

## CONSTRUCTING A CRIMINAL CODE: LESSONS FOR JERSEY

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*This paper offers a commentary on some of the issues which potential codifiers of criminal law may have to determine. Drawing on several code projects in the traditionally “common law” world, as well as the author’s experience as a member of the group which drafted a criminal code for Scotland, it considers the extent to which the process of codification ought largely to restate the current law, as opposed to attempting law reform; assesses different ways of structuring codes and of drafting provisions; stresses the importance of accurate offence labelling, and considers the relationship between a code and the common law.*

### Introduction

1 Professor Finbarr McAuley, Chairman of Ireland’s Criminal Law Codification Advisory Committee, once likened the history of criminal law codification to a graveyard, replete with draft codes which have failed to be enacted.<sup>1</sup> Certainly, attempts to codify the criminal laws of England and Scotland have thus far met with little success, despite draft codes having been prepared in both jurisdictions.<sup>2</sup> A similar fate

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<sup>1</sup> Comment made at the International Society for Reform of the Criminal Law Conference, *Codifying the Criminal Law: Modern Initiatives* (Dublin, July 2008).

<sup>2</sup> See *A Criminal Code for England and Wales*, Law Com No 177 (1989); *Codification of the Criminal Law: A Report to the Law Commission*, Law Com No 143 (1985) and *Draft Criminal Code for Scotland with Commentary* (2003) available at: <http://www.scotlawcom.gov.uk>. A history of the English codification project is provided in Roberts, “Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform”, (2001) 5 *Buffalo Crim L Rev* 173. Although the Scottish draft code was published under the auspices of the Scottish Law Commission, the exercise was an unofficial one. For an over-view, see Clive, *Submission of a Draft Criminal Code for Scotland to the Minister for Justice*, 7 *Edinburgh LR* 395 (2003).

befell endeavours to update the Canadian Criminal Code.<sup>3</sup> In 2011, Professor McAuley's Committee published a partial code, covering general principles, non-fatal offences against the person, theft, fraud, criminal damage, and public order offences.<sup>4</sup> This seems to have suffered the same fate as the British drafts. Criminal law has, however, been codified in a range of jurisdictions which have traditionally been based on the common law, including Australia,<sup>5</sup> New Zealand,<sup>6</sup> and many jurisdictions in the USA.<sup>7</sup> As Jersey joins the ranks of potential codifiers, this paper draws lessons from both successful and unsuccessful codification projects, and in particular on the author's experience as a member of the team which prepared the draft criminal code for Scotland.<sup>8</sup> Those embarking on codification may wish to reflect on some initial issues, such as—

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<sup>3</sup> Stuart, *A Case for a General Part: Lessons from Canada's Experience with Stephen's Code Since 1892 and Entrenched Charter Standards Since 1982* (paper presented at the ISRCL Conference, July 2008 (*supra*, note 1)).

<sup>4</sup> See Irish Department of Justice and Equality News: "Minister Shatter publishes draft Criminal Code prepared by the Criminal Law Codification Advisory Committee", 23 June 2011, available at: <http://www.justice.ie/en/JELR/Pages/PR11000096>.

<sup>5</sup> See the Commonwealth of Australia Criminal Code Act 1995; the Australian Capital Territory Criminal Code 2002; the New South Wales Crimes Act 1900; the Northern Territory Criminal Code Act; the Queensland Criminal Code Act 1899; the South Australia Criminal Law Consolidation Act 1935; the Tasmania Criminal Code Act 1924; the Victoria Crimes Act 1958; and the Western Australia Criminal Code 1913. It should be noted that in some states, such as New South Wales, some common law crimes remain.

<sup>6</sup> The Crimes Act 1961.

<sup>7</sup> For details of criminal codes in the USA, see <http://research.lawyers.com/State-Criminal-Codes-and-Statutes.html>.

<sup>8</sup> The other members of the Scottish code team were Professors Eric Clive and Alexander McCall Smith (Edinburgh University), and Professor Christopher Gane (Aberdeen University). Professor Sir Gerald Gordon, author of the leading textbook on Scottish criminal law, took part in the discussions of the group in the later stages. The academic nature and unofficial status of the Scottish code group were criticised—see Farmer, "Enigma: Decoding the Draft Criminal Code", (2002) 7 *Scottish Law and Practice Quarterly* 68, at 74; Jones, "Towards a Good and Complete Criminal Code for Scotland", (2005) 68 *Modern Law Review* 448. For a response, see Clive and Ferguson, "Unravelling the Enigma: A Reply to Professor Farmer", (2002) 7 *Scottish Law and Practice Quarterly* 81, at 83.

- (1) Ought the code simply to restate the current law, regardless of the merits of that law, or should the codification process attempt to reform the law at the same time? If the latter approach is adopted, how much reform can be undertaken without jeopardising the codification effort?
- (2) How should the code be structured? Ought there to be a “General Part”? If so, where should this be positioned in relation to the rest of the code? What should it contain?
- (3) Should offences be grouped together in a “Special Part”? How should offences be drafted? How should penalties be specified?
- (4) What should become of the common or customary law? Should it continue to develop alongside the code? Should the courts retain the power to develop, or indeed create, defences?
- (5) Keeping the code up to date: once a criminal code has been enacted, what steps can be taken to ensure that it does not stagnate?

### **Reform or restate?**

2 Upon embarking on the codification of its Commonwealth criminal law, the Australian Review Committee 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.”<sup>9</sup>

3 Most codifiers accept that a measure of reform is inevitable; there is an understandable reluctance to perpetuate statutory provisions which have proved to be unworkable, or to entrench in legislation common law principles which are perceived to have out-lived their usefulness. The American Model Penal Code was intended as a reforming measure; its principal drafter believed that “the . . . need was less for a description and reaffirmation of existing law than for a guide to long delayed reform.”<sup>10</sup> Similarly, the Scottish code group decided that its

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The appointment of academics to the English criminal code team attracted similar criticism—see Bennion, “Codification of the Criminal Law: (2) The Technique of Codification”, 1986 *Crim L Rev* 295, at 302.

<sup>9</sup> Review of Commonwealth Criminal Law, Interim Report: *Principles of Criminal Responsibilities and Other Matters* (1990) para 3.12.

<sup>10</sup> Weschler, “The Model Penal Code and the Codification of American Criminal Law”, in Hood (ed), *Crime, Criminology and Public Policy: Essays*

draft would in large part restate the law, but ought also to reform areas which had been subject to sustained criticism.<sup>11</sup> Since the Scottish group was an unofficial body, it was free to suggest a number of substantial amendments to the law.<sup>12</sup> The Irish Code Committee also intended reform as well as restatement.<sup>13</sup> It is, however, generally accepted that codification is not primarily designed to bring about major reform. Even if felt to be desirable, pragmatism dictates that radical reforms are unlikely to have an easy passage through the legislative process. The English criminal code team took the view that its draft code was more likely to be enacted if it largely restated the existing law and limited reforms to remedying deficiencies.<sup>14</sup> As Bennion has noted—

“Those with practical experience of the workings of the [Westminster Parliament’s] legislative processes know full well that, if there is to be any hope at all of enacting a code, it must be possible to prevent MPs putting down amendments of substance. Under parliamentary procedure, they can be excluded only if no such amendments are contained in the Bill as introduced.”<sup>15</sup>

4 Mindful of this, the Irish Code Committee proposed that innovative parliamentary mechanisms may need to be developed to expedite the

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*in Honour of Sir Leon Radzinowicz* (1974) 421. For a history of the MPC see Robinson and Dubber, “American Model Penal Code: A Brief Overview” (2007) 10 *NCLR* 319; Wechsler, “The Challenge of a Model Penal Code” (1952) 65 *Harvard L Rev* 1097.

<sup>11</sup> The law relating to rape is a good example of an area of Scots law which was ripe for reform, in the view of the code team. See now the Sexual Offences (Scotland) Act 2009, which forms a “mini code” of sexual offences.

<sup>12</sup> Some problematic areas of Scots criminal law were highlighted in Ferguson, “Codifying Criminal Law (1): A Critique of Scots Common Law”, 2004 *Crim Law Rev* 49.

<sup>13</sup> Expert Group on the Codification of the Criminal Law: *Codifying the Criminal Law* (Dublin, 2004) para 2.69.

<sup>14</sup> Law Commission: *Eighteenth Annual Report 1982–1983* (Law Com No 131), para 2.26, and *Codification of the Criminal Law: A Report to the Law Commission* (*supra*, note 2) paras 1.10–1.15. For the argument that the English code project was in fact a reforming one see Wells, “Codification of the Criminal Law—Part 4: Restatement or Reform”, (1986) *Crim Law Rev* 314. Both codes are considered in Ferguson, “Codifying Criminal Law (2): The Scots and English Draft Codes Compared”, (2004) *Crim Law Rev* 105.

<sup>15</sup> *Bennion* (*supra*, note 8) 298.

passing of code legislation.<sup>16</sup> Political expediency may dictate that codification be mainly an exercise in restatement, since there are numerous examples of draft codes which have become derailed due to the controversial nature of some of their provisions. For example, the draft Federal Criminal Code for the USA, completed in the early 1970s, recommended a ban on handguns and the outlawing of private armies for the first time in federal law.<sup>17</sup> The code would also have decriminalised consensual sodomy.<sup>18</sup> In New Zealand, the drafters of the Crimes Bill of 1989 chose not to distinguish murder from manslaughter, and this is said to have contributed to the demise of the entire Bill.<sup>19</sup> It is unsurprising that these draft codes were not enacted, given popular sentiment at the time.

5 Having cautioned against too radical an approach, it should however be noted that if codification is seen to offer little more than making life easier for those who work in the criminal justice system, it is unlikely to prove popular in political terms. In relation to the failed attempt to codify the law in Victoria, one Australian commentator noted—

“The system we have rewards politicians for winning votes. It does not reward them for getting through codifications, but for enacting popular measures that interest the general public and make a difference to everyday life outside the courts.”<sup>20</sup>

6 The same author suggests that the failure of the Victorian codification project was “not only . . . a failure of strategy and tactics

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<sup>16</sup> *Expert Group (supra, note 13) para 3.72 on.*

<sup>17</sup> *National Commission on Reform of Federal Criminal Laws, Final Report*, Doc No 1042, 92d Cong, 1st Sess. 129–514 (1971), discussed in McClellan, “Codification, Reform and Revision: The Challenge of a Modern Federal Criminal Code”, (1971) *Duke Law Journal* 663, at 706–707. Criminal law is reserved primarily to individual states by the US Constitution. Federal criminal law is generally restricted to crimes which cross more than one state, or which is difficult to police in individual states (such as narcotic offences).

<sup>18</sup> McClellan himself noted that this proposal could “be counted on to provoke sharp controversy” (*supra, note 17, at 707*).

<sup>19</sup> France, “Reforming Criminal Law—New Zealand’s 1989 Code”, (1990) *Crim Law Rev* 827, 829–830.

<sup>20</sup> Taylor, “The Victorian Criminal Code”, (2004) *University of Queensland Law Journal* 202, at 203. In similar vein, Paul Robinson has noted that the value of reforms resulting from codification “cannot be reduced to a sound bite that will generate votes at the next election”: Robinson, “Reforming the Federal Criminal Code: a Top Ten List”, (1997) *Buffalo Crim L Rev* 225, at 226.

but also a failure of salesmanship.”<sup>21</sup> This also seems to have contributed to the lack of success of the New Zealand Crimes Bill 1989.<sup>22</sup> Reflecting on the repeated failures of English law codification projects, Paul Roberts concludes that—

“Law reform is seldom high on a government’s list of priorities. The more arcane projects of consolidation and codification are unlikely manifesto commitments, for obvious reasons of voter disinterest and ignorance.”<sup>23</sup>

7 Political pressure for codification can be increased by generating public debate via the media, such as newspaper articles on what is wrong with the current law, and how codification will improve the situation. What seems to be required, then, is for codifiers to walk a tight-rope between presenting codification as a mundane, tidying-up exercise (which will be unlikely to excite the support of the public or politicians) while at the same time avoiding radical proposals which may result in hostility, not merely to the provision at issue, but to the whole code, and to the very idea of criminal law codification.

8 The innate conservatism of the legal profession is also a factor which needs to be taken into account. Predicting the arguments of those likely to oppose a new federal code in the United States, one commentator stated—

“We can firmly expect to hear it argued . . . that the shortcomings of existing jurisprudence are known and may be dealt with by proper advance preparation. It will also, of course, be suggested that a new code will cause great confusion and uncertainty and deprive the practicing bar of its accumulated wisdom under the existing law.”<sup>24</sup>

9 Those who have built up an expertise in the intricacies of a legal system will be reluctant to forgo that knowledge.<sup>25</sup> Nevertheless,

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<sup>21</sup> Taylor (*supra*, note 20).

<sup>22</sup> France (*supra*, note 19).

<sup>23</sup> Roberts (*supra*, note 2) at 188.

<sup>24</sup> McClellan (*supra*, note 17) at 686. In relation to the failed New Zealand code of 1989, Simon France has suggested that lack of support within the legal profession made the task of enacting codification much more difficult. (*supra*, note 19, 838).

<sup>25</sup> Reflecting on the failure of attempts to re-codify Canadian criminal law, Don Stuart has noted: “Legal practitioners and judges, and especially those who have spent years becoming expert on the law’s intricacies, are also often the most resistant to change” (*supra*, note 3).

despite their instinctive conservatism, the process of codification ought to stimulate debate amongst the profession (and ideally also among the citizenry) as to the appropriate boundaries of the criminal sanction. This requires close collaboration with the media to ensure that the codification exercise is widely reported, and the holding of public seminars to encourage lay participation in the process.

### Structure

10 Criminal law textbooks commonly begin with an introduction to the “general part” of the criminal law, by which is meant the principles which apply to all, or most crimes. This is usually devoted to a defining key terms, such as *actus reus* and *mens rea*, and explicating rules on causation, group liability, inchoate liability, and defences. Thereafter, particular offences are defined and described. This format allows the reader to assimilate the common elements of criminal liability before having to grapple with particular crimes. To define the crime of “battery” (in English law) as involving the intentional or reckless infliction of unlawful personal violence upon a person, or to specify that murder (in Scots law) occurs when one person causes the death of another, having intended to kill that other, does not take us very far unless we have some understanding of what it means to act “intentionally”, or “recklessly”, and of how the law in the relevant jurisdiction determines what has “caused” a particular result.

11 Criminal codes often adopt a similar division between the “General Part” and “Special Part”,<sup>26</sup> but Paul Robinson has suggested that this division be taken further, with the drafting of two separate codes, one of which would contain the “rules of conduct”, and the other “principles of adjudication”.<sup>27</sup> The former would list the offence provisions and would be addressed to citizens. The latter would be aimed at officials in the criminal justice system, and would contain the rules required for prosecuting infractions of the conduct rules, including principles of liability, defences and *mens rea* requirements.<sup>28</sup> While I think it unnecessary to have two separate codes, Robinson’s proposal does alert us to the fact that drafters ought to give

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<sup>26</sup> This is discussed further, below. For the argument in favour of enactment of a General Part for Canada’s code, see Stuart (*supra*, note 3).

<sup>27</sup> *Supra*, note 20, at 268–270. See also Robinson, Greene, Goldstein, “Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication”, (1996) 86 *J. Crim. L. & Criminology* 304, and Robinson, “Rules of Conduct and Principles of Adjudication”, (1990) 57 *U Chicago L Rev* 729.

<sup>28</sup> Robinson (*supra*, note 20) at 247.

consideration to the intended readership of their code: is it to be addressed primarily to criminal justice professionals (lawyers and law enforcement officers)? Or is it intended to be a document which would be used by (and accessible to) the lay public?

12 If there is to be a General Part, this may define key terms such as “intention”, “recklessness” and “negligence”, which simplifies the drafting of specific offences by avoiding needless repetition.<sup>29</sup> The General Part may also specify a default provision, such as that all offences in the code are to be defined as requiring intentional behaviour on the part of the accused, unless a particular provision provides otherwise. Having a default *mens rea* in a code greatly simplifies the drafting. This is the position under the Scottish draft criminal code.<sup>30</sup> The Code of the Australian Capital Territory has a default of “intention” in respect of physical elements that consists only of conduct, and of “recklessness” where the physical element consists of a circumstance or result.<sup>31</sup> The default position of the American Model Penal Code is that the accused must have acted “purposely, knowingly or recklessly”,<sup>32</sup> and the equivalent provision in the English draft code requires that such actions be done “intentionally, knowingly or recklessly”.<sup>33</sup>

13 Although the General Part usually comes before the Special Part, having the Special Part first follows the order in which cases are dealt with by the courts, in that the prosecution must first establish that there has been an infraction of one or more code provisions (Special Part), and thereafter the accused has an opportunity to establish a defence (General Part). Of course, it must be remembered that “General Part” and “Special Part” are merely labels, which may be modified or even discarded if found wanting. It may be preferable to start with a comprehensive definitions section. Next could come those general provisions which need to be understood in order to make sense of the offences (such as principles of liability, including group and inchoate liability, and so forth). Thereafter, the Special Part would describe the

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<sup>29</sup> The Australian Capital Territory’s Criminal Code 2002 uses the *mens rea* terms “intention”, “knowledge”, “recklessness” and “negligence” (s 17), as does the Commonwealth of Australia’s Criminal Code Act 1995 (s 5.1). The American Model Penal Code employs “purposely”, “knowingly”, “recklessly” and “negligently” (s 2.02).

<sup>30</sup> Section 8.

<sup>31</sup> Code of the Australian Capital Territory, s 22.

<sup>32</sup> Model Penal Code, s 2.02(3).

<sup>33</sup> Cl. 24(1) of the English draft code.

offence provisions, followed by a description of defences, in its own part (perhaps entitled “Exculpation and Mitigation”). Promulgation of the code on a website would allow for regular updating and assist in cross referencing. Key terms could appear in a different font, or in different colour from the rest of the text, and contain hotlinks to the relevant defining section.

14 In relation to the “Special Part”, the American Federal Criminal Code arranges offences alphabetically, such that “assault” is sandwiched between provisions on “arson” and “bankruptcy”. An alphabetical listing should be provided in an index, but a code will be easier to use if offences are grouped into cognate categories, such as “offences against the person”, “offences of dishonesty”, “offences against the administration of justice” and the like. Alabama, for example, has a chapter of offences “against the family”, which includes *inter alia* “incest”, “bigamy” and “adultery”, and the Commonwealth of Australia’s Criminal Code Act 1995 now includes a chapter entitled “offences against humanity” which comprises genocide, crimes against humanity, and other war crimes.<sup>34</sup> Within the categories, crimes should be listed in order of decreasing (or increasing) severity. For example, the chapter or division headed “offences against the person” could start with murder, through lesser forms of homicide, down to serious assault, simple assault, and offences of personal endangerment. It may be that “offences against the person” should be sub-divided into those which are fatal, and those which are not. The point is that there should be a gradation of offence within each category.

15 Grouping offences into categories also serves to articulate what it is about the prohibited behaviour that is reprehensible. For instance, is “robbery” primarily an offence of dishonesty, against property? Or is it better categorised as an offence of violence, against the person? If we put robbery in the former camp, what does this say about the value the criminal law puts on protection of persons, as opposed to property? Are “prostitution” and “soliciting” types of “nuisance” or “exploitation” crimes? Or are they offences against morality (and is it appropriate in the 21st century, to have the latter category of offences in the criminal law calendar?) In New Zealand, “brothel keeping” and “living on earnings of prostitution” are categorised as “crimes against public welfare”,<sup>35</sup> but sexual crimes such as rape are included under

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<sup>34</sup> The code is available at <https://www.comlaw.gov.au/Details/C2015C00601>. It was most recently amended in December 2015.

<sup>35</sup> “Crimes against public welfare” form a sub-division of Part 7 of the New Zealand Crimes Act 1961.

the heading “crimes against religion, morality and public welfare”, rather than the (arguably more appropriate) “crimes against the person”.<sup>36</sup>

16 Drafters must also determine whether their code is to contain only substantive law, or is also to include rules of procedure. The Canadian Criminal Code contains rules of evidence and criminal procedure alongside substantive provisions. Hence amid the chapter defining assaults, one finds a provision on corroboration,<sup>37</sup> rules on the inadmissibility of complainants’ sexual history in sexual assaults,<sup>38</sup> and how the court should deal with applications to have the jury and public excluded from the hearing.<sup>39</sup> While it may be useful for a jurisdiction to codify its criminal procedure, as well as its substantive law, it is surely preferable to separate these into distinct chapters, or perhaps even separate codes, rather than one code with an admixture. Part 1, s 4 of the Canadian Code contains a miscellany of provisions. For example, s 4(1) provides that a postal card or stamp shall be “deemed to be a chattel”, and s 4(6) describes how the service of any document and the giving or sending of any notice may be proved. In the midst of this rather banal jumble is s 4(5), which provides that, for the purposes of the Act, “sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted”. This would be more appropriately situated in Part V of the Canadian Code, which includes sexual offences.

### Drafting

17 As previously noted, Paul Robinson has advocated the drafting of two codes, one of which would contain the “rules of conduct”, and the other “principles of adjudication”. The conduct rules would be addressed to citizens, with offence provisions consisting of clearly drafted and simply stated prohibitions. For example, he suggests that the crime of “causing injury to a person” be defined as: “You may not cause bodily injury or death to another person.”<sup>40</sup> While this formula may suffice for a textbook or commentary aimed at explaining criminal law prohibitions to a layperson, it is surely not acceptable as

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<sup>36</sup> “Crimes against the person” are in Part 8 of the New Zealand Crimes Act 1961.

<sup>37</sup> Criminal Code of Canada 1985, s 274.

<sup>38</sup> *Ibid*, s 276.

<sup>39</sup> *Ibid*, s 276.1.

<sup>40</sup> Robinson, Greene and Goldstein (*supra*, note 27), at 307.

an attempt to formulate legislation.<sup>41</sup> It offends against the principle of fair labelling; the person who slaps another's face ends up with a conviction for the same offence as one who deliberately kills someone. It is somewhat patronising to suppose that laypeople are incapable of distinguishing assault from murder. In many jurisdictions such an approach would undermine the important role previous convictions play in sentencing. In similar vein, Robinson suggests an offence of "damage to or theft of property", defined as: "You may not damage, take, use, dispose of, or transfer another's property without the other's consent".<sup>42</sup> This might be a neat formula if the sole aim is to avoid a proliferation of offences, but it too fails the fair labelling principle by not distinguishing the thief from the vandal—concepts recognisably distinct even to the layperson.

18 While these formulations can be criticised, Robinson's proposals nevertheless do serve to remind us of the importance of clear drafting in legislation, particularly in respect of criminal law provisions. Care must be taken to ensure that a criminal code avoids unnecessarily convoluted language or excessive use of technical terms. If ignorance of the law is to be no defence to a breach of criminal law, as is the case in many jurisdictions, then the law's requirements ought to be clearly expressed such that they make sense even to the non-lawyer.<sup>43</sup>

19 One aspect of drafting which tends to confuse the layperson is the use of the pronoun "he" to mean "he or she". The UK Westminster Parliament took this form until 2007, and relies on the reader being familiar with s 6 of the Interpretation Act 1978, whereby "words importing the masculine gender include the feminine" (and vice versa).<sup>44</sup> Similarly, while many offences in the Canadian Criminal Code are phrased in gender neutral language, others use the male

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<sup>41</sup> See also Jones (*supra*, note 8) at 448, where he suggests that the rules of conduct "can be written in everyday language, with simple proscriptions" and proposes that the crime of "homicide" be defined as: "You may not cause the death of another person."

<sup>42</sup> Robinson, Greene and Goldstein (*supra*, note 27), at 309.

<sup>43</sup> For a criticism of the English Draft Criminal Law Bill (*Legislating the Criminal Code: Offences Against the Person and General Principles*, Law Com No 218 (1993)) see Bennion, (1994) 15 *Stat LR* 108, in which he describes the draft as "over-technical, poor on exposition and a sore puzzle from beginning to end". For a rebuttal in robust terms see Smith, (1995) 16 *Sta LR* 105.

<sup>44</sup> Section 6(a) and (b) of the Interpretation Act 1978. These sub-sections have been excluded, *inter alia*, by the (English) Sexual Offences Act 1985.

pronoun only.<sup>45</sup> The Model Penal Code uses “he” (no doubt reflecting the fact that it was drafted more than 40 years ago) and the New York Penal Code uses “he” in some provisions,<sup>46</sup> and “he or she” in others.<sup>47</sup> In contrast to this, the Scottish code has been drafted in a gender neutral manner, and this has been achieved without resort to employing “he/she” or the ungrammatical “if a person . . . they . . .”. For example, s.37 of the draft code states:

“A person who causes the death of another person with the intention of causing such a death, or with callous recklessness as to whether such a death is caused, is guilty of the offence of murder.”

20 A further way in which code drafting could be improved concerns the failure of legislatures to name the offences they are creating. It is not uncommon for statutory provisions to describe the *actus reus* of an offence and (if we are lucky) the requisite *mens rea*, but then simply to conclude that a person who fulfils these requirements “commits an offence”. To take a random example from Scottish legislation, s 16 of the Building (Scotland) Act 2003 states—

“Any person who—(a) makes an application under section 9 for a building warrant or an amendment to a warrant containing a statement which that person knows to be false or misleading in a material particular, or (b) recklessly makes such an application containing a statement which is false or misleading in a material particular, is guilty of an offence.”

But what the offence is called we are not told, and so must resort to saying that a conviction under this section is “for a breach of s 16 of the Building (Scotland) Act 2003”. This provision is headed: “Applications and Grants: Offences”, so perhaps we could label the offence “making false applications or false amendments to building warrants”.

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<sup>45</sup> Thus s 222(1) provides: “A person commits homicide when, directly or indirectly, by any means, *he* causes the death of a human being”, and s 265(1)(a): “A person commits an assault when . . . without the consent of another person, *he* applies force intentionally to that other person . . .” (emphases added).

<sup>46</sup> For example, s 135.25 (kidnapping); s 140.30 (burglary); s 145.12 (criminal mischief). The code is available at: <http://ypdcrime.com/penal.law/article130.htm>.

<sup>47</sup> For example, s 125.26 (aggravated murder); s 158.25 (welfare fraud); s 130.65 (sexual abuse).

21 For an example from English law, s 44 of the Serious Crime Act 2007 provides: “A person commits an offence if—(a) he does an act capable of encouraging or assisting the commission of an offence; and (b) he intends to encourage or assist its commission.” At least there is a heading at the top of the section of “Intentionally encouraging or assisting an offence”, so we know what to call this inchoate offence. Of course, we can generally work out what an offence will be about from the title of the Act. So an offence under the Building (Scotland) Act 2003 is likely to have something to do with a breach of building regulations. Things are not so simple under a criminal code, and indeed, many other criminal law statutes have titles which are less than helpful. Prior to becoming an academic, the author worked as a Procurator Fiscal depute (a Crown prosecutor). On one occasion, included in the list of previous convictions for a particular accused person was a reference to breach of a provision of the Civic Government (Scotland) Act 1982. This Act covers a miscellany of offences: hence the conviction could have been for operating a taxi without a licence;<sup>48</sup> giving a false name and address when selling something to a second-hand dealer;<sup>49</sup> being a prostitute and loitering, soliciting or importuning in a public place;<sup>50</sup> urinating or defecating in circumstances likely to cause annoyance;<sup>51</sup> or being drunk and incapable of taking care of oneself in a public place.<sup>52</sup> Since the offence for which the accused was appearing in court was a breach of the peace of a (minor) sexual nature, the court was concerned to know whether the earlier conviction was for “the taking, making, distributing, showing or having in one’s possession any indecent photograph of a child” (proscribed by s 52 of the 1982 Act). In the event, the breach was for the more innocuous s 48 (for allowing one’s dog to deposit its excrement upon a footpath).

22 It is, then, important that offences be referred to by a specific *nomen iuris*, rather than merely as “a breach of section 42 of the Criminal Code”, and the easiest way of ensuring this is to have the name of the offences included in the wording of the sections themselves.<sup>53</sup> This is the approach taken in the Scottish Draft Criminal

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<sup>48</sup> Section 21 of the Civic Government (Scotland) Act 1982.

<sup>49</sup> *Ibid*, s 26.

<sup>50</sup> *Ibid*, s 46.

<sup>51</sup> *Ibid*, s 47.

<sup>52</sup> *Ibid*, s 50.

<sup>53</sup> As Eric Clive, one of the drafters of the Scottish criminal code, has explained, naming each of the code’s offences was designed to be “an aid in transparency, record-keeping and reporting at all stages of the criminal

Code. For instance, s 41(1) states: “A person who attacks another person, presents a weapon at another person in a menacing manner or uses force against another person, without that person’s consent, is guilty of the offence of assault”. Likewise, according to s 42: “A person who intentionally or recklessly causes injury to another person without that person’s consent, is guilty of the offence of causing unlawful injury.” The Code of the Australian Capital Territory highlights the name of the offence within each of its provisions. For example—

“A person commits an *offence* (‘theft’) if the person *dishonestly* appropriates property belonging to someone else with the *intention* of permanently depriving the other person of the property”,

and—

“A person commits an *offence* (‘robbery’) if—(a) the person commits theft; and (b) when committing the theft, or immediately before or immediately after committing the theft, the person—(i) uses force on someone else; or (ii) threatens to use force then and there on someone else . . .”<sup>54</sup>

23 As well as accurate labelling, each offence ought to describe a particular form of wrongdoing, so that the public, the offender and those involved in the criminal justice system know the sort of behaviour of which the accused is guilty. The label given to an offence and the sentence imposed are often the only information to which a judge has access when assessing a list of previous convictions.<sup>55</sup> Ideally, the name of the crime should reflect the gravity and nature of the wrong the accused has committed; as previously noted, the failure to label intentional killing as “murder” contributed to the downfall of the New Zealand Crime Bill 1989. The common law crime of “breach of the peace” in Scots law has been much criticised over the years for being ill defined, and for encompassing too diverse a range of behaviours.<sup>56</sup> The High Court of Justiciary has narrowed the ambit of

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process.” See Clive, “Drafting the Law on Sexual Offences: A Comparison of the Draft Criminal Code For Scotland and the Sexual Offences Act 2003”, (2003) *Juridical Review* 55, at 61.

<sup>54</sup> Sections 308 and 309, respectively. Emphases in original.

<sup>55</sup> See Chalmers and Leverick, “Fair Labelling in Criminal Law”, (2008) 71 *Modern Law Review* 217–246, for a discussion of the importance of accurate offence labelling.

<sup>56</sup> See Ferguson, *Breach of the Peace* (Edinburgh University Press, 2013); Christie, *Breach of the Peace* (Butterworths, Edinburgh 1990); Gane,

this crime in recent years, so that conduct will only now be regarded as a breach of the peace if it is “severe enough to cause alarm to ordinary people and threaten serious disturbance to the community”.<sup>57</sup> Its application has also required to be limited by the provisions in the European Convention on Human Rights relating to freedom of expression, and of assembly and association.<sup>58</sup>

24 While these attempts to narrow the focus of the crime are to be welcomed, it remains the case that breach of the peace covers an overly broad range of anti-social behaviour.<sup>59</sup> Enactment of the Scottish draft code would restrict its ambit still further, such that the accused must have caused a disturbance by acting in a way which a reasonable observer would regard as “violent, aggressive, or disorderly”.<sup>60</sup> Other forms of conduct which would currently be regarded as breaches of the peace are separated by the draft code into other, distinct offences, such as that of “violent and alarming behaviour” (where the accused has caused fear, alarm or significant distress to another person)<sup>61</sup> and “intrusive and alarming behaviour” (to include stalking, following, watching and spying upon a person).<sup>62</sup> These innovations were justified by the code team on the basis that the principle of fair labelling requires that precise notice be given of the conduct being proscribed by the criminal law.<sup>63</sup>

25 Whatever the shape of the final draft, codifiers must ensure that it conforms to the principle of legality; its provisions should not be retrospective in application and should be drafted with sufficient clarity and precision to enable citizens to know in advance whether their conduct is subject to sanction.<sup>64</sup> Justice and equality are often regarded as being of more relevance to criminal procedure than to the

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Stoddart and Chalmers, *A Casebook on Scottish Criminal Law* (Greens, Edinburgh, 2001) at 554 on.

<sup>57</sup> *Smith v Donnelly* 2001 SCCR 800, at 807 per Lord Coulsfield.

<sup>58</sup> Articles 10 and 11, respectively. For the impact of the Convention on the crime of breach of the peace see *Jones v Carnegie*; *Tallents v Gallacher* 2004 SCCR 361 and *Quinan v Carnegie* 2005 SCCR 267.

<sup>59</sup> See also *HM Advocate v Murray* 2007 SCCR 271.

<sup>60</sup> Section 92 of the *Draft Criminal Code for Scotland* (*supra*, note 2).

<sup>61</sup> *Ibid*, s 49.

<sup>62</sup> *Ibid*, s 50.

<sup>63</sup> *Ibid*, commentary to s 49. See also the commentary to s 50. Similar statutory offences have now been enacted: see the Criminal Justice and Licensing (Scotland) act 2010, ss 38 and 39.

<sup>64</sup> See also art 7 of the European Convention on Human Rights.

substantive criminal law, but it is axiomatic that crimes should be defined in general terms, in the sense of not targeting particular groups for what they are, as opposed to for what they have done. Code drafters must check that no provision discriminates on specious grounds relating to factors out-with an individual's control, such as race, colour, gender, sexual orientation or disability.

### **Sentencing provisions**

26 Mention has already been made of the need for a gradation of offences within the code. Offence grading is also important in relation to sentencing. Currently in Scots criminal law, which is in large part based on the common law, the maximum penalty for murder, theft, assault, robbery, and breach of the peace is the same: namely, "life imprisonment". In practice, this is the mandatory penalty for murder, but is largely theoretical in relation to most of the other crimes listed. Nevertheless, it remains the case that the only limiting factor for each of these crimes is the sentencing power of the court which hears the case. The High Court of Justiciary, the most senior domestic criminal court in Scotland, can (in theory) sentence someone convicted of any common law crime to life imprisonment. Having the same maximum sentences for breach of the peace, on the one hand, and murder or robbery, on the other, fails to reflect the gravity of the latter types of offences. The Scottish draft code suggests statutory maxima for each offence, and provides six offence grades (labelled "A" to "F"). Paul Robinson has criticised the American Model Penal Code for having a similar number of categories, on the basis that where there are only a small number of grades, the judges have too much scope in selecting the appropriate sentence.<sup>65</sup> In retrospect it might have been preferable to have had a more refined sentence structure in the Scottish code.

27 Codifiers must also determine the most appropriate location for sentencing provisions. Suppose we have an offence of "causing unlawful injury", which we define as follows—

"A person who intentionally or recklessly causes injury to another person without that person's consent, is guilty of the offence of causing unlawful injury."<sup>66</sup>

28 There are several options for indicating the maximum penalties which can be imposed for a breach of this section. One could simply add a sentence provision at the end of the section itself:

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<sup>65</sup> Robinson (*supra*, note 20) at 247.

<sup>66</sup> This is based on s 42 of the Scottish draft code (*supra*, note 2).

- (1) A person who intentionally or recklessly causes injury to another person without that person's consent, is guilty of the offence of causing unlawful injury.
- (2) A person guilty of an offence under this section shall be liable—
  - (a) on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine, or to both.
  - (b) on summary conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding level 5 on the standard scale or to both.<sup>67</sup>

29 This has the advantage of being self contained; the reader does not need to jump from the offence provision to a penalties schedule. It is, however, rather unwieldy. Including a penalty provision in each offence creating section adds considerably to the length of the code. It also involves much repetition, since there will be many offences which have the same maximum penalties. If an offence is one which can be prosecuted on indictment as well as on summary complaint, the space taken up by the penalty subsections is considerable. In the above example, twice as many words are used to describe the penalty as are employed describing the offence itself. As an alternative, the section could state—

- (1) A person who intentionally or recklessly causes injury to another person without that person's consent, is guilty of the offence of causing unlawful injury.
- (2) A person guilty of an offence under this section shall be liable to a category C penalty.

30 The categories of penalty would then be given in a schedule—

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<sup>67</sup> The current standard scale in Scotland is as follows: Level 1: £200; Level 2: £500; Level 3: £1,000; Level 4: £2,500 and Level 5: £5,000 (by virtue of s 225 of the Criminal Procedure (Scotland) Act 1995).

Category of penalty	Maximum penalty on indictment	Maximum penalty on summary complaint
A	Life imprisonment	Not applicable (triable only on indictment)
B	20 years' imprisonment or a fine or both	12 months' imprisonment or a fine not exceeding level 5 on the standard scale
C	10 years' imprisonment or a fine or both	12 months' imprisonment or a fine not exceeding level 5 on the standard scale
Etc		

31 A third method is to say nothing at all in the offence creating section about penalties, but to have a schedule of maximum penalties (as above) and a list of which provisions attract which penalties, in a schedule—

Provision creating offence	Name of offence	Category: On indictment	Category: Summary proceedings
Section 1	Murder	Life imprisonment	Not applicable (triable only on indictment)
Section 2	Culpable homicide	20 years' imprisonment or a fine or both	12 months' imprisonment or a fine not exceeding level 5 on the standard scale
Section 3	Assault	10 years' imprisonment or a fine or both	12 months' imprisonment or a fine not exceeding level 5 on the standard scale
Etc			
Section 42	Causing unlawful injury	10 years' imprisonment or a fine or both	12 months' imprisonment or a fine not exceeding level 5 on the standard scale
Etc			

32 This option is the most economical in terms of words. There is also an advantage in having a complete list of offences and penalties. Police and prosecutors can easily see which offence options might apply, and what might be the most appropriate offence to libel, given the potential penalty. It does, however, involve the reader in having to cross-refer from the offence creating provision to the schedule of penalties elsewhere in the end of the Code). On the other hand, it is likely that anyone preparing a 21st century code will have in mind the ease with which such documents can be made available on-line. Many users, whether prosecutors, defence counsel, judiciary, police or layperson, would be likely to refer to an on-line version of the code, rather than a paper copy, and it would be easy for there to be a link from each section to the relevant part in the schedule of penalties. The Scottish draft code employs the third method, but in retrospect, having an indication of the category of penalty within each offence provision, as well as a detailed penalty schedule, would be more convenient for users of the code.

#### **Relationship to the common law**

33 Following amendment to the Canadian Criminal Code in 1955, almost all common law offences were abolished in that jurisdiction.<sup>68</sup> Likewise, the Scottish and Tasmanian codes, and the code of the Australian Capital Territory, provide that no crime can be prosecuted unless it appears within the code, or other statute.<sup>69</sup> However, both the Canadian and Tasmanian Criminal codes provide that rules and principles of the common law relating to justifications or excuses remain in force, unless altered by the codes.<sup>70</sup> In contrast, the Scottish code provides that all common law principles (including defences) would be repealed by its enactment.<sup>71</sup> Allowing the courts to continue to develop, or even create, defences does not offend against the principle of legality in quite the same way as judicial development or creation of crimes would do. It may be that a code ought to allow

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<sup>68</sup> The Canadian Criminal Code of 1892 was amended in 1955 by the addition of s 9, which abolished common law offences, with the exception of “contempt of court”.

<sup>69</sup> Australian Capital Territory’s Criminal Code 2002, s 5; Tasmanian Criminal Code Act 1924, s 6; Scottish Draft Code, s 1. Several American codes have a similar provision, for example, see the New Hampshire Criminal Code (Title LXII), s 625.6.

<sup>70</sup> Canadian Criminal Code 1985, s 8(3); Tasmanian Criminal Code Act 1924, s 8.

<sup>71</sup> See s 2(1) of the Scottish Draft Criminal Code.

scope for judicial evolution and invention of defences to fit unforeseen situations. If a person behaves in a way which most people feel ought to be criminal, but which is not covered by a provision in the criminal code, this can be rectified by the legislature amending the code to include a new offence. Little injustice is caused by allowing one offender to escape punishment in such circumstances. But convicting someone of a crime, despite most people believing that the person ought to have had a defence in the circumstances, is a major injustice. As Robinson and Darley have argued, the moral credibility of the criminal law depends on its ability to punish those who are guilty and, perhaps even more importantly, to exculpate those who lack blame.<sup>72</sup>

### Keeping the code up to date

34 One of the arguments employed by those who are opposed in principle to codification is that enactment of a code would cause the criminal law to lose flexibility.<sup>73</sup> Reference has already been made to the abortive attempts to modernise the 50-year-old Victorian criminal code, and those who are currently attempting to update the Canadian, and American Federal criminal codes can testify to the difficulties they have encountered in attempting to ensure that code provisions remain relevant to modern society. The Irish solution to this problem was contained within the legislation which established its Code Committee; s 168 of the Criminal Justice Act 2006 provided that one function of that Committee was to advise on the future maintenance of the code, following enactment. This was an important provision: if Ireland's Draft Code is enacted at some future date, this mechanism should ensure that the Irish avoid the difficulties others have faced in keeping their code relevant and responsive to new forms of seriously antisocial or harmful behaviours.

35 Paul Robinson has referred to the tendency of politicians to react to public concerns over crime by enacting the "*crime du jour*"; a new offence provision is created to proscribe conduct which could already be prosecuted using an existing crime.<sup>74</sup> Of course, most jurisdictions will have overlapping crimes, and criminal codes are not immune from

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<sup>72</sup> Robinson and Darley, "The Utility of Desert", (1997) 91 *Nw U L Rev* 453.

<sup>73</sup> See, for example, the criticisms of Farmer, and Jones (*supra*, note 8) in relation to the Scottish code project, and more generally: Expert Group (*supra* note 13) para 1.108.

<sup>74</sup> Robinson, *Codification, Re-codification and the American Model Penal Code*, in *International Conference on Codification of the Substantive Criminal Law*, Dublin, 22 November 2003, at 6, cited in Expert Group (*supra*, note 13) para 1.100.

this. These often result from codes being amended by legislatures which believe that a new crime must be created to highlight the dangers of a certain type of behaviour. As we have seen, the principle of fair labelling requires distinct wrongs to be recognised as such, but when an existing crime experiences merely a novel *modus operandi*, resources would be more profitably employed in publicising the ability of the current law to deal with the problem, rather than rushing to enact yet more law.

36 An example of the “*crime du jour*” tendency is the amendment of the Virginian Criminal Code in 1993 to create the specific offence of “carjacking”. This is committed by the—

“intentional seizure or seizure of control of a motor vehicle of another with intent to permanently or temporarily deprive another in possession or control of the vehicle of that possession or control by means of partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever.”<sup>75</sup>

37 The actions of the typical carjacker could be prosecuted instead as grand larceny.<sup>76</sup> A more recent addition to the Virginian Code proscribes the removal of an electronic or radio transmitting dog collar—again, this could presumably have been prosecuted as larceny.<sup>77</sup> The criminal code of New Hampshire includes the offence of “criminal mischief”. Similar to “criminal damage” or “vandalism” under English and Scots law, respectively,<sup>78</sup> the New Hampshire offence involves “purposely or recklessly” damaging another’s property.<sup>79</sup> Despite this, the legislature saw fit to add the offence of intentionally desecrating a US flag “while it is the property of another”.<sup>80</sup> It may be that little can be done to prevent the amendment of a criminal code to include overlapping or indeed superfluous offences, but having a well structured code at the outset, with clear offence provisions, may make this less of a problem.

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<sup>75</sup> Section 18.2–58.1 of the Virginia Criminal Code, available at <http://leg1.state.va.us>.

<sup>76</sup> *Ibid*, s 18.2–95.

<sup>77</sup> *Ibid*, s 18.2–97.1.

<sup>78</sup> See the Criminal Damage Act 1971, s 1(1) (for England) and the Criminal Law (Consolidation) (Scotland) Act 1995, s 52(1).

<sup>79</sup> Section 634.2.

<sup>80</sup> *Ibid*, s 646–A: 2.

### Conclusion

38 The Texas Penal Code contains a specific provision to aid in its interpretation, namely—

“The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.”<sup>81</sup>

39 This is in recognition of the fact that those who interpret the code include not only police, prosecutors and judges, but also defence counsel, who will strive to construe any ambiguities in drafting in a manner which is most favourable to their clients.<sup>82</sup> Codifiers should not labour under the misconception that their code will be interpreted in a fashion which is sympathetic to their intentions in drafting it, but rather should assume that it will be ruthlessly exploited to the best advantage of the accused. This paper has highlighted some of the preliminary issues which need to be addressed by would-be codifiers of the criminal law, and has offered some suggestions on code construction. Consideration of the failure of codification efforts in other jurisdictions may also help to avoid some of the pitfalls which may be encountered. While drafters may emulate the clarity of form and expression employed in some codes, much can also be learned from infelicities in the style and structure of others.

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<sup>81</sup> Texas Penal Code, s 1.05(a).

<sup>82</sup> A point which was well made by Ronald Gainer at the ISRCL conference (*supra*, note 1).