



Criminal Law
Codification
Advisory Committee

An Coiste Comhairleach um Chódú an Dlí Choiriúil

**First Programme of Work
2008 – 2009**

approved by

the Minister for Justice, Equality and Law Reform

January 2008

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Introduction

On 1 February 2007, the Minister for Justice, Equality and Law Reform commenced the criminal law codification project by establishing the Criminal Law Codification Advisory Committee under Part 14 of the Criminal Justice Act 2006. Section 168 of the 2006 Act provides that the function of the Advisory Committee is to oversee the development of a programme for the codification of the criminal law and to advise on the future maintenance of the code following enactment.

The 2006 Act also provides in section 173 that the Minister for Justice, Equality and Law Reform should determine a programme of work to be undertaken by the Criminal Law Codification Advisory Committee, after consultation with the Committee. The draft work programme set out below is recommended to the Minister by the Advisory Committee pursuant to this provision.

The Advisory Committee, which is chaired by Professor Finbarr McAuley, consists of representatives of the judiciary, the legal profession, legal academia, the Department of Justice, Equality and Law Reform, the Office of the Attorney General and the Office of the Director of Public Prosecutions.

The Advisory Committee is assisted in the discharge of its functions under the 2006 Act by the Criminal Law Codification Secretariat and the Criminal Law Codification Research Support Unit. The Secretariat is staffed by the Department of Justice, Equality and Law Reform, and the Research Support Unit by the UCD School of Law. The Unit's three full-time researchers were appointed in September 2007.

Structures and Personnel

Criminal Law Codification Advisory Committee

Professor Finbarr McAuley, Chairman, Jean Monnet Chair of European Criminal Justice, University College Dublin and Law Reform Commissioner

Mr Conal Boyce, Solicitor, Member of the Criminal Law Committee of the Law Society of Ireland

Ms Valerie Fallon, Department of Justice, Equality and Law Reform

Mr Matthew Feely, Office of the Attorney General

Ms Elizabeth Howlin, Office of the Director of Public Prosecutions

Dr Richard Humphreys, Barrister-at-Law

The Hon. Mr Justice Patrick J. McCarthy, Judge of the High Court

Professor Paul O'Connor, School of Law, University College Dublin

Ms Mags O'Driscoll, Barrister-at-Law

Ms Lia O'Hegarty, Consultant on legislation and public affairs and member of the Human Rights Commission

Mr Caoimhín Ó hUiginn, former Assistant Secretary, Department of Justice, Equality and Law Reform

Criminal Law Codification Secretariat

The role of the Criminal Law Codification Secretariat is to provide administrative support to the Advisory Committee to assist it in its work. Its members are:

Ms Valerie Fallon BL, Principal Officer, Director

Ms Tracy O'Keeffe BCL, LLM (NUI), BL, Assistant Principal

Mr Conor Nelson BA, LLB, LLM (NUI), Executive Officer

Ms Aisling Ní Chaoláin BCL (NUI), Stagiaire

Ms Joanna Willford 3rd year BCL (Clinical) (UCC), Stagiaire

Mr Sean Doyle, Clerical Officer

Criminal Law Codification Research Support Unit

The Research Support Unit, located in the School of Law in University College Dublin, undertakes research tasks assigned to it by the Advisory Committee. In the longer term, the Research Support Unit will become a centre of excellence for the codification process. Its members are:

Professor Finbarr McAuley BCL, LLB, MPhil (Edin), LLD, Director
Professor Paul A. O'Connor BCL, LLM, LLM (Penn), BL
Mr T.J. McIntyre BCL, LLM (Lond), BL.

The Research Unit's full-time researchers are:

Ms Caroline Davin-Power BA Intl, LLB, LLM (NUI)
Mr Carl Grainger LLB (Durham), LLM (London)
Mr Seán Ó Toghda BCL Law with French Law (NUI), LLM (London).

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Foreword

On behalf of the Criminal Law Codification Advisory Committee, I have the honour of recommending to the Minister for Justice, Equality and Law Reform the following Programme of Work for the current phase of the codification project. The Programme is being recommended to the Minister, pursuant to section 173 of the Criminal Justice Act 2006. The details of the proposed Work Programme are set out later in this document. Broadly speaking, the Programme describes the principal steps involved in unifying the sources of Irish criminal law in a comprehensive Draft Criminal Code; and outlines the salient features of the methodology to be employed in the codification process. The draft Programme has been drawn up in light of the principal recommendations of the Expert Group on the Codification of the Criminal Law, following an extensive scoping exercise by the Codification Research Support Unit.

The draft Programme of Work will be carried out by the Advisory Committee as assisted by the Codification Secretariat and the Research Support Unit, which together will form the Criminal Code Team. The Criminal Code Team will in turn work closely with the Criminal Law Reform Division of the Department of Justice, Equality and Law Reform, the Office of the Attorney General, and the Law Reform Commission; and will consult widely with codification (and recodification) projects around the common law world, as well as with the Irish legal community and the wider public.

The key structures set up to assist the Advisory Committee in the conduct of the Work Programme – the Secretariat and the Research Support Unit – were established pursuant to an imaginative partnership struck between the Department of Justice, Equality and Law Reform and the School of Law at University College Dublin. On behalf of the Advisory Committee, I should like to express our gratitude to both bodies for their continuing support.

As described in the draft Programme of Work, the inaugural code instrument will consist of a General Part, covering the general principles of criminal liability, and the core of a Special Part, consisting of four chapters dealing, respectively, with non-fatal offences against the person, criminal damage offences, theft and fraud offences, and public order offences. It is envisaged that the substance of the Draft Criminal Code thus defined will be completed by the end of the two-year period of the Work Programme.

Professor Finbarr McAuley
Chairman
Criminal Law Codification Advisory Committee
December 2007

First Programme of Work

Introduction

- 1.01 Following the recommendation of the Expert Group on the Codification of the Criminal Law, the inaugural code instrument will consist of a General Part and the core of a Special Part.
- 1.02 Accordingly, the Code Team will produce a comprehensive set of provisions covering these areas in the form of a Draft Criminal Code Bill.

The General Part

- 1.03 In modern criminal codes the General Part deals with the principles of criminal liability and other matters of general application to all of the offences contained in the Special Part.
- 1.04 Accordingly, the design and drafting exercise in respect of the General Part will comprehend all or most of the following:

Preliminary and Ancillary Matters

- (a) Interpretation and purpose section
- (b) Dictionary and definitions
- (c) Use of explanatory notes
- (d) Use of illustrative examples
- (e) Temporal limitations on application of code: commencement date and delayed application provisions; transitional provisions
- (f) Scope of application of code to code offences and non-code offences
- (g) Amendment and maintenance

Elements of an Offence

- (a) General principles on distinction between physical and fault elements
- (b) Physical elements
- (c) Causation
- (d) Fault elements
- (e) Mistake of fact
- (f) Mistake of law
- (g) Strict liability

General Defences

- (a) Age
- (b) Sane automatism
- (c) Insanity and diminished responsibility
- (d) Intoxication

- (e) Duress
- (f) Necessity
- (g) Legitimate defence
- (h) Lawful authority
- (i) Entrapment

Complicity

Inchoate offences

- (a) Attempt
- (b) Incitement
- (c) Conspiracy

Corporate criminal responsibility

- (a) General principles
- (b) Physical elements
- (c) Fault elements
- (d) Defences

Proof of criminal responsibility

- (a) Legal burden of proof
- (b) Evidential burden of proof
- (c) Standard of proof
- (d) Averments

Geographical application

The Special Part

- 1.05 The Special Part of the code will eventually contain all of the principal offences in the criminal calendar.
- 1.06 The calendar of offences included in the Special Part will be subdivided into a series of discrete categories or chapters according to subject-matter.
- 1.07 Offence chapters will be ranked in terms of relative seriousness, as will the catalogue of offences included in each chapter.
- 1.08 Following the recommendation of the Expert Group on the Codification of the Criminal Law, the Special Part will be drafted and enacted on a phased basis.
- 1.09 The Expert Group also recommended that the Special Part of the inaugural code instrument should be confined to the catalogue of offences found in the recently enacted mini-codes, viz.,
 - the Criminal Damage Act 1991;
 - the Criminal Justice (Public Order) Act 1994;
 - the Non-Fatal Offences Against the Person Act 1997;

- and the Criminal Justice (Theft and Fraud Offences) Act 2001.
- 1.10 Accordingly, the programme of work on the Special Part of the inaugural code instrument will consist of drafting four code chapters incorporating the contents of these statutes.
- 1.11 The remaining categories of offence will then be added to the code on a phased basis at a later stage in the codification project. In order to facilitate this process, the Code Team will design a draft scheme for the Special Part as a whole, indicating where the remaining categories of offence should be inserted.

Methodology

Introduction

- 2.01 In the nature of things, the Work Programme outlined in the preceding section will involve the application of the technique of codification to the body of law earmarked for inclusion in the criminal code. By way of explaining how the Work Programme will proceed, it may be useful to identify the salient features of the technique of codification.
- 2.02 In respect of the Criminal Code as a whole, the key objective will be to collect the substantive law of crime in a single instrument that is logically organised and easy to read. In the modern era this is normally done by dividing the criminal code into two parts, one dealing with the principles of criminal liability (the General Part), the other with the criminal calendar (the Special Part).

Codifying the General Part

- 2.03 As regards the General Part, the accent will be on restatement. The task will be to restate the common and (small corpus of) statute law rules and principles governing the ascription of criminal liability in a comprehensive body of law capable of systematic application to all of the offences included in the Special Part.
- 2.04 It is important to stress that the restatement exercise will not take place in a vacuum. It will be guided by one of the standard legislative models or schemes – the American Model Penal Code is perhaps the best known example - that have been developed for the express purpose of reducing the General Part to codified form.
- 2.05 Broadly speaking, these schemes or exemplars track the content and design of the General Part of modern common law criminal codes, and reflect the balance of opinion in the international literature on such matters as the optimum classification and sequencing of the elements of liability and the general defences. The most successful models place a premium on clarity of expression and logical organisation. They also make extensive use of drafting conventions and definitional templates designed to maximise ease of access and understanding for code users.
- 2.06 In the common law tradition, model schemes of this kind increasingly aim at completeness. The tendency is to articulate all of the liability rules needed to decide a criminal case within the compass of the General Part, as opposed to stating the general principles of criminal

liability in outline form and leaving the courts to elaborate their meaning on a case-by-case basis.¹

- 2.07 In summary, a key challenge for the Advisory Committee will be to select a legislative model for the General Part that suits Irish conditions; and then to reformat the liability rules developed at common law (and supplemented by statute) so that they can be restated within the framework provided by the model.

Codifying the Special Part

- 2.08 In the case of the Special Part, the emphasis will also be on restatement, albeit that the body of law requiring restatement has already been reduced to statutory form – in the shape of the four mini-codes that have been selected for inclusion in the inaugural Special Part.
- 2.09 By and large, these statutes have been drafted in an accessible modern idiom; and, as the Expert Group on the Codification of the Criminal Law has observed, when viewed as a whole exhibit a reasonable measure of conceptual consistency. But they are far from being code-compliant. The clarity and style of the drafting varies from one mini-code to the other. The templates used to define offences are not uniform. Offence definitions sometimes include liability rules that more properly belong in the General Part; as do the extensive provisions dealing with the use of defensive force contained in sections 18 to 20 of the Non-Fatal Offences Against the Person Act 1997. Some offences have arguably been misclassified as between the mini-codes. And there is some evidence of seemingly overlapping or superfluous offences.
- 2.10 Moreover, in addition to the substantive law of crime in their respective domains, each of the four mini-codes contains significant if varying amounts of adjective law – dealing with evidence, procedure, and sentencing. This feature of the mini-codes tends to add clutter to offence definitions and thus to obscure the conduct rules contained in them, thereby compromising one of the key aims of codification.
- 2.11 In the result, the contents of the mini-codes will have to be reformatted before the restatement exercise proper can proceed.
- 2.12 Bearing in mind that the Special Part is designed to deal with the *substantive* law of crime, the adjective law mentioned in the preceding

¹ The latter practice was followed by the legislature in the four mini-codes that will form the basis of the inaugural Special Part. Thus while most of the offences in the mini-codes require proof of fault in the form of intention or recklessness, these terms are not defined in the original legislation, either in the interpretation sections or in the body of the enactments. On the argument from completeness, they will have to be defined in the criminal code – in the General Part, given that they will apply across the entire spectrum of offences in the Special Part.

paragraph will have to be separated out and housed elsewhere, probably in a schedule at the back of the code instrument.

- 2.13 Similarly, given that one of the principal functions of the Special Part is to streamline the criminal calendar, it follows that the conduct rules in the mini-codes will have to be pruned of all irrelevant matter prior to restatement in the criminal code.
- 2.14 Moreover, given that conduct rules are primarily aimed at the public, the restatement exercise will have to be particularly attentive to the key codification values of simplicity, consistency, and structural uniformity. Offences will have to be defined in plain language and on the basis of a rigorous anti-scatter policy. The governing principle will be that, apart from terms of general application across the Special Part,² offences should be comprehensively defined as and where they appear in the criminal code.
- 2.15 Inevitably this will involve a departure from existing drafting and legislative practice, which relies extensively on the use of interpretation sections which have the effect of breaking up the definition of an offence by explaining certain key terms *before* the offence itself is introduced.
- 2.16 By parity of reasoning, offences will have to be structured according to a uniform template used throughout the Special Part. This template will be designed by the Code Team following a comprehensive survey of the four mini-codes.
- 2.17 Suffice it to say for present purposes that the template will aim at improved comprehension and ease of access for the ordinary citizen; and, accordingly, will specify such matters as:
 - (i) the name of the offence;
 - (ii) the definition of the offence, using a standard definitional form of the type 'A person commits an offence if...[listing the elements of the offence];
 - (iii) the conditions under which a specific offence is not committed – 'A person does not commit an offence if...[etc]'; and
 - (iv) the meaning of key terms used to define the offence.
- 2.18 In summary, the codification of the Special Part will involve reformatting the offences in the mini-codes as self-contained conduct rules that have been shorn of extraneous matter and that can be read and

² Which would naturally be defined in the General Part; see previous footnote.

understood without the need for an elaborate system of cross-reference to other parts of the code instrument.

Statutory Drafting and Codification

- 2.19 Finally, a word on the drafting exercise itself. Statutory drafting is a highly complex and specialised activity, and the Advisory Committee is fortunate in having considerable expertise in this area within its ranks.
- 2.20 As the codification process gets underway, the Advisory Committee also intends to consult widely within and beyond the State apparatus on various aspects of statutory drafting.
- 2.21 In the nature of things, the preparation of the Draft Code will require the close involvement of the Department of Justice, Equality and Law Reform. In the final analysis, the Criminal Code will be produced in the form of a Draft Bill emanating from that Department. By the same token, as the measure will eventually be passed in the form of the Criminal Code Act, it goes without saying that it will have to go through the legislative process in the normal way. Hence the need for close cooperation with the Office of the Parliamentary Counsel as the draft measure is being developed.
- 2.22 However, as the foregoing discussion illustrates, codification and statute law drafting are not identical techniques. The technique of codification raises a host of drafting issues which appear to be unique to it, and which will need to be clearly understood by everyone involved in the making of the criminal code if the resultant instrument is to be worthy of that name.
- 2.23 The Advisory Committee will address this problem by producing a running commentary on its draft schemes as they are prepared. These schemes and accompanying commentaries will be circulated for comment to the relevant Government Departments and Offices and the wider legal community, and published on our website. They will also be tested in a series of seminars and public consultations which will take place over the lifetime of the current phase of the codification project.
- 2.24 By way of attracting international comment, initial drafts of the offence templates to be used in the Special Part will be presented to the 21st Conference of the International Society for the Reform of the Criminal Law in Dublin in July 2008.