the result, if this machinery were to be invoked in the context of codification, the general part would have to be enacted in advance of the consolidation exercise designed to unify the special part.

3.69 However, in the opinion of the Expert Group, this course of action would introduce unnecessary delay into the codification process – two measures rather than one would have to be guided through the Oireachtas – and so should be discountenanced.

3.70 Moreover, apart from the fact that a two-Bill approach carries the risk that the complementary consolidating Bill might never be enacted in the event that the vagaries of the political process conspired against it, it would also necessitate the inclusion of transitional provisions linking the general part enactment to the various statutes containing the calendar of criminal offences pending their consolidation and incorporation into the criminal code.

3.71 To say the least, an arrangement of this kind does not sit easily with the idea that codification is designed to streamline the sources of the criminal law.[44]

3.72 A new hybrid procedure: Accordingly the Group believes that serious consideration should be given to developing a hybrid procedure which would enable reform and restatement of the general part and consolidation of the special part to proceed simultaneously within the framework of a single enactment.

42 Dáil Éireann Standing Order 143.

43 For discussion, see above, Chap. 2, paras. 2.136-2.143; and below, Appendix 2.

44 In the memorable words of A.T.H. Smith, it runs the risk of reducing the codification effort to 'a jumble of statute law, common law and what might be called ''transitional'' measures whose principal function is to explain and qualify the interrelation between the two': 'Legislating the Criminal Code: The Law Commission's Proposals' [1992] *Criminal Law Review* 396 at 397.

3.73 Broadly speaking, the proposed arrangement would work as follows. The legislative process would commence with a traditional Second Stage presentation of the Criminal Code Bill to the Oireachtas. The law reform components of the Bill would then be processed in the normal way, *i.e.*, through the Committee, Report and Final Stages in both houses of the Oireachtas. On completion of this process, the consolidation procedure provided for in Dáil Eireann Standing Orders 137-146 would then be activated to cater for the consolidation component of the Bill.

3.74 Although a procedure of this kind would necessitate an amendment to Oireachtas Standing Orders as currently configured, the intended structure of the inaugural Criminal Code Bill makes it an attractive option. As already indicated,[45] the reform component of the Bill would be confined to the general part of the codifying instrument, while the consolidation component would be corralled in the special part, thus facilitating their separate treatment for the purposes of enactment.

3.75 It should however be emphasised that the arrangement adumbrated in the immediately preceding paragraphs need not be confined to the enactment of the inaugural codifying instrument. Once the elements of reform and consolidation have been clearly and effectively compartmentalised, there is no reason in principle why it should not also be used when enacting the successor instruments in the codification process – or, indeed, outside the sphere of the criminal law altogether.

The fallback position

3.76 However, in the event that the proposed reform-consolidation hybrid proves not to be viable, the Expert Group recommends that the general part should be enacted first and immediately followed by consolidating legislation combining the general part thus enacted with those components of the special part identified in Chapter 2.

3.77 Irrespective of which approach is adopted, and bearing in mind the experience of other jurisdictions, the Expert Group is at pains to emphasise the crucial importance of ongoing political support during the enactment process.

E. THE PROBLEM OF MAINTENANCE

General

3.78 It goes without saying that the successful enactment of a criminal code does not signal the end of the ordinary process of criminal law reform. Codification does not stop the world from turning. Just as ordinary legislation needs to be kept under review and, where appropriate, amended, so, too, do criminal codes.[46]

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45 See above, Chap. 2, paras. 2.138, 2.45-2.81.

46 '…once you have a Code or a Crimes Act, you have a document which is written in today's language, based on today's social morality, taking into account today's technologies, and the will of today's politicians. Any of these can and in all likelihood will change as time passes. A codified criminal law must therefore be monitored, and amended from time to time as circumstances change': Piragoff, commenting on the Canadian experience of codification, Expert Group's International Conference, above, footnote 1 at 39.

3.79 However exhaustive the consultation process leading up to the enactment of a criminal code, and irrespective of the meticulousness of the drafting exercise involved in producing it, the legislature will, from time to time, find it necessary to make provision for unforeseen circumstances and new developments.

3.80 Similarly, legislative intervention may also be required in light of judicial interpretation of the provisions of the code, as a result of a change in Government policy regarding the type or range of offences which should be included in the special part, or in order to comply with developments in the international legal order.

3.81 As already indicated, it is envisaged that the Codification Advisory Committee will be charged with responsibility for overseeing the maintenance and development of the criminal code.

3.82 In the nature of things, this means that, in addition to keeping the Criminal Code under review following enactment, the Advisory Committee will be required to ensure that the instrument is sufficiently flexibly structured to accommodate periodic amendment as and when necessary.

Code degradation[47]

3.83 At the same time, the procedures for amending the code will need to be carefully designed, and the amendment process itself carefully monitored, in order to ensure that they do not lead to the progressive degradation of the codifying instrument by undermining its overall coherence and integrity.[48]

3.84 In practical terms, this means that every effort should be made to avoid amendments and additions which threaten to subvert the logic of the original offence classification system set out in the code,[49] either by needless replication of existing offences,[50] or as a result of disregard for the overall ranking system whereby offences are graded (and their associated penalties fixed) according to their relative heinousness.[51]

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47 For a stimulating discussion of this problem in the context of the recodification movement in the United States of America, see Robinson and Cahill, 'Can a Model Penal Code second Save the States from Themselves' (2003) 1 *Ohio State Journal of Criminal Law* 169, 169-177. Also see above, Chap. 1, paras. 1.99-1.100.

48 Robinson, reflecting on his involvement in the recodification projects in Kentucky (2003) and Illinois (2003), 'Codification, Recodification, and the American Model Penal Code', Expert Group's International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003, pp. 5-6, Codification Archive, Department of Justice, Equality and Law Reform. For further details, see Chap. 1, paras. 1.63, 1.100 and accompanying footnotes.

49 See above, Chap. 2, para. 2.34.

50 Robinson, Expert Group's International Conference, above, footnote 48 at 6. Goode, Expert Group's International Conference, above, footnote 7 at 4-5, provided an interesting recent example of this phenomenon from South Australia. Following sustained public pressure, new statutory provisions and penalties were introduced to deal with the problem of 'home invasion', notwithstanding that that issue was already covered by existing legislation and that the 'maximum penalties for burglary, armed robbery, rape and wounding with intent were life imprisonment'.

51 Commenting on the amendments to the Canadian Criminal Code between 1893 and 1967, Mewett has observed that they constitute 'a shocking indictment of the process of criminal legislation. Maximum penalties have been fixed without the slightest regard for the objectives in mind; major alterations have been based upon the panic induced by isolated criminal activities; compromises between the Senate and the House have resulted in legislation supportable on no grounds; and absurd formulas adopted that disguise real aims': 'The Criminal Law, 1867-1967' (1967) 45 *Canadian Bar Review* 726-740 at 735.

3.85 Moreover, code maintenance will also require judicious use of the technique of consolidation in order to ensure that amendments are not allowed to proliferate to the point that they unduly compromise the core codification values of orderly presentation, ease of access and comprehensibility.[52]

3.86 Finally, the Expert Group recommends that the Advisory Committee should have ongoing responsibility for advising the Minister for Justice, Equality and Law Reform on the timing and implementation of a comprehensive review and consolidation of the Criminal Code and that this exercise should be repeated every five to ten years following enactment.

F. SUMMARY AND CONCLUSION

3.87 The key arguments of this Chapter may be summarised as follows:

(i) codification is a resource-intensive exercise;

(ii) the most cost-effective way of achieving codification in Ireland is to organise the process around the ongoing programme of criminal law reform being undertaken by the Department of Justice, Equality and Law Reform;

(iii) codification should not however be fully integrated into the ordinary programme of criminal law reform;

(iv) complete integration would expose the codification project to the risk of losing out in the competition for scarce resources with other aspects of the criminal law reform programme;

(v) were this to arise on a regular basis, the credibility of the codification process would be put in jeopardy;

(vi) codification should however be carried out within the broad framework of the state apparatus, thus ensuring the direct involvement in the project of experts actively engaged with the policy, advisory and drafting aspects of the legislative process and the Government's overall legislative programme;

(vii) by way of avoiding direct competition with other aspects of the Government's legislative programme, codification should take the form of a free-standing, discretely funded, initiative designed to complement the ordinary programme of criminal law reform by incorporating its fruits into the codification process;

(viii) a statutory committee known as the Criminal Law Codification Advisory Committee should be established to take charge of this initiative, although the Advisory Committee might be allowed to begin its work prior to being placed on a statutory footing;

[52] In the final analysis, however, some measure of code degradation is inescapable: 'Whether we like it or not, governments will sometimes amend the criminal law out of expediency…This phenomenon is an inevitable reality of democracy': Piragoff, Expert Group's International Conference, above, footnote 1 at 45.

(ix) membership of the Advisory Committee should be drawn from the key centres of criminal law expertise within the legal community;

(x) having established best international practice, the Advisory Committee should be charged with developing and overseeing an action plan for the implementation of the programme of phased codification recommended in Chapter 2;

(xi) the work of the Advisory Committee should include the preparation of a draft general part for inclusion in an inaugural Criminal Code Bill, the design and preparation of the inaugural Criminal Code Bill and its successor instruments, and the development and implementation of procedures for ensuring the timely enactment, amendment and proper maintenance of the criminal code;

(xii) in respect of the problem of timely enactment, the Advisory Committee, in consultation with the Minister for Justice, Equality and Law Reform and the Houses of the Oireachtas, should give serious consideration to the possibility of developing a procedure which would enable the reform and consolidation components of the projected Criminal Code Bill to be processed simultaneously within the framework of a single Act of the Oireachtas;

(xiii) in respect of the issues of amendment and maintenance, the Advisory Committee should play an ongoing monitoring role designed to ensure that the process of amendment does not lead to code degradation, thus undermining the net gains of orderly presentation, ease of access and clarity of expression achieved by the original codifying instrument.

Appendix 1 – COMMON LAW CRIMINAL CODES

A. Canadian Criminal Code 1892[53]

(i) Background and development

In Canada legislative competence in respect of the criminal law is vested in the federal parliament. The adoption of a series of consolidating statutes culminated in the enactment of the Canadian Criminal Code in 1892. The Code was heavily influenced by the English draft code of 1878 (see above, Chap. 1, paras. 1.45-1.51). In 1955, a major reform was carried out and the Code was reduced from 1100 to 753 sections. However, both the basic structure and the substantive provisions of the Code remained largely intact.

Traditionally common law offences co-existed with the Code. However, they were abolished in 1955 by virtue of section 9, a new provision added to the instrument that year, although the power of the courts to punish for contempt was expressly preserved. In contrast, by virtue of section 8(3), the defences to a criminal charge were allowed to continue at common law.

In 1986 the Law Reform Commission of Canada recommended the adoption of a new Criminal Code. More recently, the Canadian Government published a white paper (in 1993) and a consultation paper (in 1994) containing proposals for a re-drafted and more comprehensive general part. Current policy is to recodify in stages.

(ii) Contents and structure

Part I	General (Sections 3–45)
Part II	Offences against Public Order (Sections 46–83)
Part II.1	Terrorism (Sections 83.01–83.33)
Part III	Firearms and other Weapons (Sections 84–117.15)
Part IV	Offences against the Administration of Law and Justice (Sections 118–149)
Part V	Sexual Offences, Public Morals and Disorderly Conduct (Sections 150–182)
Part VI	Invasion of Privacy (Sections 183–196)
Part VII	Disorderly Houses, Gaming and Betting (Sections 197–213)
Part VIII	Offences against the Person and Reputation (Sections 214–320.1)
Part IX	Offences against Rights of Property (Sections 321–378)
Part X	Fraudulent Transactions relating to Contracts and Trade (Sections 379–427)
Part XI	Wilful and Forbidden Acts in respect of Certain Property (Sections 428–447)
Part XII	Offences relating to Currency (Sections 448–462)
Part XII.1	Instruments and Literature for Illicit Drug Use (Sections 462.1–462.2)
Part XII.2	Proceeds of Crime (Sections 462.3–462.5)
Part XIII	Attempts – Conspiracies – Accessories (Sections 463–467.2)
Part XIV	Jurisdiction (Sections 468–482.1)
Part XV	Special Procedure and Powers (Sections 483–492.2)

[53] http://laws.justice.gc.ca/en/C-46/index.html

Part XVI	Compelling appearance of Accused before a Justice and Interim Release (Sections 493–529.5)
Part XVII	Language of Accused (Sections 530–533)
Part XVIII	Procedure on Preliminary Inquiry (Sections 535–551)
Part XIX	Indictable Offences – Trial without Jury (Sections 552–572)
Part XIX.1	Nunavut Court of Justice (Sections 573–573.2)
Part XX	Procedure in Jury Trials and General Provisions (Sections 574–672)
Part XX.1	Mental Disorder (Sections 672.1–672.95)
Part XXI	Appeals – Indictable Offences (Sections 673–696)
Part XXI.1	Applications for Ministerial Review – Miscarriages of Justice (Sections 696.1–696.6)
Part XXII	Procuring Attendance (Sections 697–715.2)
Part XXIII	Sentencing (Sections 716–751.1)
Part XXIV	Dangerous Offenders and Long-term Offenders (Sections 752–761)
Part XXV	Effect and Enforcement of Recognizances (Sections 762–773)
Part XXVI	Extraordinary Remedies (Sections 774–784)
Part XXVII	Summary Convictions (Sections 785–840)
Part XXVIII	Miscellaneous (Section 841–849)

(iii) The general part

Part I of the Code contains most of the provisions relevant to the general part, including sections governing possession, jurisdiction and application of the criminal law, infancy, mental disorder, compulsion by threats, ignorance of law, parties to offences, intoxication and self-defence. The effect of section 8(3), which preserves the common law defences, has been to facilitate the judicial development of justifications and excuses. Inchoate liability and being an accessory after the fact are provided for in Part XIII.

(iv) Offences

Apart from contempt of court, the calendar of criminal offences is contained either in the Code or in other federal statutes, common law offences having been abolished in 1955. Drugs offences are contained in the Controlled Drugs and Substances Act (1996).

The criminal calendar is set out in Parts II to XII.1 of the Code. The principal offence categories are as follows: offences against public order (including treason, piracy, unlawful assemblies and riots, duels and prizefighting); terrorism offences; offences involving firearms and other weapons; offences against the administration of law and justice; sexual offences; offences pertaining to public morals and disorderly conduct; invasion of privacy; disorderly houses, gaming and betting; offences against the person and reputation (embracing murder, manslaughter and infanticide, suicide, abortion, assaults, kidnapping and abduction, offences against marriage, criminal libels, hate propaganda); offences against rights of property (theft and related offences, robbery and extortion, breaking and entering, false pretences, forgery and offences resembling forgery); fraudulent transactions relating to contracts and trade; willful and forbidden

acts in respect of certain property (including arson, interfering with wrecked vessels and related offences, offences against animals); offences relating to currency; offences connected with instruments and literature for illicit drug use.

(v) Procedure, sentencing, transitional provisions

Parts XIV to XVII and XXV to XXVIII deal with criminal procedure. Sentencing is governed by Part XXIII while Part XXIV contains provisions relating to dangerous and long-term offenders. Part XII.2 provides for the forfeiture of the proceeds of crime.

B. Queensland Criminal Code 1899[54]

(i) Background and development

The Queensland Criminal Code was enacted as a schedule to the Criminal Code Act 1899 and came into force on 1 January 1901. The Code was based on a draft prepared for the Queensland government by Sir Samuel Griffith in 1897 (the Griffith Code). Griffith, at the time Chief Justice of Queensland, was later to become the first Chief Justice of Australia. The Griffith Code was influenced by the English Criminal Code Bill of 1878 and, albeit to a lesser extent, by the Italian Penal Code and the Penal Code of New York State. The Code has been amended by more than 110 separate statutes.

(ii) Contents and structure

Part 1: Introductory (Sections 1–36)

Part 2: Offences against Public Order (Sections 44–83)

Part 3: Offences against the Administration of Law and Justice and against Public Authority (Sections 85–205)

Part 4: Acts Injurious to the Public in General (Sections 206–243)

Part 5: Offences against the Person and Relating to Marriage and Parental Rights and Duties and against the Reputation of Individuals (Sections 245–364)

Part 6: Offences relating to Property and Contracts (Sections 390–534)

Part 7: Preparation to Commit Offences – Conspiracy – Accessories After the Fact (Sections 535–545)

Part 8: Procedure (Sections 545A–708)

Part 9: Transitional Provisions (Sections 709–715)

(iii) The general part

Part 1 deals with the general part. It covers attempts to commit offences, liability of secondary parties, the application of the Code to offences wholly or partially committed in Queensland, offences enabled, aided, procured or counselled by persons outside Queensland and offences procured in Queensland to be committed outside Queensland. There are also "Criminal Responsibility" provisions dealing with such matters as ignorance of law, intention-motive, mistake of fact, extraordinary emergencies, presumption of sanity, insanity, intoxication, immature age and justification and excuse.

54 http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf

The lawful use of force and legitimate defence are dealt with in Part 5 (sections 247–284). Inchoate liability and being an accessory after the fact are provided for in Part 7.

(iv) Offences

Criminal offences in Queensland are exclusively statutory, being contained either in the Code itself or in other legislation. Drugs offences are contained in the Drugs Misuse Act 1986, while the use and possession of firearms is regulated by the Weapons Act 1990.

Part 2 of the Criminal Code deals with offences against public order and incorporates sedition, offences against the executive and legislative power, unlawful assemblies, breaches of the peace, offences against political liberty and piracy.

Part 3, which deals with the administration of law and justice, contains chapters on disclosing official secrets, corruption and abuse of office, corrupt and improper practices at elections, selling and trafficking in offices, offences relating to the administration of justice, escapes and miscellaneous offences against public authority. Part 4 of the Code deals with acts injurious to the public in general and includes chapters on offences relating to religious worship, offences against morality, prostitution, nuisances, and offences against public health. Part 4 also includes sexual offences against young and mentally impaired persons, bestiality, incest and abortion offences.

Part 5 contains offences against the person and offences relating to marriage and parental rights and duties: *viz*., homicide (including attempts to murder, aiding suicide, and killing an unborn child), offences endangering life or health, assaults including assaults on persons protecting wrecks, assaults on members of the crew of aircraft, assaults occasioning bodily harm and serious assaults, rape and sexual assaults, offences against personal liberty, and unlawful stalking.

Part 6 is entitled "offences relating to property and contracts" and includes chapters on stealing, offences analogous to stealing, stealing with violence, burglary and housebreaking, other fraudulent practices, injuries to property (including arson and damaging property by explosions), forgery and offences against trade.

(v) Procedure, sentencing, transitional provisions

Part 8 deals with procedure and contains extensive provisions regulating arrest, jurisdiction, indictments, trial, evidence, verdict, costs, appeals, and seizure and detention of property.

Part 9 contains transitional provisions arising from the various amendments to the Code. Sentencing is governed by the Penalties and Sentences Act 1992.

C. New South Wales Crimes Act 1900[55]

(i) Background and development

The Crimes Act is entitled "[a]n Act to consolidate the statutes relating to criminal law." Although it contains a comprehensive special part, the Crimes Act presupposes the continued existence of the common law to the extent that the latter is consistent with its provisions and has not been expressly abrogated by it. The Crimes Act has been amended extensively by more than 230 separate enactments. As can readily be seen from the ensuing section, this is reflected in the organisation of the instrument and in the mixed numerical and alphabetical sequencing of its component parts.

(ii) Contents and structure

Part 1: Preliminary and Interpretation (Sections 1–10)
Part 1A: Geographical Jurisdiction (Sections 10A–10E)
Part 2: Offences against the Sovereign (Sections 11–16A)
Part 3: Offences against the Person (Sections 17–93)
Part 3A: Offences relating to Public Order (Sections 93A–93E)
Part 3B: Offences relating to Firearms *etc*. (Sections 93F–93I)
Part 3C: Public Order Offences relating to Contamination of Goods (Sections 93 IA–93IG)
Part 3D: Public Order Offences relating to Bomb and other Hoaxes (Sections 93IH–93II)
Part 4: Offences relating to Property (Sections 93J–203E)
Part 4AA: Offences relating to Transport Services (Sections 204–214)
Part 4A: Corruptly receiving Commissions and other Corrupt Practices (Sections 249A–249J)
Part 5: Forgery and False Instrument Offences (Sections 250–307C)
Part 6: Computer Offences (Sections 308–308I)
Part 6A: Offences relating to Escape from Lawful Custody (Sections 310A–310H)
Part 7: Public Justice Offences (Sections 311–343A)
Part 8: Unlawful Gambling (Section 344)
Part 8A: Attempts (Section 344A)
Part 9: Abettors and Accessories (Section 345–351A)
Part 10: Arrest of Offenders (Section 352–353C)
Part 10A: Detention after Arrest for Purposes of Investigation (Sections 354–356Y)
Part 10B: Powers of Search, Powers of Entry and Discharge of Persons in Custody (Sections 357–358C)
Part 11: Criminal Responsibility – Defences (Sections 359–428)
Part 11A: Intoxication (Sections 428A–428YB) *(Sections 42J–428YB repealed)*
Part 11B: Repealed (Sections 428Z–428ZB)
Part 12: Sentences (Sections 429–447B)

[55] http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/

Part 13: *Repealed (Sections 448–474)*

Part 13A: Review of Convictions and Sentences (Section 474A–475)

Part 13B: Offences Punishable by the Supreme Court in its Summary Jurisdiction (Sections 475A–475B)

Part 14: Former Provisions relating to Offences Punishable by Justices and Procedure before Justices Generally (Sections 475C–500)

Part 14A: Summary Offences (Sections 501–556)

Part 15: Repealed (Sections 556A–562)

Part 15A: Apprehended Violence (Sections 562A–562Z)

Part 16: Miscellaneous Enactments (Sections 563–582)

(iii) The general part

The Crimes Act does not contain a dedicated general part. Instead, there are provisions dealing with aspects of the general principles distributed throughout the body of the Act as follows: Part 1A deals with geographical jurisdiction; Part 11 with some of the defences; Part 11A with intoxication (sections 428A–428I); Part 8A with attempts; Part 9 with liability for secondary parties; and section 546 of Part 14A with abetting and procuring summary offences (section 546).

(iv) Offences

Most of the major offence categories are provided for in the Crimes Act. Common law offences remain in existence to the extent that they have not been expressly abrogated by statute. Abrogated common law offences include nightwalking (section 580A), eavesdropping (section 580B), being a common scold and keeping a bawdy house (section 580C). By virtue of section 343, the Act expressly preserves a subset of common law offences including those of escaping from lawful custody and refusing to assist a peace officer.

Part 3 of the Act is broken down into divisions dealing with homicide; conspiracy to murder; attempts to murder; documents containing threats; suicide; acts causing danger to life or bodily harm; possessing or making explosives with intent to injure; assaults; offences in the nature of rape; sexual servitude; misconduct with regard to corpses; attempts to procure abortion; concealing the birth of a child; kidnapping; procuring for prostitution; child prostitution and pornography; and bigamy.

Part 4 deals with stealing and like offences and criminal destruction and damage. Part 5 deals with forgery, false instruments and the provision of false and misleading information. Part 7 contains an array of offences against the administration of justice.

(v) Procedure, sentencing and transitional provisions

Procedural matters are governed by Parts 10, 10A and 10B (which regulate arrest, detention of suspects and powers of search and seizure, respectively) and Parts 13B, 14 and 14A (which deal with summary proceedings).

Part 12 deals with sentences while Part 13A regulates the review of convictions and sentences. Transitional provisions arising from the many amendments to the Act are listed in Schedule 11.

D. Western Australia Criminal Code 1913[56]

(i) Background and development

Like its Queensland counterpart, the Western Australian Criminal Code is based on the Griffith Code (see above, B(i)). It was first enacted in 1902 and subsequently re-enacted, incorporating several amendments, in 1913. In the course of its history, the Code has been amended by more than 100 different statutes.

(ii) Contents and structure

Part I	Introductory (Sections 1–36);
Part II	Offences against Public Order (Sections 44–80);
Part III	Offences against the Administration of Law and Justice and against Public Authority (Sections 81–178);
Part IV	Acts injurious to the Public in General (Sections 181–215);
Part V	Offences against the Person and relating to Marriage and Parental Rights and Duties and against the Reputation of Individuals (Sections 222–369);
Part VI	Offences relating to Property and Contracts (Sections 370–549);
Part VII	Preparation to Commit Offences: Conspiracy: Accessories after the Fact (Sections 552–563A);
Part VIII	Procedure (Sections 564–747).

(iii) The general part

The general part – contained in Part 1 – covers attempts to commit offences, liability of secondary parties, the application of the Code to offences wholly or partially committed in Western Australia, offences enabled, aided, procured or counselled by persons out of Western Australia and offences procured in Western Australia to be committed out of Western Australia; and a series of provisions headed "Criminal Responsibility" dealing with matters such as ignorance of law, intention-motive, mistake of fact, extraordinary emergencies, presumption of sanity, insanity, intoxication, immature age and justification and excuse. The rules on the lawful use of force and legitimate defence are set out in Part 5 (sections 225–261). Inchoate liability and being an accessory after the fact are provided for in Part 7.

(iii) Offences

Criminal offences in Western Australia are exclusively statutory in form, being contained either in the Code itself or in other legislation. Drugs offences are contained in the Misuse of Drugs Act, 1981 and the use and possession of firearms are regulated by the Firearms Act 1973.

56 http://www.slp.wa.gov.au/statutes/swans.nsf/Current%20Legislation%20Version2?OpenView&Start=1&Count=600&Expand=89.2&RestrictToCategory=C#89.2

Part II of the Criminal Code deals with offences against public order including sedition, offences against the executive and legislative power, offences dealing with unlawful assemblies, breaches of the peace, offences against political liberty, racist harassment and incitement to racial hated.

Part III, which deals with offences against the administration of law and justice, contains chapters on disclosing official secrets, corruption and abuse of office, corrupt and improper practices at elections, selling and trafficking in offices, offences relating to the administration of justice, escapes and miscellaneous offences against public authority. Part IV deals with acts injurious to the public in general and includes chapters on offences relating to religious worship, offences against morality, prostitution, nuisances, and offences against public health. Part IV also deals with facilitating sexual offences against children outside Western Australia, bestiality, abortion, indecency offences, keeping of bawdy houses and misconduct with corpses.

Part V contains offences against the person and offences relating to marriage and parental rights and duties: *viz*., homicide, offences endangering life or health, assaults (including assaults on a member of crew of an aircraft), assaults occasioning bodily harm and serious assaults, sexual offences (including offences against young and mentally impaired persons and sexual offences by relatives), offences against personal liberty, unlawful threats, stalking, offences relating to marriage and parental rights and duties and criminal defamation.

Part VI includes divisions on stealing, offences analogous to stealing, stealing with violence, burglary and housebreaking, other fraudulent practices, injuries to property (including criminal damage, damaging property by explosions, obstructing railways, endangering aircraft), forgery and offences against trade. Part VII, which is principally concerned with inchoate liability and assistance after the fact, also includes an offence of property laundering.

(v) Procedure, sentencing, transitional provisions

Part VIII deals with procedure and contains extensive provisions regulating arrest, videotaped interviews, jurisdiction, indictments, trial, evidence, verdict, costs, appeals, and seizure and detention of property. Transitional provisions have been included in amending statutes. Sentencing is governed by the Sentencing Act 1995.

E. Tasmanian Criminal Code 1924[57]

(i) Background and development

The Tasmanian Code was given legal effect by the Criminal Code Act 1924 which is entitled "[a]n Act to declare, consolidate, and amend the criminal law, and to establish a code of criminal law." Unlike the Criminal Codes of Queensland and Western Australia, the Tasmanian Code did not follow the Griffith draft (see above, B(i)). Although common law offences were abolished by section 6 of the Criminal Code Act, common law *defences* were preserved by section 8. The amendment history of the Tasmanian Code is reflected in the mixed numerical and alphabetical sequencing of the instrument's constituent parts.

57 http://www.thelaw.tas.gov.au/

(ii) Contents and structure

Part I	Introductory (Sections 1–55);
Part II	Crimes against Public Order (Sections 56–88);
Part III	Crimes concerning the administration of Law and Justice and against Public Authority (Sections 89–118);
Part IV	Acts injurious to the Public in General (Sections 119–143);
Part V	Crimes against the Person (Sections 144–225);
Part VI	Crimes relating to Property (Sections 226–287G);
Part VII	Frauds by personation and relating to Trade (Sections 288–296);
Part VIII	Conspiracies and crimes relating to other crimes (Section 297–300);
Part IX	Procedure (Section 301–459).

(iii) The general part

Broadly speaking, the general part is contained in Part I of the Code which provides for matters such as jurisdiction, participation, ignorance of law, intention and motive, mistake of fact, insanity, intoxication, immature age, compulsion, legitimate use of force, self-defence and consent. Part VIII deals with inchoate liability and accessories.

(iv) Offences

All criminal offences have been reduced to statutory form, with the major offences being contained in the Code. Drugs offences are provided for by the Misuse of Drugs Act, 2001, and firearms offences by the Firearms Act, 1996.

Part II of the Code, which deals with offences against public order, contains chapters on treason and other crimes against the sovereign's person or authority, sedition, crimes against the executive and legislative power, unlawful assembly, breach of the peace, and corruption and abuse of office. Part III deals with offences against the administration of law and justice and against public authority and includes offences relating to escape and the harbouring of persons unlawfully at large.

Part IV includes offences against religion and morality, common nuisances, and sexual offences against young and mentally impaired persons.

Part V deals with offences against the person including homicide, suicide, concealment of birth, crimes endangering life or health, assaults, rape, abduction, stalking, and defamation.

Part VI deals with crimes against property including stealing, robbery and extortion, burglary offences, false pretences, cheating, and frauds concerning titles, offences relating to computers, receiving stolen property, frauds by trustees and company officers, arson and other unlawful injuries to property, offences relating to aircraft, forgery and uttering, possession and administration of animal disease agents and contamination of goods. Part VII includes chapters on personation and fraudulent debtors.

(v) Procedure, sentencing, transitional provisions

Criminal procedure is regulated by Part IX which includes provisions on police powers, trial procedures, appeals, the civil execution of sentence and pardons. The general law of sentencing is contained in the Sentencing Act 1997.

F. South Australia Criminal Law Consolidation Act 1935[58]

(i) Background and development

The Criminal Law Consolidation Act 1935 is entitled "[a]n Act to consolidate certain Acts relating to the criminal law; and for other purposes." The Act presupposes the continuing existence of the common law of crime. The Criminal Law Consolidation Act has been amended extensively with over 100 separate statutes having effected changes to it. This is reflected in the organisation of the instrument and in the mixed numerical and alphabetical sequencing of its component parts.

(ii) Contents and structure

Part 1	Preliminary (Sections 1–5D)
Part 1A	Territorial application of the Criminal Law (Sections 5E–5I)
Part 2	Treason (Sections 6–10A)
Part 3	Offences against the Person (Sections 11–83)
Part 4	Offences with respect to Property (Sections 84–86A)
Part 5	Offences of Dishonesty (Sections 130–144)
Part 6	Secret Commissions (Sections 145–151)
Part 6A	Serious Criminal Trespass (Sections 167–170A)
Part 6B	Blackmail (Sections 171–172)
Part 6C	Piracy (Sections 173–174)
Part 7	Offences of a Public Nature (Sections 237–258)
Part 7A	Goods contamination and comparable offences (Sections 259–261)
Part 7B	Accessories (Section 267)
Part 8	Intoxication (Section 267A–269)
Part 8A	Mental Impairment (Sections 269A–269ZB)
Part 9	Miscellaneous and Procedure (Sections 270–329)
Part 11	Cases stated and appeals (Sections 348–367)
Part 12	Regulations (Section 370)

(iii) The general part

The Act does not contain a dedicated general part. Instead, there are provisions scattered throughout the instrument on various aspects of the general principles of criminal liability including territorial application (Part 1A); self-defence (sections 15–15C); secondary participation (Part 7B); intoxication (Part 8); mental impairment (Part 8A); and attempts (section 270A).

58 http://www.parliament.sa.gov.au/Catalog/legislation/Acts/C/1935.2252.htm

(iv) Offences

Most of the major offence categories are provided for in the Act.

Part 3 deals with offences against the person including homicide; unlawful threats; stalking; death and injury from reckless driving; acts causing or intended to cause danger to life or bodily harm; female genital mutilation; assaults; threats with firearms; rape and sexual offences; commercial sexual offences; incest; bigamy; abduction of children; abortion; and concealment of birth.

Part 4 deals with property offences and includes provisions on damaging property and recklessly endangering property.

Part 5 is entitled "offences of dishonesty" and contains provisions on theft; robbery; money laundering; deception; dishonest dealing with documents; dishonest manipulation of machines; dishonest exploitation of advantage; and miscellaneous offences of dishonesty including making off without payment. Part 6 provides for the exercise of bias by fiduciaries and bribery. Criminal trespass, blackmail and piracy are provided for in Parts 6A, 6B and 6C, respectively.

Part 7, entitled "offences of a public nature", deals with impeding the investigation of offences or assisting offenders; offences relating to judicial proceedings; offences relating to public officers; escape, rescue and harbouring of persons subject to detention; attempt to obstruct or pervert the course of justice or due administration of law; and criminal defamation. Part 7A provides for offences involving the contamination of goods.

(v) Procedure, sentencing, transitional provisions

Part 9 deals with a variety of procedural matters including the apprehension of offenders, informations, pleas and proceedings on trial, proceedings against corporations, verdicts, costs, witness fees and compensation. Part 11 deals with cases stated, appeals and references on petitions of mercy. The procedures governing the pleas of mental impairment are dealt with in Part 8A. Sentencing is governed by the Criminal Law (Sentencing) Act 1988.

G. Victoria Crimes Act 1958[59]

(i) Background and development

The Crimes Act is titled as "[a]n Act to consolidate the law relating to crimes and criminal offenders." The Act presupposes the continued existence of the common law to the extent that the latter is consistent with its terms and has not been expressly abrogated. There have been more than 170 statutory amendments to the Act. This is reflected in the organisational structure of the instrument and in the mixed numerical and alphabetical sequencing of its component parts (see (ii), below).

[59] http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf?OpenDatabase

(ii) Contents and structure

Part I	Offences (Sections 3–321S)
Part IA	Abolition of Obsolete Offences (Section 322A)
Part IB	Abolition of Historical Classifications (Sections 322B–322F)
Part II	Offenders (Sections 323–339)
Part IIA	Extra-Territorial Offences (Sections 340–345)
Part III	Procedure and Punishment (Sections 351–505A)
Part IV	Probation and Parole Provisions (Sections 506–542)
Part V	Property of Persons convicted of Treason or an Indictable Offence (Sections 543–565)
Part VI	Appeals in Criminal Cases, References on Petitions for Mercy (Sections 566–584);
Part VII	General (Sections 585–594).

(iii) The general part

The Crimes Act contains little by way of a general part. The few provisions governing general principles are scattered throughout the Act. For example, divisions 10, 11 and 12 of Part I deal with inchoate liability, while the liability of secondary parties and of married persons is governed by Part II.

(iv) Offences

Most of the major offence categories are provided for in the various Divisions of Part 1. Thus Division 1 governs offences against the person; Division 1A deals with piracy; Division 2 is broadly modeled on the English Theft Act 1968; Division 2A contains money laundering provisions; Division 3 deals with criminal damage to property and includes provisions on injuries to buildings by rioters, interference with mines, sea banks *etc*. and injuries to aircraft; Division 4 deals with contamination of goods; Division 6 with perjury; Division 7 with unlawful oaths; Division 8 with offences connected with explosive substances; and Division 9 with road traffic offences. Division 9A sets out the penalties for certain specified common law offences.

(v) Procedure, sentencing, transitional provisions

The Crimes Act contains extensive provisions on procedure and punishment. The general effect of Part IIA is to allow for the issuance in Victoria of search warrants in respect of offences committed in other Australian states and territories. Part III of the Crimes Act deals with pleading, procedure and proof and includes provisions on mode of prosecution, trial arraignment, pleas, judgments and costs.

Division 2 of Part III deals with punishment. Part IV provides for probation and parole. Part VI deals with appeals in criminal cases and petitions for mercy.

H. New Zealand Crimes Act 1961[60]

(i) Background and development

A form of codified criminal law has existed in New Zealand since the enactment of the Criminal Code Act, 1893, which was heavily influenced by the English Criminal Code Bill 1878 (see above, Chap. 1, paras. 1.45-1.51). Two further codifying measures have been enacted since then: the Crimes Act 1908 and the Crimes Act 1961. The 1961 Act, which is currently in force, is entitled "[a]n Act to consolidate and amend the Crimes Act 1908 and certain other enactments of the Parliament of New Zealand relating to crimes and other offences." Section 9 states that the only offences punishable are those created by New Zealand statutes with the effect that common law offences and offences contained in Westminster statutes have been abolished.

The power of the courts and the House of Representatives to punish for contempt was expressly preserved by section 9(a) of the 1961 Act. In contrast, common law defences were preserved by section 20 of the Act. There have been over 45 amendments to the 1961 Act. In 1989 an attempt was made to introduce a comprehensive general part in the Crimes Bill of that year. The Bill defined the principal fault elements of crime and sought to codify the defences of intoxication and necessity. The measure also sought to make compulsion available as a defence to all charges. The 1989 Bill was not enacted (see above, Chap. 3, footnote 3).

(ii) Contents and structure

Part 1: Jurisdiction (Sections 5–12)
Part 2: Punishments (Sections 13–19F)
Part 3: Matters of Justification or Excuse (Sections 20–65)
Part 4: Parties to the Commission of Offences (Sections 66–72)
Part 5: Crimes against Public Order (Sections 73–98F)
Part 6: Crimes affecting the Administration of Law and Justice (Sections 99–122)
Part 7: Crimes against Religion, Morality, and Public Welfare (Sections 123–150)
Part 8: Crimes against the Person (Sections 150A–210)
Part 9A: Crimes against Personal Privacy (Sections 216A–216F)
Part 10: Crimes against Rights of Property (Sections 217–298B)
Part 11: Threatening, Conspiring, and Attempting to Commit Offences (Sections 306–312)
Part 11A: Obtaining Evidence by Interception Devices (Sections 312A–312Q)
Part 12: Procedure (Sections 313–378)
Part 13: Appeals (Sections 379–399)
Part 14: Miscellaneous Provisions (Sections 400–412)

60 http://www.netlaw.co.nz/crime.cfm?PageID=28

(iii) The general part

The provisions of the general part are contained in Parts 1, 3 and 4. Part 1 deals with matters of jurisdiction, and Part 3 with justifications and excuses including infancy, insanity, compulsion, ignorance of the law, the use of force, defence against assault, defence of property, peaceable entry, powers of discipline, and surgical operations. Part 4 deals with the liability of secondary parties. Some general part matters are also contained in Part 11: *viz*., conspiracy (section 310); attempts and procuring (section 311); and accessories after the fact (section 312).

(iv) Offences

All criminal offences in New Zealand have been reduced to statutory form. Most of the major offence categories are contained in the Crimes Act but some serious offences are governed by other legislation, such as the Misuse of Drugs Act, 1975.

Part 5 of the Act contains a miscellany of offences classified as public order offences governing such matters as treason, sedition, unlawful assembly, riot, breach of the peace, piracy, slave dealing and participation in a criminal gang. Part 6 deals with offences against the administration of law and justice. Part 7 deals with crimes against religion, morality, and public welfare and includes sexual offences.

Part 8 deals with offences against the person and includes homicide, procuring an abortion, assaults and injuries to the person, bigamy, feigned marriages, abduction and kidnapping. Part 9A deals with crimes against personal privacy.

Part 10 includes extensive provisions on theft, crimes resembling theft, robbery and extortion, burglary, personation, fraud, money laundering, receiving, forgery and criminal damage.

Part 11 deals with serious assaults (threats to kill or to do grievous bodily harm) and threats to property.

(v) Procedure, sentencing, transitional provisions

Criminal procedure is regulated by Part 12, and appeals by Part 13, of the Act. Although Part 2 is entitled "Punishment ", most of the provisions under this rubric have been repealed. Sentencing is effectively governed by the Sentencing Act 2004.

I. Northern Territory Criminal Code 1983[61]

(i) Background and development

The Northern Territory became self-governing in 1978. Its first step towards codification took the form of the Criminal Law Consolidation Act, 1978. The 1978 Act was replaced by the Criminal Code Act 1983 which enacted the Code as an appendix. The Code was influenced by a variety of instruments including the Griffith Code, the Tasmanian Code and the New Zealand Crimes Act 1961 (see above, B(i), E(i), H(i)). There have been 48 amendments to the Criminal Code since 1961.

[61] http://notes.nt.gov.au/dcm/legislat/history.nsf/d2340eb59903a401692569f900180b08/e8adf986e7bc71da69256e5a007cc987?OpenDocument

(ii) Contents and structure

Part I:	Introductory Matters (Sections 1–21)
Part II:	Criminal Responsibility (Sections 22–43)
Part IIA:	Mental Impairment and Unfitness to be Tried (Sections 43A–43ZQ)
Part III:	Offences against Public Order (Sections 44–75)
Part IV:	Offences Against the Administration of Law and Justice and against Public Authority (Sections 76–124)
Part V:	Acts Injurious to the Public in General (Sections 125–148E)
Part VI:	Offences against the Person and Related Matters (Sections 149A–208)
Part VII:	Property Offences and Related Matters (Sections 209–276F)
Part VIII:	Attempts and Preparation to commit Offences: Conspiracy: Accessories after the Fact (Sections 277–294)
Part IX:	Procedure (Sections 295–387)
Part X:	Punishment: Appeal: Miscellaneous Matters (Sections 406–443)

(iii) The general part

Aspects of the general part are distributed throughout Parts I, II and IIA of the Code. Part I deals with definitions, presumptions, attempts, parties to offences, the application of criminal law and the effect of a previous finding of guilt or acquittal. Part 1 also includes a provision on intoxication (section 7). Part II deals with criminal responsibility, justification, excuse, mistake, diminished responsibility and provocation; and Part IIA with mental impairment and unfitness to be tried, special hearings and supervision orders. Part VIII provides for the punishment of attempts and preparatory conduct, conspiracy and accessories after the fact.

(iv) Offences

Criminal offences in the Northern Territory are exclusively statutory in form, being contained either in the Code or in ordinary legislation such as the Misuse of Drugs Act, the Firearms Act or the Weapons Control Act.

Part III of the Code deals with sedition, terrorism, offences against the executive and legislative power, unlawful assemblies, offences against political liberty and piracy. Part IV contains provisions on official secrets, corruption and abuse of office, corrupt and improper practices at elections, selling and trafficking in offices, and offences relating to the administration of justice.

Part V is broken down into divisions on offences relating to religious worship, morality, public health and the contamination of goods. Part V also includes sexual offences against minors and mentally impaired persons, incest, bestiality and child pornography offences.

Part VI comprehends homicide, suicide, concealment of birth and abortion; offences endangering life or health, assaults (including stalking, sexual intercourse without consent and coerced sexual self-manipulation), offences against personal liberty, sexual servitude and criminal defamation.

Part VII contains divisions on robbery, criminal deception (as well as blackmail and extortion), criminal damage to property, forgery and like offences, personation and computer offences.

(v) Procedure, sentencing, transitional provisions

Part IX governs procedure and contains divisions on preliminary proceedings, indictments, notice of alibi, evidence and verdict. Part X deals with appeals and miscellaneous matters including standards of proof and arrest without warrant. Sentencing is by and large governed by the Sentencing Act, 2004.

J. Queensland Criminal Code 1995 (repealed)

(i) Background and development

This Code was enacted in 1995 but never commenced and, following a change of government, was subsequently repealed on foot of an election promise by the incoming government. The instrument was drafted in the style and idiom of a modern enactment. Many of its provisions have since been added as amendments to the Queensland Criminal Code 1899.

(ii) Contents and structure

Chapter 1 General (Sections 1–93);

Chapter 2 Personal Offences (Sections 94–150);

Chapter 3 Property Offences, Dishonesty Offences and Associated Offences (Sections 151–192);

Chapter 4 Public Order and Authority Offences (Sections 193–225);

Chapter 5 Other public Interest Offences (Section 226–303);

Chapter 6 Procedure (Sections 304–460).

(iii) The general part

Chapter 1 contained a detailed general part covering jurisdictional matters, offence types, parties to offences, attempts and preparatory acts, conspiracy, ignorance of law, mistake of fact, intention-motive, intoxication, unsoundness of mind, extraordinary emergencies, immature age, compulsion and duress, lawful use of force, self-defence and provocation. Chapter 1 also included provisions on general duties and proof of defences.

(iv) Offences

Chapter 2 dealt with "personal offences" including unlawful killing, assault, rape and other sexual assaults, deprivation of liberty, threats, unlawful stalking, offences involving vehicles, other dangerous acts, and offences against persons under care.

Chapter 3 dealt with property offences, dishonesty offences and associated offences, robbery and extortion, burglary, unlawful use, possession or control, tampering, forgery, fraud, impersonation and damage to property.

Chapter 4 dealt with public order and authority offences including sedition, interfering with political liberty and influencing Members of the Legislative Assembly.

Chapter 5 dealt with breaches of the peace, bribery, engaging in organised crime, drug misuse offences, prostitution, abortion and offences involving corpses.

(v) Procedure, sentencing, transitional provisions

Chapter 6 dealt with procedural matters affecting arrest, proceedings generally, indictments, evidence, verdicts, judgments, and the prerogative of mercy.

K. Commonwealth Criminal Code 1995[62]

(i) Background and development

In Australia criminal law is primarily a matter for the States and self-governing Territories. Commonwealth (or federal) competence is correspondingly limited and exercisable only as an incident of some other power reserved to it by the Australian Constitution (which includes power to legislate for federal Territories). A Commonwealth Crimes Act was enacted in 1914 and a series of criminal statutes dealing with such diverse matters as offences against aircraft, currency offences, revenue offences and torture was passed in subsequent years.

In the 1990s the Model Criminal Code Officers Committee, comprising of representatives of the federal and state Attorneys-General, proposed a draft Criminal Code as a model for all Australian jurisdictions. That instrument was the inspiration for the Criminal Code Act, 1995 which enacted the Commonwealth Criminal Code as a schedule. The initial enactment consisted of a general principles instrument to which various offence categories were subsequently added. The general principles in the Criminal Code were progressively applied to Commonwealth offences from 1997 onwards. Since 2001 they have applied to all such offences. In 2002 the Commonwealth Attorney General's Office published *The Commonwealth Criminal Code: a Guide for Practitioners.*

(ii) Contents and structure

Chapter 1 Codification (Section 1.1)
Chapter 2 General Principles of Criminal Responsibility (Sections 2.1–16.4)
Chapter 4 The Integrity and Security of the International Community and Foreign Governments (Sections 70.1–73.12)
Chapter 5 The Security of the Commonwealth (Sections 80.1–104.9)
Chapter 7 The proper Administration of Government (Sections 130.1–261.3)
Chapter 8 Offences against Humanity and related Offences (Sections 268.1–270.14)
Chapter 9 Dangers to the Community (Section 360.1–360.4)
Chapter 10 National Infrastructure (Section 400.1–478.4)

62 http://scaleplus.law.gov.au/html/pasteact/1/686/top.htm

(iii) The general part

The Commonwealth Code contains an elaborate general part. Chapter 2 deals with the physical and fault element of offences, strict liability, the circumstances in which an accused is relieved of criminal responsibility (infancy, mental impairment, intoxication, mistake, criminal defences), inchoate and corporate liability, burdens of proof and territorial jurisdiction.

(iv) Offences

Given the limited competence of the Commonwealth in criminal matters, most offences in the Code relate to national security and Australia's international obligations. The former category includes treason and espionage, while the latter comprises offences against UN personnel, genocide, war crimes and crimes against humanity. Not surprisingly, the spectre of international terrorism has resulted in the addition to the Code of a range of offences relating to the harming of Australians abroad.

(v) Procedure, sentencing, transitional provisions

The Code does not deal with procedure or sentencing. Amending statutes contain a variety of transitional provisions.

L. Australian Capital Territory Criminal Code 2002[63]

(i) Background and development

The Criminal Code Act 2002 is the second stage in the ongoing reform of the ACT's criminal legislation, which is otherwise contained in the Crimes Act 1900.

The reform process commenced with the enactment of the Criminal Code 2001. The 2001 Code incorporated several of the general principles of criminal responsibility which had been developed by the Commonwealth Model Criminal Code Officers Committee (see above, K(i)), the remainder of which have been codified by the 2002 Act. In order to avoid the renumbering difficulties that would have arisen if the 2001 Code had been amended section by section, it was decided to repeal that instrument and replace it with a new Code (the 2002 Act).

The General Part is due to come into force in January 2006 following the incorporation of the criminal calendar. Chapter 3 of the Code, providing for theft, fraud and bribery offences, was enacted in 2004. Other offence categories are to be added in due course.

Unlike the general part of the Commonwealth Code, the general principles of the ACT Code apply only to Code offences. Thus two sets of general principles are currently in operation: one governing Code offences and the other catering for offences outside the Code. This state of affairs will continue until all criminal offences have been incorporated into the Code.

63 http://www.legislation.act.gov.au/a/2002-51/default.asp

(ii) Contents and structure

Chapter 1 Preliminary (Sections 1–5);
Chapter 2 General principles of criminal responsibility (Sections 6–67)
Chapter 3 Theft, fraud, bribery and related offences (Sections 300–379)
Chapter 4 Property Damage and computer offences (Sections 400–424)
Chapter 5 Miscellaneous (Section 425).

(iii) The general part

Like its Commonwealth counterpart, the ACT Code contains an elaborate general part which includes provisions dealing with the physical and fault element of offences, strict liability, the circumstances in which an accused is relieved of criminal responsibility (infancy, mental impairment, intoxication, mistake, criminal defences), inchoate and corporate liability, burdens of proof and territorial jurisdiction.

The Code contains an express provision to the effect that the general part is to apply only to offences created after its enactment. As already indicated it will be applied to already existing offences on incorporation (see above, Chap. 2, paras. 2.152-2.153).

(iv) Offences

On enactment, Chapter 4 of the Code provided for property damage and computer offences. Chapter 3, dealing with offences of dishonesty, was added in early 2004.

(v) Procedure, sentencing, transitional provisions

Chapter 3 deals with procedural matters. Sentencing is not included in the Code.

Appendix 2 – EXISTING CRIMINAL LEGISLATION

This appendix tabulates the principal statutory provisions currently in force in respect of the substantive criminal law. Its purpose is to identify the stock of existing legislation which might be drawn upon when drafting a criminal code. Statutory provisions have been sorted according to a rudimentary scheme covering general principles and the principal offence categories. Bearing in mind their possible relevance to the codification process, the opportunity has also been taken to identify recent law reform proposals and Bills currently before the Oireachtas.

By and large, regulatory offences – such as road traffic, licensing, health and safety, environmental and consumer protection offences – have been omitted. By the same token, revenue and customs and excise offences have been excluded, as has the adjective law governing criminal procedure, enforcement, sentencing and the disposal of offenders.

Summary offences have been marked with an asterisk.

GENERAL PRINCIPLES

Age of criminal responsibility	Children Act 2001, s 52[64]
Aiding etc. underage child to commit an offence	Children Act 2001, s 54
Legitimate defence	Non-Fatal Offences against the Person Act 1997, ss. 18-20
Participation	Criminal Law Act 1997, s 7
Concealing an offence	Criminal Law Act 1997, s 8
Insanity	Common law[65]

OFFENCES AGAINST THE PERSON

Murder	Criminal Justice Act 1964, s 4[66] Criminal Justice Act 1990, s 3[67] Criminal Justice Act 1999, s 38[68]
Conspiring or soliciting to commit murder	Offences against the Person Act 1861, s 4
Manslaughter	Offences against the Person Act 1861, s 5
Murder, manslaughter committed abroad	Offences against the Person Act 1861, s 9
Provocation	Common Law[69]
Diminished responsibility	Not applicable[70]
Corporate killing	Not applicable[71]
Infanticide	Infanticide Act 1949, s 1
Aiding and abetting etc. suicide	Criminal Law (Suicide) Act, 1993, s 2
Causing death, serious injury by dangerous driving	Road Traffic Act 1961, s 3(2)(a)

64 This provision has not yet been commenced.

65 See proposals in Criminal Law (Insanity) Bill 2002, s 4.

66 Defines mens rea; see recommendations of Law Reform Commission: LRC CP 17-2001.

67 Sentence for murder of a Garda etc.

68 Abolished "year and a day" rule.

69 See recommendations of Law Reform Commission: LRC CP 27-2003.

70 See proposals in Criminal Justice (Insanity) Bill 2002, s 5.

71 See recommendations of Law Reform Commission: LRC CP 26-2003.

Exposing children where life endangered	Offences against the Person Act 1861, s 27
Causing bodily harm by furious or wanton driving	Offences against the Person Act 1861, s 35
Assault	Non-Fatal Offences against the Person Act 1997, s 2
Assault causing harm	Non-Fatal Offences against the Person Act 1997, s 3
Causing serious harm	Non-Fatal Offences against the Person Act 1997, s 4
Threats to kill or cause serious harm	Non-Fatal Offences against the Person Act 1997, s 5
Syringe attacks	Non-Fatal Offences against the Person Act 1997, s 6
Possession of syringe	Non-Fatal Offences against the Person Act 1997, s 7
Placing or abandoning syringe	Non-Fatal Offences against the Person Act 1997, s 8
Coercion	Non-Fatal Offences against the Person Act 1997, s 9
Harassment	Non-Fatal Offences against the Person Act 1997, s 10
Demands for payment of debt causing alarm*	Non-Fatal Offences against the Person Act 1997, s 11
Poisoning	Non-Fatal Offences against the Person Act 1997, s 12
Endangerment	Non-Fatal Offences against the Person Act 1997, s 13
Endangering traffic	Non-Fatal Offences against the Person Act 1997, s 14
False imprisonment	Non-Fatal Offences against the Person Act 1997, s 15
Child abduction by a parent	Non-Fatal Offences against the Person Act 1997, s 16
Child abduction by other persons	Non-Fatal Offences against the Person Act 1997, s 17
Assault with intent to cause bodily harm or commit indictable offence	Criminal Justice (Public Order) Act 1994, s 18
Assault or obstruction of a peace officer	Criminal Justice (Public Order) Act 1994, s 19
Assault arising from combination*	Offences against the Person Act 1861, s 41
Cruelty to children	Children Act 2001, s 246
Causing etc. a child to beg *	Children Act 2001, s 245
Bigamy	Offences against the Person Act 1861, s 57
Administering drugs or using instruments to procure abortion	Offences against the Person Act 1861, s 58
Procuring drugs etc. to cause abortion	Offences against the Person Act 1861, s 59
Concealing the birth of a child	Offences against the Person Act 1861, s 60
Trafficking in illegal immigrants	Illegal Immigrants (Trafficking) Act 2000, s 2
Unnecessary malice against owner of property	Malicious Damage Act 1861, s 58

SEXUAL OFFENCES

Rape	Criminal Law (Rape) Act 1981, s 2, Offences Against the Person Act 1861, s 48
Sexual assault	Criminal Law (Rape) (Amendment) Act 1990, s 2
Aggravated sexual assault	Criminal Law (Rape) (Amendment) Act 1990, s 3
Rape under section 4	Criminal Law (Rape) (Amendment) Act 1990, s 4
Buggery of persons under 17 years of age	Criminal Law (Sexual Offences) Act 1993, s 3
Gross indecency with males under 17 years of age	Criminal Law (Sexual Offences) Act 1993, s 4
Sexual offences against mentally impaired persons	Criminal Law (Sexual Offences) Act 1993, s 5
Unlawful carnal knowledge of girl under 15 years of age	Criminal Law Amendment Act 1935, s 1
Unlawful carnal knowledge of girl between 15 and 17 years of age	Criminal Law Amendment Act 1935, s 2
Procuration*	Criminal Law Amendment Act 1885, s 2
Procuring defilement of woman by threats or fraud or administering drugs*	Criminal Law Amendment Act 1885, s 3
Incest by males	Punishment of Incest Act 1908, s 1
Incest by females of or over 17*	Punishment of Incest Act 1908, s 2
Allowing child to be used for child pornography	Child Trafficking and Pornography Act 1998, s 4
Producing, distributing, etc., child pornography	Child Trafficking and Pornography Act 1998, s 5
Possession of child pornography	Child Trafficking and Pornography Act 1998, s 6
Allowing a child to be in a brothel*	Children Act 2001, s 248
Causing or encouraging a sexual offence upon a child	Children Act 2001, s 249
Child trafficking and taking etc. child for sexual exploitation	Child Trafficking and Pornography Act 1998, s 3
Soliciting or importuning for purposes of commission of sexual offence*	Criminal Law (Sexual Offences) Act 1993, s 6
Soliciting or importuning for purposes of prostitution*	Criminal Law (Sexual Offences) Act 1993, s 7
Loitering for purposes of prostitution*	Criminal Law (Sexual Offences) Act 1993, s 8
Organisation of prostitution	Criminal Law (Sexual Offences) Act 1993, s 9
Living on earnings of prostitution*	Criminal Law (Sexual Offences) Act 1993, s 10
Brothel keeping	Criminal Law (Sexual Offences) Act 1993, s 11
Householder, etc. permitting defilement of young girl on his premises	Criminal Law Amendment Act 1885, s 6
Public indecency*	Criminal Law Amendment Act 1935, s 18
Offences in connection with notification requirements	Sex Offenders Act 2001, s 12
Non compliance with requirements relating to supervision period	Sex Offenders Act 2001, s 33
Licensee permitting licensed premises to be used as a brothel	Licensing Act 1872, s 15
Advertising brothels or prostitution	Criminal Justice (Public Order) Act 1994, s 23
Sexual offences committed outside the State	Sexual Offences (Jurisdiction) Act 1996, ss 2, 4, 5
Breach of anonymity of person charged with an incest offence and person to whom offence relates	Criminal Law (Incest Proceedings) Act 1995, s 3
Failure to give or giving false name on arrest*	Criminal Law (Sexual Offences) Act 1993, s 13

OFFENCES AGAINST PROPERTY

Theft and related offences	
Theft	Criminal Justice (Theft and Fraud Offences) Act 2001, s 4
Making gain or causing loss by deception	Criminal Justice (Theft and Fraud Offences) Act 2001, s 6
Obtaining services by deception	Criminal Justice (Theft and Fraud Offences) Act 2001, s 7
Making off without payment	Criminal Justice (Theft and Fraud Offences) Act 2001, s 8
Unlawful use of computer	Criminal Justice (Theft and Fraud Offences) Act 2001, s 9
False accounting	Criminal Justice (Theft and Fraud Offences) Act 2001, s 10
Suppression etc. of documents	Criminal Justice (Theft and Fraud Offences) Act 2001, s 11
Burglary	Criminal Justice (Theft and Fraud Offences) Act 2001, s 12
Aggravated burglary	Criminal Justice (Theft and Fraud Offences) Act 2001, s 13
Robbery	Criminal Justice (Theft and Fraud Offences) Act 2001, s 14
Possession of certain articles	Criminal Justice (Theft and Fraud Offences) Act 2001, s 15
Handling stolen property	Criminal Justice (Theft and Fraud Offences) Act 2001, s 17
Possession of stolen articles	Criminal Justice (Theft and Fraud Offences) Act 2001, s 18
Withholding information regarding stolen property*	Criminal Justice (Theft and Fraud Offences) Act 2001, s 19
Forgery	Criminal Justice (Theft and Fraud Offences) Act 2001, s 25
Using false instrument	Criminal Justice (Theft and Fraud Offences) Act 2001, s 26
Copying false instrument	Criminal Justice (Theft and Fraud Offences) Act 2001, s 27
Using copy of false instrument	Criminal Justice (Theft and Fraud Offences) Act 2001, s 28
Custody or control of certain false instruments	Criminal Justice (Theft and Fraud Offences) Act 2001, s 29
Counterfeiting currency notes and coins	Criminal Justice (Theft and Fraud Offences) Act 2001, s 33
Passing, etc. counterfeit currency notes or coins	Criminal Justice (Theft and Fraud Offences) Act 2001, s 34
Custody or control of counterfeit currency notes and coins	Criminal Justice (Theft and Fraud Offences) Act 2001, s 35
Making etc. materials and implements for counterfeiting	Criminal Justice (Theft and Fraud Offences) Act 2001, s 36
Importing and exporting counterfeit currency notes or coins	Criminal Justice (Theft and Fraud Offences) Act 2001, s 37

Fraud affecting financial interests of EC	Criminal Justice (Theft and Fraud Offences) Act 2001, s 42
Obstructing a Garda acting on a warrant*	Criminal Justice (Theft and Fraud Offences) Act 2001, s 49
Failure to comply with an order to produce evidential material*	Criminal Justice (Theft and Fraud Offences) Act 2001, s 52
Concealing facts disclosed by documents	Criminal Justice (Theft and Fraud Offences) Act 2001, s 51
Failure to report an offence*	Criminal Justice (Theft and Fraud Offences) Act 2001, s 59
Blackmail, extortion and demanding money with menace	Criminal Justice (Public Order) Act 1994, s 17
Stealing deer in an unenclosed part of a forest	Larceny Act 1861 s 12
Stealing deer in any enclosed ground	Larceny Act 1861 s 13
Possession of venison etc.*	Larceny Act 1861 s 14
Setting engines for taking deer etc.*	Larceny Act 1861 s 15
Resisting deer keepers in seizing guns etc.	Larceny Act 1861 s 16
Taking fish in any water situate in land belonging to a dwelling house etc.	Larceny Act 1861 s 24
Taking a vehicle without lawful authority	Road Traffic Act 1961, s 112
Unauthorised interference with mechanism of a vehicle	Road Traffic Act 1961, s 113
Unlawful seizure of vehicles	Criminal Law (Jurisdiction) Act 1976, s 10
Withholding information regarding stolen property, etc.*	Criminal Justice Act 1984, s 16
Criminal damage	
Damaging property	Criminal Damage Act 1991, s 2
Threat to damage property	Criminal Damage Act 1991, s 3
Possessing anything with intent to damage	Criminal Damage Act 1991, s 4
Unauthorised accessing of data*	Criminal Damage Act 1991, s 5
Obstructing a search warrant*	Criminal Damage Act 1991, s 13
Placing wood etc. on railway with intent to obstruct	Malicious Damage Act 1861, s 35
Obstructing engines or carriages on railways	Malicious Damage Act 1861, s 36
Injuries to electric or magnetic telegraphs	Malicious Damage Act 1861, s 37
Attempting to cause injury to telegraphs	Malicious Damage Act 1861, s 38
Killing or maiming cattle	Malicious Damage Act 1861, s 40
Killing or maiming other animals	Malicious Damage Act 1861, s 41
Removing or exhibiting false signals with intent of interfering with a ship	Malicious Damage Act 1861, s 47
Removing or concealing buoys etc.	Malicious Damage Act 1861, s 48
Forcible entry	
Forcible entry of land or of a vehicle	Prohibition of Forcible Entry and Occupation Act 1971, s 2
Remaining in forcible occupation of land or of a vehicle	Prohibition of Forcible Entry and Occupation Act 1971, s 3
Encouragement or advocacy of forcible entry	Prohibition of Forcible Entry and Occupation Act 1971, s 4

PUBLIC ORDER OFFENCES

Intoxication in a public place*	Criminal Justice (Public Order) Act 1994, s 4
Disorderly conduct in a public place*	Criminal Justice (Public Order) Act 1994, s 5
Threatening, abusive or insulting behaviour in a public place*	Criminal Justice (Public Order) Act 1994, s 6
Distribution or display in public place of material which is threatening, abusive, insulting or obscene*	Criminal Justice (Public Order) Act 1994, s 7
Failure to comply with the directions of a member of the Garda Síochána *	Criminal Justice (Public Order) Act 1994, s 8
Wilful obstruction of any person or vehicle in a public place*	Criminal Justice (Public Order) Act 1994, s 9
Entering any part of a building with intent to commit an offence*	Criminal Justice (Public Order) Act 1994, s 11
Trespass on any part of a building*	Criminal Justice (Public Order) Act 1994, s 13
Riot	Criminal Justice (Public Order) Act 1994, s 14
Violent disorder	Criminal Justice (Public Order) Act 1994, s 15
Affray	Criminal Justice (Public Order) Act 1994, s 16
Failure to comply with the directions of and/or control barriers erected by the Garda Síochána*	Criminal Justice (Public Order) Act 1994, s 21
Failure to surrender intoxicating liquor at any event where a barrier has been erected*	Criminal Justice (Public Order) Act 1994, s 22
Failure to give correct personal details if questioned by a member of the Garda Síochána*	Criminal Justice (Public Order) Act 1994, s 24(3)
Sodomy with an animal	Offences against the Person Act 1861, s 61
Attempt to commit sodomy with an animal*	Offences against the Person Act 1861, s 62
Begging, procuring charity under false pretences, betting in public, indecent exposure and indecent exhibitions, etc.	Vagrancy Act 1824, s 4

OFFENCES AGAINST THE INTERNATIONAL COMMUNITY

Genocide	Genocide Act 1973, s 2[72]
Torture	Criminal Justice (United Nations Convention Against Torture) Act 2000, s 2
Attempting or conspiring to commit torture or obstructing or impeding the arrest or prosecution in relation to the offence of torture	Criminal Justice (United Nations Convention Against Torture) Act 2000, s 3
Offences against United Nations workers	Criminal Justice (Safety of United Nations Workers) Act 2000, s 2
Offences in connection with premises of vehicles of United Nations workers	Criminal Justice (Safety of United Nations Workers) Act 2000, s 3
Threats to commit offences against United Nations workers	Criminal Justice (Safety of United Nations Workers) Act 2000, s 4
Grave breaches of the Geneva Conventions	Geneva Conventions Act 1962, s 3
Minor breaches of the Geneva Conventions	Geneva Conventions Act 1962, s 4
Contravening regulations re. flags, emblems etc.*	Geneva Conventions (Amendment) Act 1998, s 10
Interfering with international tribunal witnesses	International War Crimes Tribunal Act 1998, s 35

72 See proposed redefinition of genocide in the International Criminal Court Bill 2003, s 7

CORRUPTION OFFENCES

Corruption of or by a member, officer or servant of a corporation, council, board, commission or other public body*	Prevention of Corruption Act 1889, s 1
Corruption of or by an agent*	Prevention of Corruption Act 1906, s 1
Failure to comply with a member acting under a search warrant issued under this act or giving false information to a member	Prevention of Corruption (Amendment) Act 2001, s 5
Corruption in office or position of or by a public official	Prevention of Corruption (Amendment) Act 2001, s 8
Active corruption	Criminal Justice (Theft and Fraud Offences) Act 2001, s 43
Passive corruption	Criminal Justice (Theft and Fraud Offences) Act 2001, s 44

DRUGS OFFENCES

Possession of controlled drugs	Misuse of Drugs Act 1977, s 3
Possession of controlled drugs for sale or supply	Misuse of Drugs Act 1977, s 15
Possession of controlled drugs with value of €13,000 or more	Misuse of Drugs Act 1977, s 15A
Prohibited activities related to opium	Misuse of Drugs Act 1977, s 16
Cultivation of opium poppy or cannabis plant	Misuse of Drugs Act 1977, s 17
Forging or fraudulently altering a prescription	Misuse of Drugs Act 1977, s 18
Permitting certain activities to take place on land	Misuse of Drugs Act 1977, s 19
Defences under 1977 Act	Misuse of Drugs Act 1977, s 29
Drug trafficking on Irish ships	Criminal Justice Act 1994, s 33
Possession of drugs on Irish ships	Criminal Justice Act 1994, s 34
Prejudicing investigation into drug trafficking offences	Criminal Justice Act 1994, s 58
Preventing a member of the Garda Síochána from inspecting, examining or making enquiries regarding drug trafficking in any place used for public dancing	Public Dance Halls Act 1935, s 13A

OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

Penalty for false or misleading statements	Criminal Justice (Legal Aid) Act 1962, s 11
Being unlawfully at large	Criminal Justice Act 1960, s 6
Escape from custody in Northern Ireland	Criminal Law (Jurisdiction) Act 1976, s 3
Aiding etc. escapees from custody	Criminal Law Act 1976, s 6
Possession of photographs etc. of certain buildings	Criminal Law Act 1976, s 10
Prohibition of giving certain false information	Criminal Law Act 1976, s 12
Failure to appear as a juror*	Juries Act 1976, s 34(1)
Unavailability for service as a juror*	Juries Act 1976, s 34(2)
Evasion of jury service*	Juries Act 1976, s 35(1)
False replies when questioned by a court for purpose of determining qualification to serve as a juror*	Juries Act 1976, s 35(3)
Ineligible service as a juror*	Juries Act 1976, s 36(1)
Serving while disqualified*	Juries Act 1976, s 36(2)
Refusing to be sworn as a juror*	Juries Act 1976, s 37

Making false or misleading statements for the purposes of obtaining free legal aid	Court-Martial Appeal Act 1983, s 34
Making false or misleading statements for the purposes of obtaining free legal aid	Criminal Justice (Legal Aid) Act 1962, s 11
Publication of criminal record of bail applicant	Bail Act 1997, s 4
Disclosure of information relating to relocated witnesses	Criminal Justice Act 1999, s 40
Intimidation etc. of witnesses, jurors and others	Criminal Justice Act 1999, s 41
Making false statement in documentary evidence	Criminal Evidence Act 1992, s 6
False statement of evidence*	Criminal Justice Act 1984, s 21
Refusal of person convicted of, or dealt with under the Probation of Offenders Act 1907, to give fingerprints*	Criminal Justice Act 1984, s 28
Obstructing Gardaí in relation to certain arrested persons*	Criminal Law Act 1976, s 7
Clearing of court and prohibition of reports of proceedings	Criminal Justice Act 1951, s 20
Failure to surrender bail*	Criminal Justice Act 1984, s 13
Breach of community service order*	Criminal Justice (Community Service) Act 1983, s 7
Failure to give name during search of a brothel*	Criminal Law Amendment Act 1935, s 19
Obstruction of search warrant serious offence*	Criminal Justice (Miscellaneous Provisions) Act 1997
Prejudicing investigation into drug trafficking	Criminal Justice Act 1994, s 58
Failure to comply with an order to provide information to the Court	Criminal Justice Act 1994, s 11
Failure to comply with an order to make material available during investigations into drug offences and money laundering offences	Criminal Justice Act 1994, s. 63(10)
Offences relating to the proceeds of crime	
Publication of identity of Bureau staff etc.	Criminal Assets Bureau Act 1996, s 11
Obstruction of a Bureau officer	Criminal Assets Bureau Act 1996, s 12
Intimidation of a Bureau officer etc.	Criminal Assets Bureau Act 1996, s 13
Obstruction of Bureau search warrant*	Criminal Assets Bureau Act 1996, s 14
Assaulting a Bureau officer	Criminal Assets Bureau Act 1996, s 15
Failure to give name to Garda member of the Bureau	Criminal Assets Bureau Act 1996, s 16
Money laundering	
Money laundering	Criminal Justice Act 1994, s 31
Contravention of provisions to prevent money laundering	Criminal Justice Act 1994, s 32(12)
Failure to report contravention of provisions to prevent money laundering	Criminal Justice Act 1994, s 57

TREASON AND RELATED OFFENCES

Punishment of treason	Treason Act 1939, s 1
Encouraging, harbouring or comforting persons guilty of treason	Treason Act 1939, s 2
Misprision of treason	Treason Act 1939, s 3

OFFENCES AGAINST THE STATE

Usurpation of functions of Government	Offences against the State Act 1939, s 6
Obstruction of government	Offences against the State Act 1939, s 7
Obstruction of the President	Offences against the State Act 1939, s 8
Interference with military or other employees of the State*	Offences against the State Act 1939, s 9
Prohibition of printing, etc., certain documents*	Offences against the State Act 1939, s 10
Importing foreign newspapers, etc., containing seditious or unlawful matter*	Offences against the State Act 1939, s 11
Possession of treasonable, seditious or incriminating documents*	Offences against the State Act 1939, s 12
Breach of obligations in respect of documents printed for reward*	Offences against the State Act 1939, s 13
Non-compliance with obligation to print printer's name and address on documents*	Offences against the State Act 1939, s 14
Performance of unauthorised military exercises prohibited*	Offences against the State Act 1939, s 15
Involvement or participation in secret societies in army or police*	Offences against the State Act 1939, s 16
Administering unlawful oaths*	Offences against the State Act 1939, s 17
Membership of an unlawful organisation	Offences against the State Act 1939, s 21
Organisation of, or attendance at, a public meetings held by unlawful organisations*	Offences against the State Act 1939, s 27
Organising etc. a prohibited meeting in the vicinity of the Oireachtas*	Offences against the State Act 1939, s 28
Obstruction in relation to search warrants issued for offences against the State or for treason*	Offences against the State Act 1939, s 29
Obstruction in relation to arrest, re-arrest or detention of persons*	Offences against the State Act 1939, s 30, s 30A
Aiding and abetting an escapee detained under this act*	Offences against the State Act 1939, s 32
Refusal to accept the jurisdiction of the Special Criminal Court	Offences against the State Act 1939, s 51[73]
Failure/Refusal to give account of movements or information or give false or misleading information to a member of the Garda Síochána when detained under the provisions of Part IV of the 1959 Act*	Offences against the State Act 1939, s 52[74]
Obstructing or impeding a member of the Garda Síochána exercising powers of search etc.*	Offences against the State (Amendment) Act 1940, s 5
Failure to give an account of recent movements etc.	Offences against the State (Amendment) Act 1972, s 2
Making statements etc. constituting interference with the course of justice	Offences against the State (Amendment) Act 1972, s 4[75]
Incitement or invitation to join unlawful organisation	Criminal Law Act 1976, s 3
Failure by a bank or an individual within a bank to comply with a requirement to pay moneys into the High Court	Offences against the State (Amendment) Act 1985, s 7

73 Allows court to punish accused for contempt of court.

74 Held to violate Article 6 (1) and (2) of the European Convention of Human Rights: see *Quinn v Ireland* [2000] ECHR 36887/97.

75 Does not affect power of a court to punish for contempt of court.

Directing an unlawful organisation	Offences against the State (Amendment) Act 1998, s 6
Possession of articles for purposes connected with explosives, firearms offences	Offences against the State (Amendment) Act 1998, s 7
Unlawful collection etc. of information by an unlawful organisation	Offences against the State (Amendment) Act 1998, s 8
Withholding information	Offences against the State (Amendment) Act 1998, s 9
Training persons in the making or use of firearms without lawful authority	Offences against the State (Amendment) Act 1998, s 12

OFFICIAL SECRETS OFFENCES

Disclosure of official information	Official Secrets Act 1963, s 4, s 13
Disclosure of confidential information in official contracts	Official Secrets Act 1963, s 5, s 13
Retention of official documents and articles	Official Secrets Act 1963, s 6, s 13
Acts contrary to the safety and preservation of the State	Official Secrets Act 1963, s 9, s 13
Harbouring offenders and failing to report offences	Official Secrets Act 1963, s 11, s 13
Obstructing a Garda operating under a search warrant	Official Secrets Act 1963, s 16
Refusing to give, or giving false information to a member of the Gardaí	Official Secrets Act 1963, s 17

VIDEO RECORDING OFFENCES

Supplying video recordings of uncertified video works	Video Recordings Act 1989, s 5
Prohibition of possession of video recordings for sale*	Video Recordings Act 1989, s 16
Prohibition of possession of video recordings for supply	Video Recordings Act 1989, s 9
Supplying video recordings of prohibited video works	Video Recordings Act 1989, s 8

SUMMARY JURISDICTION OFFENCES*

Common assault	Summary Jurisdiction (Ireland) Act 1851, s II(1)
Assaults with intent to prevent sale of corn etc.	Summary Jurisdiction (Ireland) Act 1851, s II(2)
Workman, apprentice etc. spoiling work or goods	Summary Jurisdiction (Ireland) Act 1851, s III(1)
Destroying fruit or vegetables in a garden	Summary Jurisdiction (Ireland) Act 1851, s III(2)
Destroying fruit or vegetables not in a garden	Summary Jurisdiction (Ireland) Act 1851, s III(3)
Destroying or damaging trees or shrubs etc.	Summary Jurisdiction (Ireland) Act 1851, s III(4)
Destroying or damaging fence, wall or gate	Summary Jurisdiction (Ireland) Act 1851, s III(5)
Obstructing export of agricultural produce	Summary Jurisdiction (Ireland) Act 1851, s III(6)
Damaging property of a workhouse	Summary Jurisdiction (Ireland) Act 1851, s III(7)
Damaging any property not already provided for	Summary Jurisdiction (Ireland) Act 1851, s III(8)
Possession of shipwrecked goods	Summary Jurisdiction (Ireland) Act 1851, s IV(1)
Possession of stolen mutton etc.	Summary Jurisdiction (Ireland) Act 1851, s IV(2)
Possession of stolen wood	Summary Jurisdiction (Ireland) Act 1851, s IV(3)
Offering shipwrecked goods for sale	Summary Jurisdiction (Ireland) Act 1851, s IV(4)

Stealing etc. deer in an enclosed ground	Summary Jurisdiction (Ireland) Act 1851, s V(1)
Stealing dogs, beasts or birds ordinarily kept in confinement and not subjects of larceny	Summary Jurisdiction (Ireland) Act 1851, s V(2)
Stealing etc. any live or dead fence, wooden stile or gate	Summary Jurisdiction (Ireland) Act 1851, s V(3)
Stealing trees, shrubs etc.	Summary Jurisdiction (Ireland) Act 1851, s V(4)
Selling stolen trees, shrubs, etc.	Summary Jurisdiction (Ireland) Act 1851, s V(5)
Workman, apprentice etc. making away with goods committed to his care	Summary Jurisdiction (Ireland) Act 1851, s V(6)
Stealing poultry	Summary Jurisdiction (Ireland) Act 1851, s V(7)
Offering spoilt or adulterated corn etc. for sale	Summary Jurisdiction (Ireland) Act 1851, s VII(1)
Trespass on fields	Summary Jurisdiction (Ireland) Act 1851, s VIII(1)
Turning horse etc. loose and negligence in driving cattle	Summary Jurisdiction (Ireland) Act 1851, s X(1)
Carrying timber crosswise	Summary Jurisdiction (Ireland) Act 1851, s X(9)
Exposing animals for sale in public	Summary Jurisdiction (Ireland) Act 1851, s X(10)
Allowing swine, etc. to wander on roads	Summary Jurisdiction (Ireland) Act 1851, s X(11)
Driver carrying more than a certain number	Summary Jurisdiction (Ireland) Act 1851, s XI(1)
Carrying luggage on the top of a carriage, with inside passengers, exceeding a certain height	Summary Jurisdiction (Ireland) Act 1851, s XI(2)
Omitting to paint the number of passengers to be conveyed on the doors, etc. of public carriages	Summary Jurisdiction (Ireland) Act 1851, s XI(3)
Misconduct, etc. of drivers to passengers	Summary Jurisdiction (Ireland) Act 1851, s XI(4)
Drivers leaving their horses until a proper person shall stand at their head; or allowing others to drive	Summary Jurisdiction (Ireland) Act 1851, s XI(5)
Names of owners etc. not printed on carts	Summary Jurisdiction (Ireland) Act 1851, s XII(2)
One driver taking charge of more than one cart	Summary Jurisdiction (Ireland) Act 1851, s XII(3)
Drivers of carts driving thereon without some other person to guide them	Summary Jurisdiction (Ireland) Act 1851, s XII(3)
Drivers leaving their cart negligently	Summary Jurisdiction (Ireland) Act 1851, s XII(4)
Drivers refusing to tell owners name	Summary Jurisdiction (Ireland) Act 1851, s XII(5)
Keeping on the wrong side of the road	Summary Jurisdiction (Ireland) Act 1851, s XIII(1)
Passing with a led horse and not obeying rules of the road	Summary Jurisdiction (Ireland) Act 1851, s XIII(2)
Furious driving	Summary Jurisdiction (Ireland) Act 1851, s XIII(4)
Children under 13 driving	Summary Jurisdiction (Ireland) Act 1851, s XIII(5)
Unnecessarily obstructing streets or market places	Summary Jurisdiction (Ireland) Act 1851, s XVII(4)
Using false weights or measures	Summary Jurisdiction (Ireland) Act 1851, s XVIII(2)
Offence against public decency within police district of Dublin Metropolis	Summary Jurisdiction (Ireland) Amendment Act 1871, s 5
Contempt of Court within police district of Dublin Metropolis	Summary Jurisdiction (Ireland) Amendment Act 1871, s 6

[76] The provisions of the Dangerous Substances Act 1972 relating to explosives has not been brought into force; the other provisions of that Act have come into operation: Dangerous Substances Act 1972 (Commencement) Order 1979 SI No. 287/1979.

EXPLOSIVES OFFENCES[76]

Causing explosion likely to endanger life or property	Explosive Substances Act 1883, s 2
Attempt to cause an explosion or making or keeping explosives with intent to endanger life or property	Explosive Substances Act 1883, s 3
Making or possession of explosive	Explosive Substances Act 1883, s 4
Accessory to committing a crime under this act	Explosive Substances Act 1883, s 5
Manufacturing gunpowder or other explosives without a licence	Explosives Act 1875, s 4
Storing gunpowder or other explosives in an unauthorised place	Explosives Act 1875, s 5
Non compliance with the terms of the licence issued for the manufacture of gunpowder or licence issued for the manufacture of other explosives	Explosives Act 1875, s 9
Breach of the general rules for factories and magazines producing gunpowder or other explosives	Explosives Act 1875, s 10
Failure to notify the designated authority of a change in the occupier of a gunpowder or other explosives factory	Explosives Act 1875, s 13
Breach of the general rules applying to the storage of gunpowder or other explosives	Explosives Act 1875, s 17
Breach of the special rules for the regulation of workmen in gunpowder or other explosives stores	Explosives Act 1875, s 19
Breach of the rules governing a premises registered for keeping gunpowder or other explosives	Explosives Act 1875, s 22
Failure to take precautions against fire or explosion by the occupier of a gunpowder or other explosives factory	Explosives Act 1875, s 23
Sale of gunpowder or other explosives in a public place, thoroughfare, street or highway	Explosives Act 1875, s 30, s 39
Sale of gunpowder or other explosives to a child	Explosives Act 1875, s 31
Sale of gunpowder or other explosives in containers that are not correctly labelled or secured	Explosives Act 1875, s 32
Breach of the byelaws by the harbour authorities as to conveyance, loading, etc. of gunpowder or other explosives	Explosives Act 1875, s 34
Breach of the byelaws by railway and canal company as to conveyance, loading, etc. of gunpowder or other explosives	Explosives Act 1875, s 35
Breach of the byelaws as to wharves in which gunpowder or other explosives is loaded or unloaded	Explosives Act 1875, s 36
Breach of the byelaws as to conveyance by road or otherwise, or loading of gunpowder or other explosives	Explosives Act 1875, s 37
Breach of an order prohibiting the manufacture, importation, storage or carriage of specially dangerous explosives	Explosives Act 1875, s 43
Breach of the regulations applying to gun-makers and cartridge makers	Explosives Act 1875, s 46

Breach of the provisions in favour of owners of mines and quarries as to making charges, etc. for blasting	Explosives Act 1875, s 47
Failure to comply with a Government inspector appointed under this act	Explosives Act 1875, s 55
Failure to comply with requirements of an inspector to remedy dangerous practices	Explosives Act 1875, s 58
Failure to notify the Secretary of State of an accident involving explosives or fire where there is loss of life or injury and the amount of explosives or gunpowder being stored or carried is above a specified quota	Explosives Act 1875, s 63
Breach of the conditions set out for reconstruction of buildings used in connection with explosives which have been damaged or destroyed	Explosives Act 1875, s 64
Failure to attend or produce documents at a court holding an investigation under this Act	Explosives Act 1875, s 66
Failure of the occupier of a store or registered premises to show an authorised officer of the local authority every place in his premises and provide him with samples of any ingredients requested	Explosives Act 1875, s 69
Refusal to admit any authorised person to search a premises	Explosives Act 1875, s 73
Tampering or disposing of a sample given to an occupier by an authorised officer who has destroyed the explosive ingredients due to risk of public danger	Explosives Act 1875, s 74
Failure to admit an authorised officer on to a wharf, carriage, boat etc. with explosives in transit	Explosives Act 1875, s 75
Trespassing in any premises containing explosives	Explosives Act 1875, s 77
Throwing fireworks in a public thoroughfare	Explosives Act 1875, s 80
Forgery or falsification of documents	Explosives Act 1875, s 81
Defacing notices	Explosives Act 1875, s 82

FIREARMS OFFENCES

Possession, use or carriage of firearm or ammunition without a certificate and/or contravening a condition imposed in relation to the granting of a certificate	Firearms Act 1925, s 2
Failure to comply with conditions set by the Minister for dealing in firearm or ammunition	Firearms Act 1925, s 9
Failure to comply with the restrictions on the manufacture and sale of firearms	Firearms Act 1925, s 10
Failure to hand back a certificate for firearms dealership if removed from the register	Firearms Act 1925, s 11
Failure to keep or produce records of any transactions conducted by a firearms dealer*	Firearms Act 1925, s 12
Obstructing a member of the Garda Síochána from inspecting firearms and ammunition stocks	Firearms Act 1925, s 13
Possession of firearms with intent to endanger life	Firearms Act 1925, s 15
Breach in the restrictions on the export or removal of firearms or ammunition from the State	Firearms Act 1925, s 16

Breach in the restrictions on the import of firearms, prohibited weapons and ammunition into the State	Firearms Act 1925, s 17
Obstructing a member of the Garda Síochána from searching any place listed in this section, or any public place, or from seizing firearms or ammunition, or giving false information, or refusing to give information regarding the consignor, consignee or owner of the firearms or ammunition*	Firearms Act 1925, s 21
Failure to give name and address, or giving false or misleading information if it is requested by a member of the Garda Síochána who suspects a person is carrying, using or in possession of a firearm or ammunition*	Firearms Act 1925, s 22
General catch all provision allowing for punishments to be imposed when an offence is committed under this act for which no other punishment is provided	Firearms Act 1925, s 23
Carrying a firearm that is of a class which has been temporarily prohibited	Firearms Act 1964, s 5
Breach of the conditions laid down for an auctioneer to sell, etc. a firearm or ammunition	Firearms Act 1964, s 13
Possession of a firearm or imitation firearm while taking a vehicle without permission	Firearms Act 1964, s 26[77]
Using a firearm to resist arrest or aid an escape	Firearms Act 1964, s 27
Possession of firearm in suspicious circumstances	Firearms Act 1964, s 27A
Carrying firearm with criminal intent	Firearms Act 1964, s 27B
Unauthorised possession, sale or transfer of silencers	Firearms and Offensive Weapons Act 1990, s 7
Reckless discharge of a firearm	Firearms and Offensive Weapons Act 1990, s 8
Possession in a public place of a knife or other article	Firearms and Offensive Weapons Act 1990, s 9
Trespassing with a knife, weapon of offence or other article	Firearms and Offensive Weapons Act 1990, s 10
Production of an article capable of inflicting serious injury	Firearms and Offensive Weapons Act 1990, s 11
Breach of a prohibition to manufacture, import, sell, hire or loan offensive weapons	Firearms and Offensive Weapons Act 1990, s 12
Giving false information when applying for firearms certificate or altering or forging such a certificate	Firearms (Firearm Certificate for Non-Residents) Act 2000, s 3
Breach of conditions in licence to hunt with firearms	Wildlife Act 1976, s 29

[77] This provision applies to a person who contravenes Road Traffic Act 1961, s 112 while in possession of a real or imitation firearm.

Appendix 3 – FORMAL CONSULTATION PROCESS

A. National Conference on Codification of the Substantive Criminal Law

Saturday 26 July, 2003

Bedford Hall, Dublin Castle

Agenda

Chairman Professor Finbarr McAuley

9.00 Registration

9.30 Ministerial Address

9.45 Chairman's Introduction

10.00 Session 1:

Is codification of the criminal law a good idea in principle?

11.15 Coffee

11.30 Session 2:

To the extent that it is considered to be a good idea in principle, what form should codification take in Ireland?

12.45 Lunch

13.45 Session 3:

If it is decided to codify the criminal law, how should the process of codification be managed?

15.00 Seminar conclusions

16.00 Close

Issues Paper Distributed to Participants at National Conference

Issue One

Is codification a good idea?

The principal arguments in favour of codification may be summarised as follows:

(i) The argument from natural progression

- the idea that the natural history of the criminal law can be represented in three stages: *viz*., the common law; statute law; and codification.

(ii) The argument from improved accessibility

- codification would mean that the law would be stated in a single, authoritative source, replacing the current array of diverse, fragmented and often incomplete sources.

(iii) The argument from improved comprehension

- the introduction of a code would mean a uniform drafting style and the consequent elimination of the Tower of Babel effect created by the current co-existence of a plurality of drafting styles from different historical periods.

(iv) The argument from improved consistency

- codification would facilitate conceptual consistency in the law throughout the General and Special Parts.

(v) The argument from improved certainty

- in the nature of things, codification would involve a systematic review and, where necessary, reform of the current law. The uncertainties and *lacunae* that beset the current law would thus be removed.

The principal arguments against codification may be summarised as follows:

(i) Codes are civilian imports

- the argument here is that codification ignores key differences between common law and civilian legal culture: *viz*., the differing architecture of judicial power in the two systems; differences of attitude to judicial interpretation; differences on the question of judicial law making; differences on the role of analogical reasoning; etc.

(ii) The fate of the common law under codification

- this is the argument that the introduction of a single authoritative source of law would effectively consign the common law to the dustbin of legal history, thus needlessly jettisoning centuries of legal wisdom.

(iii) The relative rigidity of a codified system

- this is the familiar argument that the introduction of a set of pre-ordained rules would result in a significant loss of the sort of flexibility associated with the common law: in a codified system, judges would be constrained to apply the law as found in the Code.

(iv) The 'Sysyphus' complaint

- this is the argument that with the passage of time, codes inevitably generate a huge body of accompanying interpretative jurisprudence, thereby effectively restoring the *status quo ante*: namely, a body of scattered, fragmented law.

(v) The argument from cost

- experience in other jurisdictions shows that, if seriously engaged with, codification is an expensive exercise, likely to devour huge quantities of scarce resources that could be better employed elsewhere in the criminal justice system.

Issue Two

What form should codification take?

The available options might be summarised as follows:

(i) Preserve the status quo

- continue the current regime of systematically reforming the various 'blocks' of extant criminal law in a step-by-step process.

(ii) Introduce an instrument designed on the 'necklace' principle

- this might be done by restating the entire corpus of the criminal law in a single Crimes Act. On this model, the general principles of criminal liability would remain uncodified.

(iii) Introduce a General Principles Instrument

- this model would leave the enactment of the Special Part to the process described at ***(i)*** above.

(iv) Introduce a General Principles Instrument with a series of 'bolt-ons'

- the later would be taken from the existing corpus of quasi-codified law dealing with various categories of offences.

(v) Introduce a Codification Instrument stricto sensu

- this would involve drafting a General Part covering the principles of criminal liability, followed by a Special Part dealing with the criminal calendar.

The following residual questions might also be addressed:

(i) What should the General Part contain?

- the principles of inculpation?
- the principles of exculpation?
- jurisdictional matters?

(ii) What should the Special Part contain?

- Homicide?
- Non-Fatal Offences?
- Property Offences?
- Sexual Offences?
- Public Order Offences?
- Offences Against the State?
- Offences Against the Administration of Justice?

(iii) Should the Special Part include Road Traffic and Regulatory Offences?

(iv) Should there be separate codes for sentencing and criminal procedure?

Issue Three

How should the process of codification be managed?

At least three matters arise for consideration under this rubric:

(i) Who will do the work of codification?

- The Law Reform Commission?
- A Codification Committee?
- State Apparatus?

(ii) Is phased or step-by-step codification desirable?

(iii) If it is, should the process be internally prioritised?

(iv) What are the practical difficulties involved in enacting a Criminal Code?

- British experience
- Parliamentary time
- Other issues
- Fixing a realistic time-frame.

B. International Conference on the Codification of the Substantive Criminal Law

22 November 2003

Radisson SAS Hotel, Stillorgan Road, Dublin 4.

Programme

9.00 Registration

9.40 Ministerial Address

9.50 Chairman's Introduction

10.00 ***The British Experience***

Speakers: Professor Ian Dennis
Professor Pamela Ferguson
Professor Chris Gane

Chair: Mr. James Hamilton, DPP

11.30 Coffee and Tea

12.00 ***The Canadian Perspective***

Speakers: Mr. Donald Piragoff
Chair: The Hon. Mr. Justice Barry White

13.00 Lunch

14.15 ***The View from New Zealand and Australia***

Speakers: Mr. Matthew Goode
Professor Roger Clark
Chair: The Hon. Mr. Justice Nial Fennelly

15.45 Coffee and Tea

16.00 ***Codification and Recodification: United States of America and Italy***

Speakers: Professor Paul Robinson
Professor Alberto Cadoppi
Chair: Professor Paul O'Connor

17.30 ***Plenary and Conclusion***

Chair: Professor Finbarr McAuley

18.00 ***End of Conference***

Biographical Profiles of Speakers and Chairmen at International Conference

Professor Alberto Cadoppi

Alberto Cadoppi is Professor of Criminal Law and Director of the Institute of Criminal Sciences at the University of Parma, Italy. His teaching and research interests are in the areas of domestic and comparative criminal law. He has published several books and more than 100 articles on these topics. Many of his writings deal with the historical and comparative aspects of criminal law codification, focusing, in particular, on the civilian influence on the first Queensland Criminal Code. Professor Cadoppi has spent many periods of sabbatical leave in the common law world.

Professor Roger S. Clark

A New Zealander by birth, Roger Clark has taught International Law and Criminal Law at Rutgers Law School, Camden, New Jersey, since 1972. He is a Board of Governors Professor, the University's highest rank. He is a graduate of Victoria University of Wellington, New Zealand (B.A., LL.B., LL.M., LL.D.) and Columbia University School of Law (LL.M., J.S.D.). He was a consultant to the New Zealand Department of Justice on the proposed Crimes Bill 1989. Between 1987 and 1990, he was a member of the former U.N. Committee on Crime Prevention and Control. He represented the Government of Samoa in the negotiations to create the International Criminal Court and was one of Samoa's representatives to the first meeting of the Assembly of States Parties of the Court. He has written widely on issues of criminal law, human rights, international organisation, decolonisation and international criminal law.

Professor Ian Dennis

Ian Dennis is Professor of Law and Head of the Department of Laws at University College London. His teaching and research interests are in the areas of criminal law, evidence and procedure. He is the author of *The Law of Evidence* (2nd ed, Sweet & Maxwell, 2002) and numerous articles and essays. He is the Editor of the *Criminal Law Review* and was a member of the team of academic lawyers which from 1981-1989 advised the Law Commission of England and Wales on the preparation of a criminal code. He is currently acting as Special Consultant to the Law Commission on the revision of the Commission's draft criminal code, published in Law Com. No. 177 (1989).

The Hon. Mr. Justice Nial Fennelly

Nial Fennelly served as Irish Advocate General at the European Court of Justice prior to his appointment to the bench of the Supreme Court of Ireland. A member of the Board of Trustees of the Trier Academy of European Law, he is also Chairman of the Irish Centre for European Law, President of the Irish Society of European Law, and a frequent contributor to UCD Law Faculty's undergraduate and postgraduate European law programmes. Mr. Justice Fennelly is Chairman of the Working Group on the Jurisdiction of the Courts whose Report on criminal jurisdiction, *The Criminal Jurisdiction of the Courts*, was published in 2003.

Professor Pamela Ferguson

Pamela Ferguson is Professor of Scots law at the University of Dundee, where she teaches several courses on criminal law. Prior to becoming an academic she was a member of the Procurator Fiscal Service. Professor Ferguson was appointed as Senior Adviser to the Scottish Parliament's Justice 2 Committee during its recent inquiry into the Crown Office and Procurator Fiscal Service. She joined the Scottish Criminal Law Codification Team in 1999. The team's *A Draft Criminal Code for Scotland with Commentary* was published by the Scottish Law Commission in September 2003.

Professor Christopher Gane

Christopher Gane holds the Chair of Scots Law at the University of Aberdeen where he specialises in domestic and international criminal law. He also contributes to the teaching of Human Rights in the Law School's graduate programme. Professor Gane's publications include several authored and edited books in these fields, and he has acted as adviser to the Scottish Executive in relation to human rights, and to the Justice Committees of the Scottish Parliament on criminal justice matters. He is one of a group of Scottish academics whose work on an unofficial criminal code has recently been published as *A Draft Criminal Code for Scotland with Commentary*, under the auspices of the Scottish Law Commission.

Mr. Matthew Goode

Matthew Goode is Managing Solicitor in the Policy and Legislation Section of the South Australian Attorney-General's Department, specialising in criminal law and criminal justice; and Adjunct Associate Professor of Law at the University of Adelaide, where he was formerly Dean of the Law School. He is a member of the Criminal Law Officers Committee (now known as the Model Criminal Code Officers Committee), a body set up by the Standing Committee of Attorneys-General to produce a model criminal code for Australia. As a member of that committee he did the preliminary drafting work on the general principles of criminal liability, and wrote the report and commentary thereon. The resultant *Criminal Code Act* was enacted by the Commonwealth Parliament in 1995.

Mr. James Hamilton, DPP

James Hamilton has been Director of Public Prosecutions since 1999. He graduated in History and Political Science from Dublin University in 1971 and practised at the Bar from 1973 to 1981. From 1981 he was a legal adviser in the Office of the Attorney General and in 1995 was appointed as permanent head of the Office. In that capacity he dealt with legal issues relating to constitutional and administrative law, criminal law, human rights, issues relating to Northern Ireland and draft legislation. He was responsible for providing advice on legal issues arising during the negotiations which led to the conclusion of the Northern Ireland Agreement in 1998. He was a member of the Constitution Review Group which published a comprehensive review of the Constitution of Ireland in 1996. He was the Irish member of the Council of Europe's Venice Commission from 1998 to 2002.

Professor Finbarr McAuley

Finbarr McAuley is Jean Monnet Professor of European Criminal Justice and Acting Director of the Institute of Criminology, University College Dublin, Editor of the *Irish Jurist* and a member of the Law Reform Commission. He has served on several government committees on criminal law matters and was appointed as Chairman of the Expert Group on the Codification of the Substantive Criminal Law in 2002. His many publications include *Insanity, Psychiatry and Criminal Responsibility* (1993), *Criminal Liability* (2000) (co-author), and *Criminal Justice History: Themes and Controversies from Pre-Independence Ireland* (2003) (co-editor).

Professor Paul O'Connor

Paul O'Connor is Professor of Law and Dean of the Faculty of Law at University College Dublin. He is a graduate of University College Dublin, the King's Inns and the University of Pennsylvania; and has been a Fulbright Fellow in law at the University of Michigan. Prior to his election as Dean, he taught and published widely in the areas of evidence and family law. His many publications include *Key Issues in Irish Family Law* (1988).

Mr. Donald K. Piragoff

Donald K. Piragoff is Acting Assistant Deputy Minister with the Criminal Law Policy and Community Justice Branch of the Department of Justice, Canada. He was educated at the Universities of Winnipeg, Manitoba and Toronto. He was called to the Manitoba Bar in 1979 and joined the federal Department of Justice in 1981. During his career at Justice Canada, he has led or worked on numerous policy and legislative initiatives regarding criminal law, criminal procedure and evidence law. He has represented Canada at and chaired meetings of the G8, the United Nations, the Council of Europe, the Commonwealth and the Organization of American States, as well as other international bodies; and has participated in the negotiation of several treaties, including the *Rome Statute of the International Criminal Court*. He has taught law at Osgoode Hall Law School, Toronto, and at the Faculty of Law, McGill University, Montreal. He has also authored a book on evidence, as well as several articles in national and international publications.

Professor Paul H. Robinson

Paul H. Robinson, the Colin S. Diver Distinguished Professor of Law at the University of Pennsylvania, has been engaged in criminal code reform work for the past four decades as both a code drafter and as an academic critic of existing codes. He is the author of *Structure and Function in Criminal Law* (Clarendon, Oxford 1997), a primer for some code drafters, as well as of a general treatise, *Criminal Law* (Aspen 1997). He has written extensively on criminal codes and criminal law codification, and has participated in or run criminal law codification projects in the United States and abroad, sometimes as a United Nations consultant. His U.S. codification work includes service as Counsel for the United States Senate Subcommittee on Criminal Laws and Procedures when that committee was drafting a new federal criminal code. Most recently, he has been running the two current state recodification projects in the United States, in Illinois and Kentucky.

The Hon. Mr. Justice Barry White

Barry White, S.C., is a Judge of the High Court. He was educated at University College Dublin, where be obtained his BCL in 1966, and King's Inns. He was called to the Bar in 1967 and to the Inner Bar in 1982. Prior to his appointment to the Bench, in 2002, he was one of the country's leading criminal law practitioners.

List of Attendees at Codification Conferences

Mr. Simon Barr, Law Reform Commission

Mr. Duncan Berry, Office of the Attorney General

Mr. Rory Brady, Attorney General

Ms. Karen Brennan, Institute of Criminology, University College, Dublin

The Hon. Mr. Declan Budd, President of the Law Reform Commission

Professor Alberto Cadoppi, University of Parma

Mr. Peter Charleton, S.C.

The Hon. Mr. Justice Paul Carney, Judge of the High Court

Mr. Frank Cassidy, Office of the Chief Prosecution Solicitor

Professor Robert Clark, Faculty of Law, University College Dublin

Professor Roger Clark, Rutgers University

Ms. Alma Clissman, Parliamentary & Law Reform Executive, Law Society of Ireland

Professor Ian Dennis, University of London

Mr. Edward Donnellan, Director of the Statute Law Restatement Division, Office of the Attorney General

Her Honour Judge Elizabeth Dunne, Judge of the Circuit Court

Mr. Michael Durack, S.C.

The Hon. Mr. Justice Nial Fennelly, Judge of the Supreme Court

Professor Pamela Ferguson, University of Dundee

Ms. Finola Flannagan, Director General, Office of the Attorney General

Mr. Patrick Gageby, S.C.

Mr. Barry Galvin, Solicitor

Professor Chris Gane, University of Aberdeen

Professor Matthew Goode, Attorney General's Office, South Australia

Mr James Hamilton, Director of Public Prosecutions

Professor John Jackson, School of Law, Queens University

His Honour Judge Pat McCartan, Judge of the Circuit Court

Mr. Michael McDowell, T.D., Minister for Justice, Equality and Law Reform

Mr. James Mac Guill, Solicitor

Ms. Deirbhle Murphy, Chief Parliamentary Counsel

Mr. Fachtna Murphy, Deputy Commissioner of An Garda Síochána

Professor Paul O'Connor, University College Dublin

The Hon. Mr. Justice Kevin O'Higgins, Judge of the High Court

Mr. Paul O'Higgins, S.C.

Mr. Caoimhín Ó hUiginn, Assistant Secretary, Department of Justice, Equality and Law Reform

Mr. Giollaíosa Ó Lideadha, Barrister

Mr. Tom O'Malley, B.L., Faculty of Law, University College Galway

Mr. Donald Piragoff, Department of Justice, Canada

Ms. Claire Reilly, Parliamentary Counsel, Office of the Attorney General

Ms. Patricia T. Rickard-Clarke, Law Reform Commissioner

Ms. Mary Ellen Ring, S.C.

Professor Paul Robinson, University of Pennsylvania

The Hon. Mr. Justice Esmond Smyth, President of the Circuit Court

The Hon. Mr. Justice Barry White, Judge of the High Court

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