LETTER TO THE EDITOR

Criminal Code Reform

NT Attorney-General Dr Peter Toyne MLA.

In the July and August 2005 edition of *Balance* an article by Mr Glen Dooley appeared critical of the need to reform the Criminal Code.

I greatly appreciate the efforts of the Law Society Northern Territory in drawing the attention of its members to legislative proposals and thereby generating comment and discussion. I am always very pleased to receive informed comment on Bills.

Mr Dooley's article primarily focused on two aspects of the Criminal Code Amendment (Criminal Responsibility Reform) Bill (No 2) 2005 (the Bill); the amended sexual intercourse and gross indecency without consent offence (Section 192) and the repeal of dangerous act (Section 154) and its replacement with more specific offences including manslaughter by criminal negligence.

In relation to the amendment of section 192, Mr Dooley was critical of the extension of the definition of recklessness, in relation to consent to sexual intercourse, to include a failure to advert to consent. In particular he stated that the amendment proposed by the Bill did not follow the Model Code which he said "does not include the 'not giving any thought intrusion into the ambit of 'recklessness' in its formulation and its rape provisions" and was critical that on the "first importation of the Model Code into our Code, that such a pivotal provision is tampered with in the manner proposed".

It is unclear to me how Mr Dooley arrived at that assertion. The extension of recklessness to include inadvertence to sexual intercourse was a specific recommentation of the Model Criminal Code Officers Committee (MCCOC). The equivalent to proposed section 192(4A) in the Bill may be found in the Model Code at section 5.2.6(3). It also appears in all the Commonwealth Code unlawful sexual penetration offences, for example at section 71.8(4).

Additionally, it may be noted that in New South Wales "recklessness" has been held to cover the accused who fails to consider the question whether there was or was not consent (R v Kitchener (1993) 29 NSWLR 696, R v Tolmie (1995) 37 NSW LP 660). In Kitchener, Kriby J (as he then was) stated that there are strong policy reasons as to why recklessness should encompass an inadvertent state:

> *"To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to the possibility, is self evidently unacceptable. In the hierarchy of wrongdoing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today... It would be unacceptable to construe a provision so as to put outside the ambit of what is "reckless" a complete failure to advert to whether or not the subject of the proposed sexual intercourse consented to or declined consent. Such a law should simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women."*

Mr Dooley also suggested that the inclusion of such a provision reduces the fault element for the offence to negligence. Again this is not correct. The amendment to the rape offence essentially leaves intact the basic alignment of the Northern Territory with the common law approach to liability for rape but clarifies the position with regard to the circumstances proposed to be covered by section 193(4A), that is, where no thought at all has been given to the matter of consent. This does not introduce a negligence standard. As the MCCOC report notes there are other areas of law which recognise indifference as part of recklessness, for example, fraud.

Mr Dooley's article also defended the retention of the Dangerous Act offence on the basis that it is a "remarkable stop gap", that "s154 charges have that unique quality of being able to be tailored to each case" and that in general it is/has "fluidity and malleability". These features are in fact the very flaws with the offence that suggests the necessity for its repeal because it infringes the principle of specificity.

Continued page 29...

Opening of the Legal Year service in Darwin

Opening of the Legal Year procession in Darwin

De Silva Hebron table at the OLY lunch.

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Offences should be cast broadly enough to apply to cases of wrongdoing intended to be penalised but should be no broader. If an offence is insufficiently broad public confidence in the legislative scheme will be compromised. If it is overly broad the potential deterrent and educative effect of the law is undermined. A person is entitled to understand in advance whether their conduct might infringe the law. They do not expect to have laws that can be moulded in an individual case to fit the conduct committed.

I would be grateful if this correction and comment could be brought to the attention of your readers.

Yours sincerely,

Peter Toyne
Attorney-General.

Opening of the Legal Year lunch in Darwin

The Hon Austin Asche, the Hon Jane Aagard, Bishop Ted Collins at the Opening of the Legal Year.

ODDP staff at the Opening of the Legal Year lunch.

The Territory legal profession turned out in force at the Opening Legal Year lunch and Director of Public Prosecutions Rex Wild's retirement speech.