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# Review of Chapter 2 Model Criminal Code

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**To Attorney-General's Department**

**23 March 2012**

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## Introduction

1. The Law Council welcomes the invitation by the Attorney-General's Department (AGD) to provide views and comments on Chapter 2 of the *Model Criminal Code*.
2. The Law Council notes that views and comments are being sought as the National Criminal Law Reform Committee (formerly the Model Criminal Law Officers Committee) is currently conducting a review of Chapter 2.
3. The Law Council has a long standing interest in of Chapter 2 of *the Model Criminal Code*. The AGD has acknowledged that the Law Council's previous submission on Chapter 2 of the *Model Criminal Code* will be taken into account in the current review.<sup>1</sup>
4. In previous correspondence with the then Standing Committee of Attorneys-General (SCAG) and the AGD, the Law Council has expressed its concern that Chapter 2 of the *Model Criminal Code* has not been implemented in all jurisdictions despite endorsement by SCAG.<sup>2</sup>The Law Council maintains this concern.
5. The Law Council notes that Chapter 2 of the *Model Criminal Code* has been implemented in the *Criminal Code Act 1995* (Cth) (the *Commonwealth Criminal Code*). However, the Law Council has also observed in correspondence with the AGD that amendments have been made to Chapter 2 of the *Commonwealth Criminal Code* without consultation and while the review of Chapter 2 of the *Model Criminal Code* is being undertaken.<sup>3</sup> The Law Council maintains these concerns.
6. In its previous submission to the AGD, the Law Council reiterated its concern about the failure of the majority of the state and territory jurisdictions to implement Chapter 2 of the *Model Criminal Code*. The Law Council also noted the introduction of a range of Commonwealth offences which can be characterised as 'preparatory offences' and sit uncomfortably with the extended liability provisions in Division 11 of Chapter 2 of the *Commonwealth Criminal Code*. The Law Council maintains these concerns.
7. The Law Council notes that the invitation from the AGD to comment on Chapter 2 identifies the following particular areas:
  - (a) Revision of complicity provisions, including the issue of common purpose;
  - (b) Revision of the conspiracy offence, including clarification of its elements and the timing for consent to prosecution;
  - (c) Revision of corporate criminal responsibility, including allowing for the aggregation of employees' conduct, amending provisions relating to corporate culture, and allowing fault elements other than default fault elements to be attributed to a corporation;

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<sup>1</sup> See Law Council submission, "Effectiveness of Chapter Two of the Model Criminal Code", 19 December 2008 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=A5479DAA-1E4F-17FA-D2AD-4CDE0DC3A6FC&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=A5479DAA-1E4F-17FA-D2AD-4CDE0DC3A6FC&siteName=lca);

<sup>2</sup> See Law Council letter to the Secretary, Standing Committee of Attorneys-General, 1 November 2007 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=33147DAB-1E4F-17FA-D21C-1EFDA3540C64&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=33147DAB-1E4F-17FA-D21C-1EFDA3540C64&siteName=lca)

<sup>3</sup> See Law Council letter to the Secretary, Attorney-General's Department, 18 December 2009 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=D0284CE6-1E4F-17FA-D252-CA09E6641F12&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=D0284CE6-1E4F-17FA-D252-CA09E6641F12&siteName=lca);

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- (d) Incorporation of standards of behaviour; and
  - (e) Amendments to allow for offences with fault elements that exist independently of any physical element.
8. In the time available for comments, the Law Council is able to provide some comments on:
- (a) Physical and fault elements generally and in the context of the conspiracy offence; and
  - (b) Joint commission provisions.

## Physical and Fault Elements Generally and in the context of Conspiracy

### Background

9. The Chapter 2 Report of the then Model Criminal Code Officer's Committee dealt with the "General Principles of Criminal Responsibility."<sup>4</sup>
10. With few exceptions, the *Model Criminal Code* was intended to codify the general principles of criminal responsibility as they stood in 1992. The Chapter 2 Report intended to encapsulate these principles in statutory form but envisaged that preceding law would continue to be relevant to interpretation of the *Model Criminal Code*, drawing an analogy with the approach taken by the courts to the English *Theft Act 1968*.<sup>5</sup>
11. The main divide on general principles of criminal responsibility was between the approaches taken by the common law jurisdictions as opposed to the Griffith Code states. This conflict was resolved principally in favour of the common law approach. In particular, the *Draft Code* adopted a presumption in favour of subjective fault elements. (However, most notably, as enacted and contrary to the *Draft Code*, the *Commonwealth Criminal Code* did not adopt the common law in relation to intoxication.)
12. The National Criminal Law Reform Committee is now considering a number of amendments, including amendments relating to s3.1 and 3.2.

### The Relationship between Physical Elements and Fault Elements

13. The Chapter 2 Report contained a *Draft Code*. Sections 201 – 202.3 of the *Draft Code* in part became sections 3.1 and 3.2 of the *Model Criminal Code*.
14. The *Model Criminal Code* adopted the traditional distinction between *actus reus* and *mens rea* under the new terms "physical elements" and "fault elements". Sections 3.1(1) and (2) replicate the *Draft Code*. As the commentary in the Report observes, some submissions had suggested that section 3.1 was unnecessary but the Report concluded that "there were clear advantages in specifying the framework for

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<sup>4</sup> Criminal Law Officer's Committee, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility* (1993)

<sup>5</sup> *Ibid*, 3.

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analysing criminal responsibility.”<sup>6</sup> Section 3.1(3) of the *Commonwealth Criminal Code* is an addition which says that “The law that creates the offence may provide different fault elements for different physical elements.”

15. Section 3.2 headed “Establishing guilt in respect of offences” was not included in the *Draft Code*. It seems to have been included for the sake of completeness. Both s3.1 and 3.2 are intended to state the basic common law framework.
16. Section 3.2 of the *Commonwealth Criminal Code* has now been considered by the High Court in *LK* in relation to the fault elements for conspiracy.<sup>7</sup> The High Court analysed the relationship between the physical and fault elements of the conspiracy offence. The particular problem related to the appropriate fault element for the offence agreed to be committed. However, the issue ramifies beyond conspiracy to a number of multi-fault element offences (eg the dishonesty offences).
17. The basic principle expressed in s3.1 is that an offence consists of physical elements and fault elements. However, section 3.1(2) allows that there may be some physical elements which do not require proof of a fault element. This is to cater for the existence of strict and absolute liability physical elements.
18. Section 3.1(3) (which was not included in the *Draft Code*) allows different fault elements for different physical elements of offences. For example, physical element 1 may require proof of intent, while physical element 2 may be satisfied by recklessness. This again seems relatively uncontroversial in light of the standard common law framework. (Further, though again, not specifically said here, proof of intention *or* recklessness will suffice for some physical elements (see s5.6(2)).
19. Section 3.2 then specifies what must be proved in order to establish guilt. In section 3.2(a) the physical elements relevant to establishing guilt must be proved and in addition, pursuant to section 3.2(b):
  - (b) in respect of each such physical element for which a fault element is required, *one* of the fault elements for the physical element. (Emphasis added)
20. The use of the word “one” may lead to an interpretation that a physical element only needs one fault element. However, many offences have more than one fault element. The physical element of theft (appropriation of property) requires proof that the defendant knew that the property belonged to another person, intended to appropriate the property, intended to permanently deprive the owner of that property, and was dishonest. Each of these fault elements must co-exist at the time of the appropriation and in relation to that appropriation. Nothing in the *Commonwealth Criminal Code* precludes that interpretation and, in the event of ambiguity, it conforms exactly to the preceding law.
21. The drafters of section 3.2(b) were focused on the problem of ensuring strict liability fault elements were presumptively excluded. It did not preclude the requirement of more than one fault element for each physical element. However, there is a passage in the judgement of the High Court in *LK* which has caused concern. The plurality judgement says that, “Part 2.2 [of the *Commonwealth Criminal Code*] makes no provision for the specification of a fault element that ‘is not for a physical

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<sup>6</sup> *Ibid* at 9.

<sup>7</sup> *The Queen v LK* [2010] HCA 17.

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element of [the] offence.”<sup>8</sup> (However, they concluded that the fault elements elaborated in ss11.5 (2)(a) and (b) did relate to the physical elements set out in s11.5(1)).

22. It may have been preferable to have drafted s3.2(b) to say “at least one of the fault elements for the physical element’, or to parallel section 3.2(a) as follows:

“(b) The existence of such fault elements as are, under the law creating the offence, relevant to establishing guilt.’

23. This would have made it make it clearer that more than one fault element may be required in relation to a physical element. An amendment along these lines would clarify the position both with respect to conspiracy and other multiple fault element offences, while continuing to preserve the original concern, namely the presumption that at least one fault element was required for each physical element. In summary, a re-draft of section 3.1(2) as suggested above would cater for both situations, namely:

- (i) Physical elements which do not require the proof of any fault element (i.e. strict liability elements); and
- (ii) Offences where more than one fault element is required in relation to a particular element (e.g. theft).

## The Reasoning in *LK*

24. The issue that arises from *LK* is whether offences can have physical elements which involve more than one fault element, or whether there can be fault elements which are “free-floating” and do not relate to any physical element. These seem to be aspects of the same problem. The so-called “free-floating” fault element in conspiracy is something of a misnomer: crimes do not exist in the mind alone. For conspiracy – the intent to commit the agreed offence – is tied up with the physical element of the offence, namely the agreement. There must be an intent to agree, but the agreement is to commit an offence.<sup>9</sup>
25. In *LK*, the plurality proceeded on the basis that the fact of agreement pre-supposes the knowledge of the facts which make the agreed conduct an offence.<sup>10</sup>
26. They go on to analyse s11.5(1) as containing the physical elements of the offence of conspiring to commit an offence. The references in s11.5(2)(a) and (b) are to the fault elements for the physical element contained in s11.5(1). They are “epexegetical” of the fault elements for conspiracy.<sup>11</sup>
27. In this context, the passage that has given rise to concern about free-floating fault elements fades. S11.5(2)(b) is not free-floating. It is tied to the physical elements in s11.5(1).

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<sup>8</sup> At [132].

<sup>9</sup> This is consistent with the plurality view. See below.

<sup>10</sup> At 117.

<sup>11</sup> At [132] – [133].

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28. The reasoning of French CJ in *LK* therefore proceeds on the wrong footing. In particular at [57] there is a discussion of whether s11.5(2) of the *Commonwealth Criminal Code* sets out some or all of the elements of the offence of conspiracy. It proceeds on the assumption that section 11.5(2) does not relate to any physical element of the offence of conspiracy.
  29. Noting the awkwardness of dividing conspiracy into physical and fault elements, French CJ holds that at common law the agreement is the *actus reus* and the intent to commit an offence pursuant to the agreement is the *mens rea*. He goes on to supply a perceived gap in s11.5 from the common law [at 57].
  30. Part of the difficulty in the analysis arises from casting an abstraction like an agreement as *actus reus* or as a physical element. An agreement involves a meeting of minds and the condition of an agreement amounting to a conspiracy is that there is an agreed intention to commit an offence. In the case of conspiracy, the physical element of the conspiracy is an agreement. Whether that is analysed as one physical element or two is somewhat arbitrary.<sup>12</sup>
  31. Is physical element 1 an agreement, and physical element 2 a term of the agreement that an offence will be committed? Then intent to agree plus intent to commit the offence are required, one for each of the two physical elements.
  32. Or should the physical element be regarded as one single physical element, namely, “an agreement to commit a criminal offence”? In this latter instance, the fault elements to cover that physical element would be multiple fault elements, but they would still be intent to enter the agreement and intent to commit an offence pursuant to that agreement. This is consistent with the structure of s11.5(2)(a) and (b) as explaining the fault elements of the offence set out in s11.5(1), with the analysis of the plurality, and with the commentary in the Chapter 2 Report.<sup>13</sup>

## Interpretation of the Criminal Code

33. The *Commonwealth Criminal Code* generally emerges from a common law context and it was not the intention that it be divorced from that context. For example, specifically in relation to the law of theft, it closely followed the English *Theft Act* model and relied on the interpretations of the various provisions already established in many decisions both in England and in Australia.
34. Like any other statute, the *Commonwealth Criminal Code* did intend to draw on the common law and the references in *LK* to cases such as *Georgianni* on the question of sufficiency of recklessness is consistent with that approach.
35. An approach which attempted to strip the provisions used in the *Commonwealth Criminal Code* from this interpretative context would not be desirable.<sup>14</sup>

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<sup>12</sup> An example of a similar characterisation issue arose in the old felony murder case *Ryan v R*(1967) 121 CLR 205. What is the act that forms the basis for a felony murder charge? Is it holding a gun, or is it holding a gun in the back of a struggling victim in the course of an armed robbery?

<sup>13</sup> At [117], [132] – [133] and [141]. The Chapter 2 Report commented that the equivalents of s11.5(2)(a) and (b) “were re-drafted to more clearly separate the agreement component of the conspiracy from the intent to commit the offence pursuant to that agreement.” (at 99).

<sup>14</sup> Chapter 2 Report at 3. Cited with approval in *LK* at [102].

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## Suggested Amendment

36. Although the concern raised about multiple fault elements/free-floating fault elements after *LK* does not seem to be well-based, it may be prudent to pre-empt further doubt by amending s3.2(b) as suggested above so that it would read:
- (b) The existence of such fault elements as are, under the law creating the offence, relevant to establishing guilt.

## Complicity and Joint Commission

37. Section 11.2A “Joint Commission” of the *Commonwealth Criminal Code* makes a defendant (“D”) criminally responsible for an offence (offence “A”) where D agreed with another person (“X”) to commit a different offence (offence “B”) if offence A is committed in the course of carrying out the agreement to commit offence B and
- (a) offence A is “of the same type” as offence B; or
- (b) D was “reckless about the commission of” offence A.
38. In substance, s 11.2 “Complicity and common purpose” makes D criminally responsible for an offence (offence “A”) committed by another person (“X”) where D’s conduct in fact assisted or encouraged the commission of that offence by X if D intended that his or her conduct would assist or encourage the commission of
- (a) any offence “of the type” that X committed (ie of the same type as offence B); or
- (b) any offence AND D was “reckless about the commission of” offence A (“including its fault elements”).
39. It may be seen that the substantive difference between s 11.2 and s 11.2A is that, in respect of the former, D must have in fact assisted or encouraged the commission of offence A. Instead of that requirement, s 11.2A only requires that there was an agreement to commit some other offence B and that offence A was committed in the course of X carrying out the agreement to commit offence B. For example, under s 11.2A, where D agrees with X that a Commonwealth official be assaulted and X proceeds to murder the Commonwealth official, D will be made criminally responsible for that murder if murder is regarded as an offence “of the same type” as assault or D was “reckless” about the commission of murder by X – even if D has not agreed to the commission of murder and has not assisted or encouraged the commission of that crime in any way.
40. There can be no doubt that pre-existing common law authority existed to support the approach taken to principles of complicity in s 11.2. In contrast, the Law Council is unaware of common law authority (or statutory precedents in other jurisdictions) that would support s 11.2A. It is true that there is common law authority that, where D agrees with X to commit a particular offence and X commits that offence, D will be criminally responsible for that offence: *Osland v The Queen* (1998) 197 CLR 316, McHugh J at 342, citing *R v Lowery and King* [No 2] [1972] VR 560 and *R v Tangye* (1997) 92 A Crim R 545.
41. It has also been held under the doctrine of “extended common purpose” that, where D and X agree to commit offence A, and D foresees the possibility that crime B will be committed, D will be criminally responsible for that crime committed by X if D

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“continues to participate in the venture”: *Clayton v R* [2006] HCA 58; (2006) 231 ALR 500; *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108. It is the participation in the criminal enterprise by D that justifies the extension of criminal responsibility for a foreseen, but not agreed, offence. As was stated in *McAuliffe* at 118, “the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight”. The Law Council is unaware of any authority extending this principle to make D liable in the absence of such participation in the criminal enterprise by D.

42. Section 11.2A of the *Commonwealth Criminal Code* was not part of the Chapter 2 Report or the *Draft Code*.
43. Even the wider concept of “acting in concert” in the Victorian case law - embodied in a decision in Victoria of *Jensen and Ward* [1980] VR 194 at 201 – does not go as far as s11.2A. It provides as follows:

*“In essence people act in concert and are equally guilty of the crime if:*

- They reach an agreement, understanding or arrangement that a criminal act or acts will be committed by them or by one of the; and*
- While that understanding or arrangement is still afoot, a crime is committed by one or more of them of a kind which falls within the scope of the understanding or arrangement; and*
- They are present at the scene of the crime (presence may be actual or constructive).*

44. Section 11.2A lacks the third element, participation. The Chapter 2 Report was concerned about the width of the common law common purpose rule and considered its abolition. Ultimately it was retained in a narrower form.<sup>15</sup> The extension of that rule to a non-participant goes beyond the common law rule and beyond the rules relating to acting in concert. For the reasons set out above and in the Chapter 2 Report, the extension is not justifiable.

## **Suggested Amendment**

45. Section 11.2A should be amended to include participation.

## **Conclusion**

46. The Law Council considers that the current review of Chapter 2 of the *Model Criminal Code* being conducted by the National Criminal Law Reform Committee provides an important opportunity to address a number of outstanding and current issues in relation to the implementation of Chapter 2 of the *Model Criminal Code*.

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<sup>15</sup> Chapter 2 Report at 87-91.

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47. Outstanding issues previously raised by the Law Council include the lack of implementation by the majority of jurisdictions and the passage of Commonwealth offences, which depart from Chapter 2 principles.
  48. The issues dealt with in this submission are the need to clarify s3.1 and s3.2 regarding physical and fault elements generally and particularly in the context of the conspiracy provisions, as well as the need to clarify the joint commission provisions.
  49. If further details of the other areas identified by the National Criminal Law Reform Committee as part of the Chapter 2 review become available, the Law Council may be able to provide further comments on these areas.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory lawsocieties and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- MrDuncan McConnel, Executive Member
- MsLeanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.