Submission on Theft, Fraud and Bribery and related offences in the Criminal Code

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In broad terms, we are supportive of the ACT government's intention to adopt this part of the Model Criminal Code.

In relation to the specific concerns flagged in Attachment B, we make the following comment:

The Proposed Inclusion of Summary Offences in the Criminal Code.

We agree that there are significant advantages to adopting a unified approach to summary and indictable offences in the Code. As well as being convenient to practitioners, as you note, it also improves accessibility of the law to the community and therefore serves an important democratic/educative function. This will ensure that will be a consistent interpretation and application of the general principles to both serious and minor offences. It is also consistent with the development of similar rules of evidence, practice and procedure, across the Supreme and Magistrates Courts.

Our only concern in relation to the inclusion of summary offences in the context of theft offences arises from the definition of dishonesty and, in particular, how its application differs when considered by magistrates in the summary jurisdiction. Commentators have noted that the definition of dishonesty has evolved on the assumption that the adjudicative function rests with a jury rather than a judge: see generally Bronitt and McSherry, Principles of Criminal Law (2001), p 684 ff. Unlike the secrecy of the jury verdict, which shields the moral assumptions and the particular "community standards" at work, a magistrate is required to articulate and explain their factual findings. The fact that magistrates will express different ideas about the scope of community morality in this field may result in inconsistent approaches between magistrates. These differences, which will be laid open to public view, may ultimately bring the law into disrepute.

The solution is a more prescribed definition of dishonesty than is current proposed. In R v Salvo [1980] VR 401 Fullagar J recognised (at 430-431) the difficulty of applying an "ordinary meaning" approach to dishonesty in Feely precisely because “all do not have the same intuitions”. In our view, further definitional detail, especially for the sake of magistrates, is required. This definition should guide the tribunal of fact both as to what does and does not constitute dishonesty. In this regard, the definition of dishonesty, like consent in sexual offences against the person, should contain both positive and negative elements.

In this context, we particularly urge the retention of the existing negative definition (unique to the ACT) which states that it is not dishonest if the person has a belief that the appropriation would cause no significant practical detriment. This definition is adapted...
from McGarvie J's definition: see approval of this Victorian definition of dishonesty over the English *Feely* test in DW Elliot, "Dishonesty in Theft" [1982] Crim LR 395 at 410. Such endorsement of the existing ACT model from a distinguished UK authority on the Theft Act should not be discounted lightly.

While this is a departure from the MCC, and a preservation (in part) of the existing ACT approach, we believe that striving for further clarity in the dishonesty definition does not detract from the important goals of uniformity and consistency. Rather it would have the beneficial effect of promoting consistency and transparency in the operation of the criminal law.

The following comments are more general:

**Separating Obtaining By Deception and Theft**

Currently the ACT law avoids the problems, experienced in the UK, caused by the separation of the offences of obtaining by deception and ordinary theft by appropriation. The existing ACT model integrates these two offences into a single framework of stealing. This brings flexibility for both prosecutors and judges in their respective approaches to prosecuting offences and directing the jury. In many cases, it is only when the evidence is heard at trial does it become clear that the appropriation occurred with "consent" (procured through a deception) rather than without consent: see Bronitt and McSherry, pp691-94 for a discussion of the complexity of English law on this point. We are not convinced by the argument, used in the MCC, that ordinary people distinguish between fraud and theft in such a nuanced way. A person who used phoney cheques to obtain goods from a shop would be regarded as a thief by most people!

If the Criminal Code does separate these offences, we suggest that EM accompanying the final Bill which can assist in maintaining the clear delineation between appropriation and obtaining by deception, thus avoiding the risk that the complexities of English would be imported into the ACT model. Also, the EM should draw prominent attention to s 372 and the alternative verdict provisions which ameliorates these dangers too.

**De minimis Appropriation**

The scope of appropriation under the proposed provision is limited by the requirement that the assumption of rights must be non-consensual. However, there remains a problem, especially in relation to persons who assume rights of control over property, of an over-broad definition of the physical element. In our view, simply touching or sitting on property should not be the physical element of theft. A de-minimis principle should be introduced through adding qualifiers: eg rather than simply "Any assumption", section 304 could be redrafted as "Any significant assumption" or some equivalent.

**General Dishonesty Offence**
We are concerned about the potential breadth of the general dishonesty offence in s333. This broad offence is not envisaged in the MCC. It bears analogy with Commonwealth fraud offences and also with older (arguably obsolete in Australia) common law offences against public cheating.

The question in our minds is why special offences are required to deal with behaviour that is intended to cause any degree of economic loss, however minimal, to the State. It is appropriate in our view that taking a public sign be prosecuted as minor theft. However, under this proposal, such conduct would also clearly fall within the definition of this wider and more serious offence. Indeed, any conduct intended to "impose" costs on the State is potentially criminalised: eg, hoaxes that are not intended to cause harm or alarm, but are simply intended to waste the time of State employees may be covered. The offence is not limited to serious loss or gain, and therefore the offence potentially applies to conduct that is intended to cause only negligible loss or gain. Furthermore, the argument that the requirement of dishonesty tempers the breadth of the offence is unconvincing. The concept of dishonesty, as noted above, is broadly and vaguely defined under s300 of the Code. In our view, it does not, by itself, operate as a sufficient counterweight against offences with widely drafted physical elements.

The proposed offence also violates the principle of proportionality. It carries a much more serious penalty than minor theft (s321), despite the fact that the physical element of s333 is broader and more nebulous: that is, merely "doing something"! This concept of "doing something" is vague: it does not cohere with conventional categories of action typically used for property offences, eg appropriating, defrauding, agreeing, passing etc. We believe that this offence would confer on prosecutors an unreasonable discretion in how to proceed in cases where the conduct involved "doing something" that adversely affects the State's interests. Furthermore since this offence covers inchoate forms of conduct (ie where the harm does not in fact occur), it is disproportionate to punish such conduct with harsher penalties than completed offences such as minor theft.

The rationale for the offence provided in the EM is that the provision aims to deal with the problem of "human ingenuity" in devising dishonest schemes to cheat the State. While there may be a case for specific offences dealing with tax evasion or fraudulent claims of state benefits, we believe that these proposed 'dragnet' offences breach the requirements of clarity and proportionality upon which the legitimacy of the criminal law rests.

The MCCOC in Chapter 3: Theft, Fraud, Bribery and Related Offences, Final Report (1995) has recommended against the adoption of general offences of dishonesty on the ground that, while flexible and adaptable, they would offend the principle that criminal offences should be certain and knowable in advance. The MCCOC concluded (p 169):

> The Theft Act offences are already expressed in a more general or abstract way than the preceding law. To take the further step of dispensing with the need to prove an appropriation without consent or that there was a deception is to go too far. Problems in specific areas like tax and social security can and have been dealt with under specific legislative provisions.
Section 318 raises related problems with over-breadth and the role of dishonesty. The offence is no longer confined to taking vehicles without consent, but extends to persons "who drive and ride". Our concern is that this offence has significantly widened, moving from lack of authority or excuse or "without consent". These are different concepts. Consent in this new section is not defined: can it is express, implied or conditional? Although the offence is widened, the protection offered by exculpatory defences in the current ACT offence has been removed: namely that a person is not guilty where they believe have authority or an excuse or that the owner would have consented had they known of the circumstances. A broad offence, where lack of dishonesty is the only way to escape liability, is too broad. For this reason, again, an explicit definition of dishonesty is needed. For example, had the definition retained the existing s 86(4)(c) a person who believed mistakenly that they had consent would not be dishonest. The claim that this section is covered by the general definition of dishonesty does not offer sufficient guidance to tribunals of fact on this point.

**Interpretive Principles**

Our final concern relates to the interpretive approach applicable to the Code. It is not specific to the theft provisions, but applies generally.

The Code would have the effect of rendering all offences statutory. It would therefore prevent the courts from creating or developing common law crimes.

5 **Codification**

(1) The only offences against Territory laws are the offences created under this Act or any other Act.

The question that remains unresolved both in the MCC and ACT Codes is how much pre-Code common law will be relevant to the interpretation of the new Code offences. It is expressly stated in the MCCOC Report on Chapter 2, General Principles of Criminal Responsibility (p 3) that pre-Code common law is not irrelevant to the interpretation of Code offences. MCCOC notes, as an example, that English courts have drawn on the pre-existing law of larceny to assist in interpretation of the Theft Act. The view that the common law will remain relevant to interpreting the Code was reiterated by Ian Leader-Elliot in his presentation on the ACT Criminal Code (20 Aug 2003). He stated that there will still be windows left into the common law for example, where there is a lack of definition in the Code itself.

But, respectfully, this assumption is contrary to established approaches to the interpretation of Codes adopted in Australia. In *Charlie v The Queen* (1999) 162 ALR 463, Kirby J summarised the proper principles governing code interpretation as follows (at 466):

"The first loyalty, as it has been often put, is to the code. Where there is ambiguity, and
especially in matters of basic principle, the construction which achieves consistency in
the interpretation of like language in similar codes of other Australian jurisdictions will
ordinarily be favoured. But before deciding that there is ambiguity, the code in question
must be read as a whole. The operation of a contested provision of a code, or any other
legislation, cannot be elucidated by confining attention to that provision. It must be
presumed that the objective of the legislature was to give an integrated operation to all of
the provisions of the code taken as a whole, and an effective operation to provisions of
apparently general application, except to the extent that they are expressly confined or
necessarily excluded."

The need to clarify these interpretive principles in the Code itself is imperative in our
view. This is particularly important if, as Kirby J suggested, a Code should be read "as a
whole" and the Code integrates both summary and indictable offences. A clear approach
to interpretation is needed especially to deal with those inevitable cases where the Code
lacks a complete definition or is ambiguous.

It was clearly envisaged that Chapter 1 would contain more guidance on the scope and
content of these guiding principles: p 3, ibid. Such detail has not been forthcoming. The
enactment of these substantive crimes, like theft, raises many questions about the role, as
an interpretive resource, of the common law of larceny, as well as later interpretations of
the existing theft offences in the ACT.

In our view, further thought should be given to the principles of interpretation in Chapter
1 and to the issue of how a Code (as distinct from an ordinary Act) interacts with the
mandated purposive approach set out in the Legislation Act 2001, s139.