CONSTRUCTING A CRIMINAL CODE

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

I INTRODUCTION

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

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1 Comment made at the International Society for Reform of the Criminal Law Conference, Codifying the Criminal Law: Modern Initiatives (Dublin, July 2008).
jurisdictions. A similar fate has befallen endeavours to update the Canadian Criminal Code. In 2002 the Irish Government established an Expert Group to explore the desirability and feasibility of codifying Ireland’s substantive criminal law. Two years later, the Group recommended that codification be undertaken on a phased basis, and in 2007 an Advisory Committee was established to oversee the development of a programme for codification. As the Irish project proceeds apace, this seems an opportune time to reflect on some of the issues which potential codifiers may have to determine. The criminal law has been codified in a range of jurisdictions which have traditionally been based on the common law, including Australia, New Zealand, and many jurisdictions in the USA. The paper draws lessons from some of these codification projects, and in particular on the

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4 The Criminal Law Codification Advisory Committee (henceforth, ‘the Irish Code Committee’), established under Part 14 of the Criminal Justice Act 2006.

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


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