



## 'The Very Foundations of Any System of Criminal Justice': Criminal Responsibility in the Australian Model Criminal Code

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### **Abstract**

The *Model Criminal Code* (MCC) was intended to be a Code for all Australian jurisdictions. It represents a high point of faith in the value and possibility of systematising, rationalising and modernising criminal law. The core of the MCC is Chapter 2, the 'general principles of criminal responsibility', which outlines the 'physical' and 'fault' elements of criminal offences, and defines concepts such as recklessness. This paper assesses the MCC as a criminal law reform project and explores questions of how the MCC came into being, and why it took shape in certain ways at a particular point in time. The paper tackles these questions from two different perspectives—'external' and 'internal' (looking at the MCC from the 'outside' and the 'inside'). I make two main arguments. First, I argue that, driven by a 'top down' law reform process, the MCC came into being at a time when changes in crime and criminal justice were occurring, and that it may be understood as an attempt to achieve stability in a time of change. Second, I argue that the significance of the principles of criminal responsibility, which formed the central pivot of the MCC, lies on the conceptual level—in relation to the language through which the criminal law is thought about, organised and reformed.

### **Keywords**

*Model Criminal Code*; criminal responsibility; codification; coherence in criminal law.

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## Introduction

The Commonwealth *Model Criminal Code* (MCC) (Parliamentary Counsel's Committee 2009), which was developed in the early 1990s, signalled a particular 'moment' in the history of Australian criminal law. The MCC represents a high point of faith in the value and possibility of systematising, rationalising and modernising criminal law. As stated by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General which developed it (here called the 'Code Committee'),<sup>2</sup> the MCC aimed to provide Australia with 'consistency, if not uniformity' in criminal law (Code Committee 1992: ii). Criminal responsibility—the rules according to which the legal system attributes a particular act or omission to a particular individual (Lacey 2016)—was central to the reform endeavour embodied in the MCC. When the Code Committee held its first formal meeting, priority was given to the principles of criminal responsibility on the basis that these were 'the very foundations of any system of criminal justice' (Scott 1992: 351). This first set of materials would come to form Chapter 2 of the MCC, titled 'General Principles of Criminal Responsibility'. Chapter 2 was intended to 'codify' the principles of criminal responsibility (*Model Criminal Code* s 101), which were regarded as the lynchpin of the criminal law.

Measured in terms of ambition and scope, the MCC was the most significant criminal law reform project in Australia's history but, measured in terms of outcomes, the MCC has not been as significant, nor as successful, as its drafters had hoped. By modelling 'best practice' in criminal law (Goode 2004: 234), the MCC aimed to bring Australia's nine criminal jurisdictions—six state governments, two territory governments and the federal government—into some sort of alignment. This was no easy task: in the Australian Federation, most criminal law is state-based, and Australia has both common law criminal jurisdictions (New South Wales, Victoria and South Australia) and, as a result of earlier systematising efforts, jurisdictions with criminal codes (Australian Capital Territory, Northern Territory, Queensland, Tasmania, and Western Australia, as well as the Commonwealth).<sup>3</sup> Crucially, as I discuss in this paper, the common law states and the code states adopt different approaches to the principles of criminal responsibility. The drafters of the MCC attempted to resolve this issue once and for all, and to generate a centripetal force in criminal law in Australia. But, with state jurisdictions taking up the MCC provisions in a piecemeal and uneven way, it has not been thought to have had a decisive influence on the Australian criminal law landscape. As I argue in this paper, the significance of the MCC as a law reform project lies on the conceptual level, in the language through which the criminal law is understood.

This paper assesses the MCC as a criminal law reform project and explores questions of how the MCC came into being, and why it took shape in certain ways at a particular time. The paper tackles these questions from two perspectives: 'external' and 'internal'; in other words, looking at the MCC from the 'outside' and the 'inside'. I make two main arguments. First, I argue that, driven by a 'top down' law reform process, the MCC came into being at a time when other changes in crime and criminal justice were occurring, and that it may be understood as an attempt to achieve stability in a time of change. Second, I argue that the significance of the principles of criminal responsibility, which formed the central pivot of the MCC, lies in the coherence these principles provided on a conceptual level, in relation to the language through which the criminal law is thought about, organised and reformed.

This paper contains four main sections. In the first two sections, I examine the creation of the MCC via a *sui generis* law reform body, and then offer an analysis of the reasons the MCC appeared in the 1990s. In the third and fourth sections, I outline the principles of criminal responsibility contained in Chapter 2 of the MCC and critically assess their significance in the MCC. I conclude with a brief discussion of developments in relation to the MCC post-enactment, in 1995, as *The Commonwealth Criminal Code*.

### **The creation of the Australian MCC**

The creation of the MCC was the activity of an intellectual elite. It was conceived, drafted, discussed and finalised by a small circle of lawyers, public servants and politicians who were aiming for a more perfect formulation of the criminal law. Against the backdrop of a long tradition of criminal law codification projects and, with adherence to principle over policy or politics, the drafters approached work on the MCC as an opportunity to formulate 'best practice basic criminal law provisions' (Goode 2002: 163), developed free from the restrictions of a particular case and unsullied by political or policy considerations. These features of the conception and drafting of the MCC suggest that it represents 'top down' reform of the criminal law.

The MCC was the product of an unusual law reform process. In February 1987, the Review of Commonwealth Criminal Law Committee was formed with a brief to overhaul the Commonwealth criminal law (Goode 1991a). The Committee, chaired by the Hon. Harry Gibbs (the 'Gibbs Committee'), produced a draft Bill for a Federal criminal code (Review of Commonwealth Criminal Law (Australia) 1990) but this was not introduced into parliament. The work of the Gibbs Committee inspired efforts to develop a criminal code for all Australian jurisdictions and, in 1990, the Standing Committee of Attorneys-General of Australian states and territories (SCAG) put the development of a uniform criminal code for Australia on its agenda (Code Committee 1992: i). This move recognised that a number of Australian jurisdictions were undertaking or about to undertake reviews of their criminal law and, thus, that 'the time was right to consider moves towards at least consistency, if not uniformity in criminal law' (Code Committee 1992: ii). The Code Committee (Criminal Law Officers Committee), comprising representatives of each Australian state and territory, was formed as a subcommittee of SCAG, and tasked with preparing draft code materials. Early on in the process, the goal shifted from a uniform code to a model code, on the basis that this would provide the best means of 'bridging' differences between the common law and code jurisdictions in Australia (Scott 1992).

The small group of lawyers that developed the MCC were devoted to the task of crafting a more perfect criminal law as a public service. The Code Committee was an unusual body for two main reasons, relating to constitution and brief (Goode 1991a). First, Committee members were drawn from within the senior ranks of the public service as well as the legal profession, with academics engaged as consultants. Members of the public service appointed to the Committee were those who had special responsibility for advising their Attorney-General on criminal law issues (Code Committee 1992: ii). The Committee's direct connections with the government of the day—'it consisted of the very people who were in a position to push for change', in Matthew Goode's (2004: 232) words—were thought to improve the chances its proposals would be acted upon. But, by the same token, the Committee did not have a separate institutional identity and existed solely to perform the task of drafting the MCC. This fact may have contributed to the low uptake of the model provisions by Australian states. Second, the Code Committee was tasked with drafting new law rather than merely reviewing existing law and making recommendations for reform. At this time, law reform bodies existed in a number of Australian jurisdictions, including at the national level, but none was enlisted in the task of drafting a model criminal code. Taken together, these two features of the Code Committee indicate that the MCC was envisaged as an administrative project with a technical legal exercise at its core.

The MCC was intended to be a model in that it represented 'ideal law', 'devoid as much as possible of local, parochial, political considerations' (Scott 1992: 351). In this sense, the MCC is a code squarely within the Benthamite codification tradition and, in broad terms, this tradition forms the backdrop to the creation of the MCC. Jeremy Bentham, writing in the last decades of the 1700s, famously declared that law is based on universal principles which applied across time and place, and the development of the law was a rational and technical rather than cultural or political task (Lobban 1991; Postema 1986). For Bentham, the 'unwritten' nature of the English common law and the lack of transparency of its language (requiring that law be interpreted) usurped the

power of the legislature (Kayman 2004: 214-216). In Bentham's terms, and by contrast with common law ('dog law'), written (statute) law does not invite constant interpretation and re-interpretation (Kayman 2004: 217). Moreover, codification of the law had advantages beyond those of statute. Chief among these is recognition of parliamentary sovereignty. As Ashworth writes, the enactment of a criminal code makes it clear that 'the creation of offences is for Parliament alone, and that the role of the judiciary is to interpret rather than add or subtract' (1991: 420). It is on this basis that codes are held to serve an important democratic and constitutional function (Ashworth 1991; Leader-Elliott 2002). In addition, in the Benthamite tradition, the virtues of a code include simplicity, completeness and accessibility.

Codification of the common law of crime was advanced in distinctive ways by Commonwealth countries such as Australia (and Canada, India and elsewhere) (Wright 2007, 2008). As is well known, Bentham's codification efforts were more successful abroad than at home in England. The Benthamite Codes enacted around the world include the *Criminal Code Act 1899* (Qld) developed by Sir Samuel Griffith, a Queensland lawyer, judge and politician and one of the first members of the High Court of Australia (Fricke 1986). The Queensland code, which was also influenced by the civil law systems of continental Europe, provided the model for the codes of Western Australia (*Criminal Code Act Compilation Act 1913* (WA)) and Tasmania (*Criminal Code Act 1924* (Tas)). Like the MCC, this first generation of Australian codes (known as the Griffith Codes) were the product of systematising and modernising efforts. Each of the Griffith Codes devoted a section to general criminal responsibility principles, with which the principles adopted by the MCC stand in contrast, as I discuss below.

Against the backdrop of the long tradition of criminal law codification projects, the distinctiveness of the MCC as a code seems to have come down to a somewhat imprecise idea: that of the MCC as 'ideal law' and as a sort of super legislation. It was taken for granted by the drafters of the MCC that the appropriate mode or form for the reform of Australian criminal law was a code. Indeed, the Code Committee was committed to the idea of a code from the outset, but it left the precise concept of the codification to be utilised by the MCC drafters unarticulated (Gani 2005a, 2005b). This pre-commitment seems to have been in part the result of a general belief that the process of reform should closely resemble the creation of the *Model Penal Code* (MPC) in the USA and, as Goode (1991b: 6) stated at the time, this '*necessarily* [emphasis in original] involves codification in non-Code states and territories'. The MPC, drafted over a period of ten years by The American Law Institute (without government backing), had been published in 1962 (The American Law Institute 1962). Like the MCC, the MPC was intended as a model for future legislators (Farmer 2014). In addition, and as the Code Committee members were aware, at the time work on the MCC commenced, work on criminal codes had been undertaken in England, Canada (recodification) and New Zealand (Code Committee 1992: ii). This seemed to indicate that codification was occurring across the common law world. Beyond this, the idea of a model code—as both ideal law and as a kind of super legislation—seems to have fitted the spirit of the times, as I discuss in the next section.

As the mode of reform of the law—as a code—was taken for granted, the rationale for a code was largely external to the drafting process. Discussion of the MCC as a code seems to have operated mostly at the level of rhetoric. Goode, who seems to be the chief defender of the MCC, offered the most elaborate defence of the MCC as a code. Both at the time of its formulation and in the years since, Goode invoked Bentham in arguing that codification was necessary because the criminal law should be 'easy to discover, easy to understand, cheap to buy, and democratically made and amended' (1992: 15-16). For Goode, the MCC as a code modernised the law by putting the legislature in charge. Beyond invocation of democracy and modernisation, it is not clear that all the implications of law reform as codification were appreciated. Similarly, when it came to debate in parliament, the mode of the reform as a code does not seem to have been expressly considered by legislators.<sup>4</sup> Parliamentarians made references to Bentham's famous quip about common law as 'dog law', a number of legislators referenced the virtues of codification (Cleeland 1995: 1352-

53; Kerr 1995: 1349-1352), and The Hon Philip Ruddock MP referred to 'almost unanimous' support for 'the *concept* [emphasis added] of the model national Criminal Code' (Ruddock 1995: 1340), but the distinctiveness of this mode of reform of the criminal law did not garner much attention.

It is in part because the mode of reform of the criminal law as a code was taken for granted that greater attention was not given to principles of interpretation of the MCC. Chapter 1 of the MCC was intended to cover the 'mechanics of implementing a Code' (Code Committee 1992: 3) and to provide guidance on interpretation of its provisions, but it was never written.<sup>5</sup> Controversy over the interpretation clauses that had been drafted for the criminal code for England and Wales (Ashworth 1991), and uncertainty about whether principles of interpretation were a legislative or judicial responsibility, seem to have dampened the Code Committee's efforts to develop such principles. In the end, the MCC drafters relied on an analysis by Ashworth (1991) regarding the English criminal code to conclude that such principles of interpretation were not essential. As Miriam Gani (2005b: 275) suggests, the omission of general interpretation provisions is particularly surprising considering principles of statutory interpretation are regarded as settled law in Australia, and 'interpretation' legislation mandating purposive construction exist in each Australia jurisdiction (for example, *Acts Interpretation Act 1901* (Cth)). In the years since 1995, the absence of the principles of interpretation from *The Commonwealth Criminal Code* has been regarded as one of its weaknesses (Gani 2005b).<sup>6</sup> Gani (2005b: 279) describes it as a 'legal paradox' that a 'legislative-centric' approach to the criminal law did not also entail legislation on interpretation. I return to this issue of the absence of principles of interpretation below.

The efforts of the drafters and others involved in the Code Committee bore fruit in what was initially a short draft criminal code. The Criminal Code Bill 1994 containing a revised version of the MCC as an appendix was introduced to the Commonwealth parliament in June 1994. At this point, the MCC contained only Chapter 1 (containing just one clause) and Chapter 2. That same year, the Commonwealth, state and territory Premiers' Leaders Forum endorsed the MCC as a project of national significance and unanimously gave commitments to fostering its implementation by 2001 (Goode 1997). Against a political and constitutional backdrop often characterised as 'uncooperative federalism', the MCC was carried by the momentum of exceptional state-territory-Commonwealth collaboration, receiving largely positive if brief welcome across the political spectrum in the Commonwealth parliament (Spindler 1994: 352; Vanstone 1994: 351). The Criminal Code Bill 1994 became the *Criminal Code Act 1995* (Cth), with what was now *The Commonwealth Criminal Code* included as a Schedule. At this point, it was confidently anticipated by both politicians and many legal professionals that the model offence and defence provisions would have a decisive influence on criminal law in Australia and be implemented progressively by all Australian states (Crowley 1994: 2382).

### **Why the 1990s? Stability in a time of change**

Although it might have appeared otherwise to the drafters—for whom the MCC's time had come—the creation of a Commonwealth code was not a 'natural' act: rather, it was contingent and political. So the question arises as to why the MCC was developed in the 1990s; why was a major reform of the criminal law perceived to be valuable at that time? Here, I suggest that the MCC promised stability in what was perceived to be a time of significant change. The interplay of four factors generated this perception of significant change. These factors put pressure on existing arrangements of primarily state-based criminal law and generated momentum for the reform in Australia.

The first factor was the changing reality of crime. When discussion about a criminal code commenced, the reality of crime in Australia was perceived to be changing. Trans-jurisdictional crime, particularly drug crimes and organised crime, was impacting on the Australian criminal landscape. The Australian Royal Commission of Inquiry into Drugs (1980) (known as the

'Williams Commission') had called for uniform drug trafficking legislation (Bush 2009), and drug policy had risen high on the political agenda, in large part because of the growth in the use of illicit drugs, including heroin (Bennett 2008). In addition, computer crime had come to be perceived as a serious threat. Developments such as these heightened political awareness that crime does not respect jurisdictional boundaries (Crowley 1994: 2379). In the then Minister for Justice The Hon Duncan Kerr's words, 'criminal activity does not recognise the boundary lines drawn on the map of Australia' (quoted in Easterbrook 1993: 9). By the time discussion about a model criminal code was under way, the old adage that 'all crime is local' was under some pressure.

The second factor contributing to a perception of change was the changing reality of criminal justice. There were two aspects to this: changes in relations between parts of the criminal justice system; and the changing relationship between state and Commonwealth criminal justice systems. With regard to the first aspect, the last decades of the twentieth century were a time of flux. The size of criminal justice systems had grown significantly, and policing practices and increasing prison numbers were prominent political issues. Further, both the states and the Commonwealth recognised the escalating cost of criminal justice as an issue (Vanstone 1994: 351). In spruiking the MCC, the Minister for Justice emphasised that it would remove barriers facing law enforcement officers investigating interstate crimes and cut down the cost of administering justice (Easterbrook 1993). The 'front end' of criminal justice—law enforcement—was increasingly regarded as an important part of the justice system, compared with the 'back end', the courts. In touting the benefits of a series of national law reforms, including the MCC, the then Prime Minister, The Hon Paul Keating, called for a 'more sophisticated emphasis on prevention' rather than reactive responses to crime (Willox 1994: 4). The relationship between the judiciary and the legislature was also changing. The end of the 1980s and the early 1990s brought with it the spectre of 'judicial activism'.<sup>7</sup> Concern about 'judicial activism' in this period can be mapped to a corresponding desire on the part of the legislature to 'reassert' dominance over the judiciary through, for instance, codification of the law.

An additional aspect of this change in the criminal justice landscape related to the evolving relationship between state and Commonwealth criminal justice systems. In 1901, at the time of Federation, states had retained power to pass criminal laws, but, by the end of the 1980s, the scope of Commonwealth criminal law had grown significantly. In addition to laws enacted under specific constitutional heads of power such as customs (drug importation) and telecommunications (computer crimes), ratification of various international treaties had enabled the Commonwealth to legislate in new areas under its external affairs power (*Commonwealth of Australia Constitution Act* s 51(xxix); *Polyukhovich v Commonwealth* (1991) 172 CLR 501). While state laws continued (and continue) to cover 'core' offences such as murder, sexual assault and assault, the Commonwealth had enacted more specialised offences—in the areas of the environment and taxation, for instance—and also covered the field of high profile crimes such as drug importation.

The effect of the Commonwealth's growing legislative reach constitutes the third factor generating a perception of significant change: the expansion of Commonwealth criminal law exacerbated perceived problems of Federalism for criminal justice in Australia. By the early 1990s, the growth in the number of Commonwealth offences sitting *outside* the *Crimes Act* 1914 (Cth) was burgeoning. Although these offences were regarded as part of the Commonwealth criminal law, as a result of sections 79 and 80 of the *Judiciary Act* 1903 (Cth), they were subject to the procedural law of the state in which the offence was tried. The existence of these extra-mural offences was perceived as adversely affecting the rule of law. Several authors pointed to the difficulties of charging different individuals with the same (Commonwealth) offence, yet have them subjected to different procedural rules depending on the state jurisdiction in which they were charged (Colvin 1991; Goode 1997). When the MCC was enacted, the fact that it ensured that, 'for the first time since Federation those accused of Federal offences will be dealt with under the same principles' was lauded (Crowley 1994: 2379), with the Minister for Justice, The Hon

Duncan Kerr, stating that the Code advanced 'true equality before the law in Australia' (Kerr 1994).

The fourth and final factor giving rise to a perception of change was a more nebulous but strongly felt need for modernisation of the criminal law. The need for modernisation was expressed by politicians as well as MCC drafters and commentators. This need for modernisation revolved around the value of bringing principles and practices up to date, and concern that multiple criminal legal regimes were both unnecessary and unjustified, acting to impede economic and national development. The 'centuries of development, much of it ad hoc' of the criminal law had generated 'loopholes and gaps' that an 'in depth and principled' review of the criminal law could address (Griffin 2002-2003: 264). Part of this modernisation was the streamlining of the criminal law across code and common law jurisdictions, with the MCC labelled 'one of the most ambitious legal simplification programs ever attempted in Australia' (Explanatory Memorandum Criminal Code Bill 1994: 1). Differences between Australian jurisdictions regarding the age of criminal responsibility and the age of consent were touchstone issues, decried by the Attorney-General for Queensland as 'lunacy or at best illogicality' in a country as 'homogenous as Australia' (Wills 1990: 111). In Parliament, reference was made to a general community desire to unify laws as far as possible (Slipper 1995: 1353). Echoing the ideas of nation-building associated with the criminal codes of Queensland and Western Australia, for instance, uniform criminal law was said to be necessary as 'we become closer together and as we seek to operate as a nation' (Ruddock 1995: 1337).

Beyond the criminal law and criminal justice, the 1990s was a period marked by several other major, national legal developments, which reveal that the momentum for reform extended beyond the criminal law. These developments were part of a raft of economic and other reforms aimed at market liberalisation to ensure efficiency and growth. The early 1990s saw the enactment of 'corporations legislation' throughout Australian jurisdictions (such as *Corporations Act 2001* (Cth)). Following 'the excesses of the 1980s', these reforms focused on responsibility and accountability, broadening duties of directors, and enhancing shareholders' rights (Rose 1995). This was also the period of taxation reform and codification of consumer credit contracts. While the economic case for uniform or consistent criminal law might seem less self-evident than for corporations law, debate at the time included a number of references to the economic benefits associated with a uniform criminal law: the ability of lawyers to work in more than one jurisdiction; and the accommodation of an increasingly mobile populace involved in business and recreation across state and territory boundaries (Kerr 1995: 1332). In further evidence of this trend towards uniformity, at about the same time as the MCC was being drafted and debated, the uniform 'evidence legislation' producing standard rules of evidence to be enacted into each jurisdiction was also being formulated. In general, law reform was depicted as key to social progress and growth: Prime Minister The Hon Paul Keating connected it to ensuring Australia could count itself as a 'great social democracy' (quoted in Willox 1994: 4).

Outside Australia, multiple developments in the international legal order arguably enhanced the need for the harmonisation of laws within Australia. By the 1990s, international human rights schemas and international criminal justice matters—with the state as defendant—were beginning to place pressure on domestic criminal justice practices (such as in *Dietrich v R* (1992) 177 CLR 292).<sup>8</sup> At the same time, perceptions of increasing interconnectedness—typically going under the umbrella concept of globalisation—were making subnational divisions in countries such as Australia less significant. In this sense, the MCC project represents something of the *Zeitgeist* of the 1990s: it involved the re-inscription of boundaries—at a national rather than subnational level—and the 'fixing' of the internal or domestic in the face of profound destabilising, global change. 'Fixing' such boundaries at the national level presented a stronger and more relevant front, and the MCC seemed to include an implicit promise to equip the Australian nation for the challenges of a new century.

## Criminal responsibility in the Australian MCC

The general principles of criminal responsibility, comprising Chapter 2, form the heart of the MCC. These principles provided the basis on which the MCC offered 'consistency, if not uniformity' in the criminal law (Code Committee 1992: ii). Here, I show how the principles of criminal responsibility provided the central pivot for the systematisation and rationalisation of the criminal law that the MCC embodied.

With its presentation of the principles of criminal responsibility, Chapter 2 was regarded as the most important chapter of the MCC. As stated in the first reading speech introducing the Criminal Code Bill in the Commonwealth Senate in 1994, the general principles of criminal responsibility are 'the foundations of the Commonwealth criminal law' (Crowley 1994: 2379). For the Code Committee, 'starting at the beginning' involved starting with the principles of criminal responsibility (Goode 1997: 269). Chapter 2 was the first part of the MCC to be prepared, borrowing from the earlier statement on principles of criminal responsibility drafted by the Gibbs Committee. It was intended that the principles of criminal responsibility would be capable of adoption by all jurisdictions (Code Committee 1992); that is, they would not bear the stamp of any particular jurisdiction (although they bore the stamp of the common law in their embrace of subjectivism, as discussed below). The drafters held these principles as sacred, stating that, 'in principle', the 'basic rules of criminal responsibility' should not vary from state to state (Code Committee 1992: 5). Chapter 2 was left largely unchanged between initial draft and enactment, with the exception of the law regarding intoxication.<sup>9</sup>

The MCC adopted what has been labelled a 'compound' approach to criminal responsibility: that is, criminal responsibility is the result of proof of all the elements of an offence, and disproof or failure of any defences open on the facts (Leader-Elliott 2002, 2009a). The central provision of Chapter 2, *Model Criminal Code* s 201, which Leader-Elliott describes as its 'primary analytical achievement', relates to elements of an offence (Leader-Elliott 2002: 31). This provision defines all offences as comprising 'physical' and 'fault' elements (terminology which replaced the common law states' reliance on the terms *actus reus* and *mens rea*). The 'physical elements' are defined as conduct, circumstance or result (*Model Criminal Code* s 202). 'Fault elements' are intention, recklessness, knowledge or negligence (*Model Criminal Code* s 203). The MCC provides that a fault element attaches to each physical element unless the legislature imposes strict or absolute liability for that element (the presumption of fault) (*Model Criminal Code* ss 204-205). Chapter 2 also defines 'voluntariness', and itemises circumstances in which there is no criminal responsibility (children aged under 10, children aged between 10 and 14, and mental impairment) (*Model Criminal Code* ss 202.2.1, 301, 302). Provisions relating to extensions of liability, corporate criminal responsibility, proof of criminal responsibility, and geographical jurisdiction make up the rest of Chapter 2.

Crucially and controversially, the MCC oriented the principles of criminal responsibility around subjective fault, the idea that criminal fault should depend on what the accused himself or herself 'knew, believed or intended at the time of the conduct' (Code Committee 1992: 21). Reflecting this orientation and the ability of the drafters to impress their views on the product of the reform process from the 'top down', the MCC provided that the default fault element for a criminal offence is recklessness, which was defined following the *Model Penal Code*, as the advertent taking of a substantial and unjustifiable risk (*Model Criminal Code* s 203.5). The language of physical and fault elements (rather than the language of the existing criminal codes of will, accident and chance) (Colvin 1991), and the embrace of subjectivism, entailed a conscious rejection of the principles of criminal responsibility as they applied in the Australian code jurisdictions. Reflecting their nineteenth century origins, the criminal codes of states such as Queensland and Western Australia adhered (and continue to adhere) to objective fault principles, where criminal responsibility is negated by accident, or honest and reasonable mistake, or by automatism (Colvin



1991). This decision by the MCC drafters disappointed lawyers from code states: as one such commentator commented, the MCC opted for 'systematic subjectivism' (Colvin 1991: 85).

The principles of criminal responsibility contained in Chapter 2 had several sources. First, Chapter 2 was modelled on the corresponding article of the US *Model Penal Code* (from which the title of the chapter came) (Leader-Elliott 2002, 2006). Second, the elements of offences provisions in Chapter 2 also owed a debt to Justice Brennan's judgment in *He Kaw Teh* ((1985) 157 CLR 523) which, in re-inscribing the significance of the common law presumption that statutory offences require proof of fault, provided a template for the elements of criminal responsibility (Goode 2002). Third, as mentioned above, Chapter 2 also reflected the recommendations of the Gibbs Committee (Review of Commonwealth Criminal Law (Australia) 1990), which had drafted principles of criminal responsibility that would not involve 'radical reform', but would 'restate existing principles' and 'fill gaps, remove obscurities and correct anomalies' (1990: [3.12]). Fourth, and most significantly, Chapter 2's antecedent was the common law on criminal responsibility. The Code Committee presented the decision to opt for the common law and the principle of subjective fault as bringing Australia into line with other nations, noting that the US, English, Canadian and New Zealand codes had all adopted the subjective fault approach (Code Committee 1992).

Criminal responsibility provided the central pivot of the systematising and rationalising effort that the MCC embodied. There are two aspects to this point. The first relates to efforts to offer an exhaustive coverage of criminal responsibility principles. Chapter 2 was intended to 'codify' the principles of criminal responsibility (*Model Criminal Code s* 101). Broadly speaking, the principles of criminal responsibility contained in the MCC correspond to what had come to be known as the 'general part' of criminal law; the backbone of criminal law in common law systems (that part of criminal law that is 'generalisable', as opposed to specific offences and defences, which comprise the 'special part' of criminal law) (Fletcher 2000). Individual responsibility is central to the general part of the criminal law, and organises the distinction between it and the special part (Farmer 2016; Lacey 2016). Although the construction of a 'general part' of criminal law has been a largely academic endeavour, beginning with the growth of the legal-philosophical tradition of criminal law theory in the post-WWII period, the MCC and other codification projects harnessed scholarly resources (such as Glanville Williams' (1961) seminal text *Criminal Law: The General Part*, first published in 1953) to support and legitimate the professional activity of rationalising criminal law in code form (Bronitt and Gani 2009; Horder 2003).

The second way in which the principles of criminal responsibility were central to the MCC's systematising and rationalising effort concerns the orientation of principles of criminal responsibility around subjective fault. The MCC was intended as a definitive adjudication between subjective and objective fault in criminal law—and between the common law states' and the code states' approaches to criminal responsibility—in favour of the former. While one common law commentator labeled the criminal responsibility principles contained in the MCC 'conservative or traditional' on the basis that they had been articulated by academic commentators in the post-WWII era (Leader-Elliott 2002: 31), given the division between Australian criminal jurisdictions, the triumph of subjectivism could not be taken for granted in the Australian context. Following careful consideration, the MCC drafters embraced the common law approach to responsibility and subjective fault. Subjectivism was seen to represent the modern criminal law, with the Code Committee noting that the trend over time had been towards a strengthening of the presumption that subjective intent is part of all offences (Code Committee 1992). Subjectivism is significant because, in its modern form, it is seen as a means of respecting freedom of action and treating individuals as moral agents (Horder 2003). As such, it is held up as a constraint on criminalisation: a way of establishing a limit on permissible state action. Although the strength of this limitation on the scope of the criminal law has been questioned (Farmer 2016; Lacey 2016), in line with the tradition of codification referred to above, it seems that the drafters of the MCC intended subjective fault to operate in this way.

With Chapter 2's principles of criminal responsibility as the central pivot, the remainder of the MCC was intended to 'cover the field'. The other chapters of the MCC, which were drafted progressively throughout the 1990s, covered the 'core' or 'mainstream' criminal law, such as sexual offences, and more peripheral parts of the corpus, such as conspiracy to defraud.<sup>10</sup> Although there were some notable omissions,<sup>11</sup> and while it was always intended that a significant part of the corpus of Commonwealth criminal law would continue to sit *outside* the MCC, the MCC aimed to provide model offence and defence provisions in the major areas of substantive criminal law. This intention to 'cover the field' was an important dimension of the MCC as a criminal law reform project: if the MCC was to provide the centripetal force in criminal law its drafters anticipated at the time it was created, it would have to be extensive if not exhaustive in its coverage of the law. As the Code Committee stated confidently, 'the Code will eventually provide model provisions capable of replacing all common law offences and Crimes Act provisions in the common law jurisdictions, and the Criminal Code provisions in the Griffith Code jurisdictions' (Code Committee 1992: 3).

### **Understanding the significance of criminal responsibility in the MCC**

As discussed in the previous section, the principles of criminal responsibility were central to the reform effort embodied by the MCC. How are we to understand the significance of criminal responsibility principles in the MCC? Taking into account what I identify as three dimensions of the MCC as a law reform project, I suggest that criminal responsibility provided formal coherence in the MCC, but that this coherence was realised on a conceptual level. By this, I mean that criminal responsibility principles realised linguistic uniformity, representing a common conceptual language for criminal law and criminal lawyers.

On a general level, the MCC is an instance of modern criminal law, and this affects the significance of criminal responsibility in the MCC. Criminal responsibility occupies a cardinal place not only in the MCC—and, as discussed above, was central to the modernisation that the MCC embodied—but also in modern criminal law. As Lacey argues, individual responsibility for crime is the lynchpin of the modern criminal law (Lacey 2001). As critical criminal responsibility scholars suggest, this has several effects. As Farmer (2016) argues, responsibility (alongside jurisdiction and codification) is thought to be central to the conceptual order and the self-understanding of the criminal law in the modern period. In the modern era, the ascription of responsibility has become 'a technical-legal question, a matter of positive law' (Farmer 1997: 159); that is, a matter internal to the law itself. Criminal responsibility has also been used as a means of defining legal personhood: the issue of who is the proper subject of the law (Farmer 2016). Thus, orienting the MCC around criminal responsibility places the responsible subject at the centre of the MCC, and of the criminal law. With a juridical model of the responsible person—the individual, reasoning subject (Farmer 2016)—at its heart, criminal law becomes a plank of the modern political and legal order, in which individuals are held to account for their conduct and for creating risk, and where law is oriented to the goal of securing civil order (Farmer 2016).

In addition, on a specific level, arguably because the precise idea of codification informing the development of the MCC was not fully worked out, the principles of criminal responsibility were required to bear the weight of the task of marking the intended transition to modern Australian criminal law. As mentioned above, Chapter 2 was intended to 'codify' the principles of criminal responsibility (*Model Criminal Code* s 101), and to present a definitive adjudication between subjective and objective fault in criminal law, and between the common law states' and the code states' approach to criminal responsibility. As I suggested, the idea of codification informing the MCC reduced to a rather nebulous idea of 'ideal law' and super legislation, and this left criminal responsibility to draw a line between the criminal law past, on the one side, and the present and future, on the other side. As Farmer writes, codes allow for the 'logical control of coherence, the replacement of diachronic by synchronic logic' (2014: 382). The statement of principles of criminal responsibility in Chapter 2 of the MCC resets the clock: going forward, it is to be this

(exhaustive) statement of criminal responsibility which is to underpin the exposition of the criminal law in the MCC and the terrain of criminal law as a whole.

Further, as mentioned above, the MCC did not contain any general interpretation provisions, and this amplifies the significance of criminal responsibility in the MCC. Without general interpretation provisions—and against a wider national background marked by the absence of formally entrenched rights protections in Australia—it is the principles of criminal responsibility that are presented in the MCC as necessary and sufficient guides to parliament in its task of drafting criminal offences. This role for the principles of criminal responsibility in part reflects that, by the 1990s, criminal statutory interpretation had come to entail interpretation consistent with ‘the general part’ of criminal law, not just with principles of statutory interpretation such as strict construction (Ashworth 1991), a point illustrated by the influential decision of *He Kaw Teh* ((1985) 157 CLR 523) referred to above. It is the principles of criminal responsibility that structure and order the law to promote internal coherence. In the MCC, criminal responsibility is the chief element of the internal coherence of the MCC; that is, criminal responsibility is the main way in which the MCC measures itself against itself.

These three dimensions of the MCC as a law reform project taking place in a particular time and place—at the general level, as an instance of modern law, and, more specifically, as a project of codification unsupported by a thoroughly worked out idea of codification or general interpretation provisions—come together to a single point. The significance of criminal responsibility in the MCC is that it realised conceptual coherence: the general principles of criminal responsibility in the MCC offer linguistic uniformity; that is, they provide a common conceptual language for criminal law and criminal lawyers. While the MCC was trumpeted as bringing about consensus among criminal law experts from each jurisdiction on the principles of criminal responsibility and model offence, defence and procedure provisions (Howie 1996; Rose 1995), this consensus revolved around the ‘terms of the debate’—the way in which the criminal law is thought about, organised and reformed—and this centred on criminal responsibility. The MCC achieved a conceptual shift in the way in which the criminal law was to be understood, with criminal responsibility at the core of the criminal law, and subjective fault at the core of criminal responsibility.

It is as a language for understanding the criminal law that criminal responsibility is significant. As Goode (1991a: 45) writes in relation to the MCC, consistency in the criminal law demands that ‘even if the various jurisdictions agree to disagree, at least they should be speaking the same language’. So, as Goode goes on to state, even if Australian jurisdictions might disagree on the basis for criminal fault, the inclusion of default fault elements will mean they (the legislature) have to say so (Goode 1991a: 45). It is this act of ‘saying so’ that is crucial: disagreement must be stated. The ways in which the principles of criminal responsibility control and order meaning on a conceptual level is their achievement in the MCC. As Martin Kayman argues in relation to Bentham’s linguistic theory and practice, Bentham relies on a ‘mutual identity between the law of language and the language of law’ (2004: 218). Similarly, here, it is not just that enacting the general principles of criminal responsibility in the MCC was ‘an expression of confidence in the aim of uniformity’, as stated by the Minister for Justice (Kerr 1995: 1359), but, rather, that this expression constitutes that uniformity.

One of the implications of this analysis of the conceptual significance of criminal responsibility in the MCC relates to a critique often made of Chapter 2. This critique concerns the default status of the principles of criminal responsibility. Although the Code Committee subscribed to a belief in the foundational nature of the MCC’s principles of criminal responsibility, and stated that parliament should not make a decision to override them lightly (Code Committee 1992), there was nothing in the MCC to prevent this occurring. Further, there are no principles to ensure consistent decision-making, or to outline priority between principles (Bronitt and Gani 2009). Indeed, the principles of criminal responsibility contained in the MCC apply only in the event that

parliament is unclear in its intentions regarding new criminal offences (Leader-Elliott 2009a). This means that the ‘fundamental’ principles of criminal responsibility are merely default fault principles, unable to exert any real limiting pressure on the legislature.<sup>12</sup> This leads Leader-Elliott to conclude that Chapter 2 provides the legislature with a ‘set of instructions for subverting common law principles’ of criminal responsibility (Leader-Elliott 2006: 401, 2009a: 232). But, according to my analysis, what is vital to appreciate is that, as a ‘set of instructions’, criminal responsibility represents both what should be done *and* how it might be subverted; in the observance or the breach, criminal responsibility governs the way in which the criminal law is understood.

## Conclusion

The enactment of a modified version of the MCC as *The Commonwealth Criminal Code* was said to herald a ‘new era’ not just for Commonwealth law but also for the criminal law of Australia generally (Crowley 1994: 2382). The MCC—the content of which had been so thoroughly discussed at state and Commonwealth level in the drafting process that the Bill was considered ‘remarkably uncontentious’ (Williams 1995: 1348)—facilitated cooperation between the states and territories and the Commonwealth. Under the auspices of the unique law reform body, the Code Committee, the Commonwealth was able to act as a leader in criminal justice which had been exclusively a field of state power, and individual states were left free to legislate to adopt the provisions of the MCC as enacted. In Commonwealth parliamentary debates, the MCC was considered a ‘landmark in cooperative federalism’ (Williams 1995: 1349), as well as a demonstration that Federalism works, and a ‘fitting project’ with which to mark the then forthcoming centenary of Australian Federation, in 2001 (Crowley 1994: 2380). In what, with hindsight, seems overly optimistic or perhaps naive, there was even a suggestion that raising crime to the national stage and encasing it in *The Commonwealth Criminal Code* would immunise it from media sensationalism and populist concerns, thereby reducing pressure on politicians and permitting ‘more rational debate’ on criminal justice policy than that allowed at a local level (Melham 1995: 1343-1344).

The ‘new era’ heralded by the enactment of the version of the MCC has not yet arrived. In general, the MCC has become a reference point rather than the benchmark for criminal law reform in Australia, although it did not even serve as a reference point (at least expressly) in the proposed reform of the Queensland *Criminal Code* in the mid-1990s (Kift 1997). While *The Commonwealth Criminal Code* has been altered and expanded—most profoundly, via rewriting and expansion of terrorism provisions (Goode 2011)—its take up rate has disappointed its drafters (Goode 2004). Only the Australian Capital Territory and Northern Territory have adopted Chapter 2 (in 2002 and 2006, respectively) (Leader-Elliott 2002: 29). Some sets of provisions, such as those relating to self-defence, have been adopted by some states, such as NSW (Gani 2005b). This approach has been referred to as ‘picking the eyes out’ of the Code (Griffin 2002-2003: 265). Parts of the MCC have been subject to sustained criticism (Leader-Elliott 2009a) and, in some instances, it has served as a *counterpoint* to state-based initiatives.<sup>13</sup> Although it has been said that the success of the MCC should be measured in decades rather than years (Goode 2002), if current trends continue, the MCC is not likely to be labelled a success.

While the perceived ‘failure’ of the Code is commonly put down to lack of political will or inertia (Goode 2011; Griffin 2002-2003), or the absence of commitment by government to regular revision and parliamentary machinery to enable review and amendment (Leader-Elliott 2009a), arguably, an equally crucial factor has been a more nebulous one: the loss of faith in the idea of the criminal law as a whole, and in belief in the value and possibility of systematising criminal law. In the years since 1995, both state and Commonwealth criminal law has grown significantly (Brown 2015), and politicisation of the criminal law and criminal justice policy at all levels of government has only amplified. The idea that one code might encapsulate it all and serve as a model for each Australian jurisdiction seems somewhat Utopian. Beyond this, it is not clear that

the principles of criminal responsibility are capable of carrying the burden of providing coherence in the criminal law, a terrain now marked by a multiplicity of modes of criminalisation (McNamara 2015). These have had the effect of further fragmenting a fragmented landscape or, perhaps, of creating entirely new landscapes.

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  - <sup>2</sup> The Committee was initially called the Criminal Law Officers Committee (CLOC) but, from 1993, it was known as the Model Criminal Code Officers Committee (MCCOC) and, later, the Model Criminal Law Officers Committee (MCLOC). In this paper, I refer to the 'Code Committee' for simplicity.
  - <sup>3</sup> The criminal codes of Queensland (*Criminal Code Act 1899*), Western Australia (*Criminal Code Act Compilation Act 1913*) and Tasmania (*Criminal Code Act 1924*) were developed at the end of the nineteenth century and early part of the twentieth century. The criminal codes of the Northern Territory (NT) and Australian Capital Territory (ACT) were developed later but are modelled on the earlier codes (the NT law is now modelled on *The Commonwealth Criminal Code* and the ACT has incorporated Chapter 2 of the MCC).
  - <sup>4</sup> In the Australian political system, drafting offences is a bureaucratic exercise: legislation only reaches parliament after public servants operating under ministerial guidance have drafted it (Bronitt and Gani 2009: 246-247).
  - <sup>5</sup> As it stands, Chapter 1 comprises just one clause, on codification (*Model Criminal Code* s 101), which was intended to indicate the scope of the MCC and explain the location of the chapter on criminal responsibility (Code Committee 1992; Gani 2005b).
  - <sup>6</sup> It has been suggested that a practitioner manual—the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Leader-Elliott 2009b)—should be cast into legislative form in order to aid interpretation of the MCC. As it is, the principles governing interpretation of the Code have been judicially-developed (Bronitt and Gani 2009).
  - <sup>7</sup> Under Chief Justice Anthony Mason, the Australian High Court moved from 'legalism' to 'realism' in constitutional interpretation, and the native title decisions of *Mabo* (and later *Wik*), and the development of an implied rights jurisprudence, enhanced the political profile of the High Court (Hall 2000: 147-149, 150-151).
  - <sup>8</sup> *Dietrich* concerned access to legal representation when an accused is charged with a serious offence and where the absence of such representation compromises the right to a fair trial; see also *Toonen v Australia* Communication No. 488/1992 (concerning rights to privacy and non-discrimination that were infringed by Tasmanian laws criminalizing sex between men).
  - <sup>9</sup> The MCC provisions on intoxication were based on the High Court's decision in *O'Connor*, allowing voluntary intoxication to cast doubt on whether the accused had formed the requisite intent in relation to any offence (Code Committee 1992: 49-51; *R v O'Connor* (1980) 146 CLR 64). When it came to enacting the draft code provisions, parliament sought a more pragmatic approach and opted for the dominant common law approach, which had been set out by the House of Lords in *Majewski* in 1977 (*DPP v Majewski* [1977] AC 443), and which restricts the cases in which voluntary intoxication can be raised by the defence to a subset of cases: those in which the accused is charged with an offence of 'specific intent'.
  - <sup>10</sup> The Code Committee produced eight reports in total, each of which included draft legislation. After the report on general principles of criminal responsibility, these reports covered: theft, fraud and related offences (1995); blackmail, forgery and bribery; non-fatal offences against the person (1994); sexual offences (which also covered some evidentiary and procedural issues, and age of consent) (1996); conspiracy to defraud (1997); serious drug offences (1998); offences against the administration of justice; and public order offences (1998).
  - <sup>11</sup> The Code Committee 'ran out of time and resources' on homicide (Goode 2004: 229).
  - <sup>12</sup> This has been borne out by the subsequent development, in 2002 and the years since then, of a raft of Commonwealth terrorism offences, which bear little connection to the subjective fault standard enshrined in the MCC (Bronitt and Gani 2009).
  - <sup>13</sup> An example is the recommendation that psychopathy/severe personality disorder be excluded from the bounds of the mental impairment defence in NSW (NSW Law Reform Commission 2013 [3.37]-[3.40]).

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