ARTICLES

General Endangerment Offences: The Way Forward?

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Four Australian states/territories (including Western Australia) employ general endangerment offences while the remaining Australian jurisdictions and English law only criminalise specific dangerous activities. This article examines whether these latter jurisdictions should introduce such a general endangerment offence and concludes that such a broad offence would be unjustifiable and unnecessary.

THE content of criminal law and the structure of its offences are widely accepted as being informed by JS Mill's harm principle.[1] Conduct should be criminalised if it causes harm to others. There has also been a wide acceptance that the definition of 'harm' for this purpose must include the risk of harm,[2] and so, for example, no one seriously questions that a law of attempt is justifiable. Further, many offences criminalise conduct that has the potential to cause harm even if that harm was not intended. These are known as risk-taking or endangerment offences. Such offences are justified on the basis that they facilitate early intervention by the police or other enforcement authorities before harm materialises.[3] In terms of the well-established purposes of punishment, people need to be deterred from performing dangerous acts. Such persons have also demonstrated their dangerousness and need for incapacitation and rehabilitation.

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1. JS Mill *On Liberty* (London: JW Parker & Son, 1859).
2. J Feinberg *The Moral Limits of the Criminal Law* (New York: OUP, 1984).
3. Although, as will be seen at p 138, prosecution for endangerment offences tends to be reserved for cases where the harm has materialised.

Both England and the different jurisdictions in Australia have numerous endangerment offences that criminalise specific dangerous activities that create risks of harm such as injury or death. Examples of such offences in English law are: dangerous driving; careless driving; failing to ensure the health, safety and welfare of employees at work; and the various offences relating to possession of firearms and other offensive weapons. Typical current examples from an Australian jurisdiction are to be found in the Queensland Criminal Code:[4] carrying or placing dangerous goods in or on a vehicle;[5] endangering the safety of persons travelling by aircraft;[6] endangering the life of children by exposure;[7] setting mantraps;[8] dangerous operation of a vehicle;[9] endangering safety of persons travelling by railway;[10] sending or taking unseaworthy ships to sea;[11] endangering steamships by tampering with machinery;[12] and so on.

In the United States and in four Australian states/territories (ie, the Northern Territory, South Australia, Victoria and, since 2004, Western Australia) there are also general endangerment offences. For example, section 154 of the Northern Territory Criminal Code makes it a crime, punishable by a maximum of five years' imprisonment, to do any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public. The Australian Model Criminal Code also proposes the introduction of a general endangerment offence.[13]

Two important articles published in the *Criminal Law Review* have given consideration to the operation of the Australian general endangerment offences.[14] Neither, however, reached a firm conclusion as to whether English law should introduce such an offence. Unlike these two articles, the present essay will merely sketch the main features of general endangerment offences and will not focus much on the detail of the drafting of these general endangerment provisions and their interpretation by the courts as many of the same interpretive issues present themselves in applying specific endangerment provisions. Rather, it will take a broader look at the scope of such provisions and their relationship to the structure of

4. For the position in Western Australia prior to the introduction of a general endangerment offence, see below p 137 .
5. Criminal Code Act 1899 (Qld) s 317A.
6. Ibid, s 319A.
7. Ibid, s 326.
8. Ibid, s 327.
9. Ibid, s 328A.
10. Ibid, s 329.
11. Ibid, s 330.
12. Ibid, s 331.
13. Model Criminal Code Officers Committee *Model Criminal Code – Chapter 5: Non Fatal Offences Against the Person* (Canberra, 1998) paras 5.1.24–5.1.26.
14. KJM Smith 'Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation' [1983] Crim LR 127; D Lanham 'Danger Down Under' [1999] Crim LR 960. Neither article considered the position in Western Australia.

criminal offences in general. It will conclude that English law and the remaining Australian jurisdictions would be ill-advised to introduce a general endangerment offence.

THE OFFENCES

The general endangerment offence in Western Australia is different from those in the other jurisdictions (and the Model Criminal Code proposal) in that it is the only one that requires the endangering act to be unlawful.[15] In the other jurisdictions (and under the Model Criminal Code proposal) all that is required is *any* act, omission[16] or conduct.[17] South Australia and Victoria do specify that the act or conduct must be 'without lawful excuse', but such a limitation would be implied in the other jurisdictions under general principles. It is uncertain what meaning the courts in Western Australia will attribute to the word 'unlawfully'. Dealing with different sections of the Code, it has been held in both Queensland and Western Australia that grievous bodily harm is 'unlawfully' caused unless the acts of the defendant were authorised, justified or excused.[18] If this interpretation were adopted, there would be little difference between this and the South Australian and Victorian formulation. However, the latest Western Australian Court of Criminal Appeal decision on this point, *R v Houghton,*[19] has held that the word 'unlawfully' in section 297 of the Western Australian Criminal Code (unlawfully doing grievous bodily harm) requires the doing of an act that is prohibited by law. If this latter interpretation were to be accepted, it would be of great significance and would mean that the general endangerment offence in Western Australia would not apply to several of the situations where it is commonly claimed that a general offence is necessary.[20] The importance of this limitation is discussed below.[21]

The four jurisdictions having general endangerment offences (and the Model Criminal Code proposal) differ as to what needs to be endangered. In South Australia there are three offences: endangering life, creating a risk of grievous bodily harm and creating a risk of harm to the person.[22] In Victoria (and under the Model Criminal Code proposal) there are two offences: endangering life and creating a danger of

15. Criminal Code Act 1913 (WA) s 304(1): 'If a person omits to do any act that it is the person's duty to do, or unlawfully does any act, as a result of which: (a) bodily harm is caused to any person; or (b) the life, health or safety of any person is or is likely to be endangered, the person is guilty of a crime and is liable to imprisonment for 5 years'.
16. Criminal Code Act 1983 (NT) s 154(1); Criminal Law Consolidation Act 1935 (SA) s 29.
17. Crimes Act 1958 (Vic) ss 22-23; Model Criminal Code Officers Committee above n 13, paras 5.1.25–5.1.26.
18. *R v Knutsen* [1963] Qd R 157; *R v Kuczynski* (1989) 2 WAR 316. This was also the view of Murray J, dissenting, in *R v Houghton* (2004) 28 WAR 399.
19. Ibid, Steytler & Wheeler JJ 422.
20. See p 136.
21. At p 143.
22. Punishable by a maximum of 15, 10 and 5 years' imprisonment respectively: Criminal Law Consolidation Act 1935 (SA) ss 29(1)-(3).

serious harm to a person.[23] The two broadest provisions are those in the Northern Territory and Western Australia, which only require danger to 'the life, health or safety of any person'.[24] Having separate offences for endangering life and creating a danger of grievous bodily harm is problematic because the offences vary so significantly in seriousness. Under English law, the main rationale for the rule that the mens rea of murder is satisfied by an intention to cause grievous bodily harm is that grievous bodily harm is harm of such magnitude that it will usually be life-threatening.[25] Yet under most of the general endangerment offences an almost impossible distinction needs to be drawn between acts that pose a danger of these two results.

Endangerment offences need to be fairly precise about the likelihood of the danger (whether of causing death or whatever) materialising. For example, in the Northern Territory, the actions of the defendant must create a 'serious danger, actual or potential' and under the Model Criminal Code proposal there must be a 'real' danger. In Victoria, the statute only requires that a person be placed 'in danger' but this has been interpreted judicially to mean there must be an 'appreciable danger'.[26] Western Australia requires that the other person is 'likely to be endangered'. The relevant provision in South Australia does not specify that any danger need be caused. It merely requires that the defendant must act 'knowing that the act or omission is likely to endanger life'. However, in *R v Bedi,*[27] it was held that there must be proof that the act was in fact likely to endanger life.

What mens rea is required for these general offences? Most of the relevant provisions specify the requisite degree of culpability. South Australia requires knowledge of the likelihood of endangerment and either an intentional or reckless endangerment. Victoria and the Model Criminal Code proposal specify that recklessness is required. In Victoria this has been interpreted to mean that there must be foresight that the probable consequence will be serious injury (or death, as appropriate)[28] or foresight of an appreciable risk of the consequence.[29] The Model

23. Punishable by 10 and 5 years' imprisonment respectively: Crimes Act 1958 (Vic) ss 22-23; and by 10 and 7 years' imprisonment respectively: Model Criminal Code Officers Committee, above n 13, paras 5.1.25–5.1.26.
24. Punishable by a maximum of 5 years' imprisonment or by a maximum of 20 years' imprisonment if the defendant acted with intent to cause harm: Criminal Code 1913 (WA) ss 294(1)–(2). Maximum of 5 years' imprisonment: Criminal Code Act 1983 (NT) s 154(1); if grievous harm or death results from the dangerous act the maximum penalty is increased to 7 and 10 years' imprisonment respectively.
25. Criminal Law Revision Committee *Working Paper on Offences Against the Person* (London: HMSO, 1976) para 29.
26. *R v D* (unreported) Vic Sup Ct, 1 May 1996, discussed by M Groves *Case and Comment* (1997) 21 Crim LJ 40; *Mutemeri v Cheesman* [1998] 4 VR 484, discussed by M Groves *Case and Comment* (1998) 22 Crim LJ 357.
27. (1993) 61 SASR 269.
28. *Filmer v Barclay* (1994) 2 VR 269.
29. *Mutemeri v Cheesman* above n 26.

Criminal Code defines recklessness as requiring that the defendant be aware of a 'substantial risk that the result will occur'.[30] In the Northern Territory, the Criminal Code is explicit that the offence is one of negligence: all that is required is that an 'ordinary person similarly circumstanced would have clearly foreseen such danger'. In Western Australia, the relevant provision is silent as to mens rea. According to principles applied when interpreting the Western Australian Criminal Code, no mens rea is to be implied[31] and it will therefore be for the courts to interpret the general provisions of the Western Australian Code to decide this issue. The most common method of indirectly introducing a culpability requirement under the Western Australian Code is via the second limb of section 23, which exempts people from criminal responsibility for an event which occurs by accident. This has been interpreted to mean that the consequence must not have been intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person.[32] This provision, as interpreted, is aimed at result crimes and seems to have no application to endangerment offences where no 'event' (consequence) occurs. A further relevant provision under the Western Australian Code is section 226, which imposes a duty on persons in charge of dangerous things to use reasonable care and take reasonable precautions to avoid danger. Unlike section 265, which is expressly limited to 'lawful' acts, this provision is capable of application to the sort of 'unlawful' acts covered by section 304, which would mean that in such cases negligence was required. It would, however, be anomalous if negligence was required in such cases but not in other endangerment cases where the person was not in charge of a dangerous thing. Further, section 266 seems to be largely aimed at result crimes in that it specifies that where there has not been the requisite standard of care, the defendant will be held to have caused any consequences which result. A further provision for importing a culpability requirement under Western Australian law is section 24 under which an honest and reasonable mistake of fact can exempt a defendant from liability. This provision, however, is unlikely to be applicable to section 304. If a person is objectively 'likely to be endangered', any belief to the contrary held by the defendant would probably be regarded as unreasonably held and discounted. Depending on the interpretation of 'unlawfully' in section 304, it could be that it will be necessary, on occasions, to establish that the defendant had the mens rea of the unlawful act. Apart from this, the general endangerment offence in Western Australia is effectively one of strict liability.

CASE FOR A GENERAL ENDANGERMENT OFFENCE

There appears to have been little serious consideration given to this topic. For example, in the Northern Territory, section 154 of the Criminal Code was drafted as a

30. Model Criminal Code Officers Committee above n 13, para 5.4(2)(a).
31. *R v Hutchinson* (2003) 144 A Crim R 28.
32. *R v Kaporonovski* (1973) 133 CLR 209.

knee-jerk, 'fall back'[33] reaction to the decision in *R v O'Connor*,[34] which had opened the door to severely intoxicated persons escaping criminal liability. Section 154 was drafted to enable an intoxicated person who acted dangerously and/or caused harm to another to be convicted of a serious criminal offence.

However, some consideration has been given to the issue of whether a general endangerment offence is preferable to a raft of specific offences. The Model Criminal Code Officers Committee, in drafting the Model Criminal Code, did not support specific endangerment offences in relation to listed situations (eg, trains and aeroplanes). This was because, taken together, these 'really indicate that a general principle and hence a general offence is involved'.[35] It argued that 'endangerment of human lives should be covered by one offence.... There should be endangerment offences despite the risks of over inclusion. The modern environment is, for all people, an interdependent environment, in which life and safety must and does depend on the skill and foresight of others'.[36]

This view is understandable. There is no particular reason why certain dangerous activities have been criminalised but others have not. For example, in English law why is reckless endangerment a criminal offence (carrying a maximum penalty of life imprisonment) when the defendant is damaging another person's property but no offence when he or she is engaging in some other activity?[37]

One of the main reasons for having a general endangerment offence is to ensure that there are no gaps, which might exist if there were only specific endangerment offences. This is the only reason given in the Parliamentary debate that led to the enactment of the new Western Australian general endangerment offence.[38] While specific endangerment offences can be tailored to certain dangerous activities such as driving motor vehicles or running factories, there are a host of other everyday activities where we depend on others to perform their actions safely (eg, electricians and builders working in our houses, or child carers looking after our children, or doctors caring for our health). It is almost impossible to cater in advance, through

33. D Sturgess *Criminal Code Seminar* (Darwin, Oct 1983) 23, cited by J Blockland 'Dangerous Acts: A Critical Appraisal of Section 154 of the Northern Territory Criminal Code' (1995) 19 Crim LJ 74, 75.
34. (1980) 146 CLR 64.
35. Model Criminal Code Officers Committee above n 13, 69.
36. Ibid.
37. A Ashworth *Principles of Criminal Law* 4th edn (Oxford: OUP, 2003) 309-310.
38. Criminal Code Amendment Bill 2003 (WA) *Hansard* (LA) 3 Apr 2003, 6158. In debate, the Attorney-General, Mr JA McGinty, simply referred to the earlier 'Murray Report' (MJ Murray *The Criminal Code: A General Review*, 1983) which he said had 'expressed concern . . . [that the specific endangerment offences were] . . . overly restrictive and narrow' (ibid, 6159). In fact, the Murray Report (at p 205) gave no reason for its recommendation of a general endangerment offence other than to say that the purpose was 'to convert this section into a wider form of general provision proscribing dangerous acts and omissions'.

specific offences, for all such persons who might act in a manner dangerous to our lives or safety. Only a general offence is capable of covering all such cases.

CASE AGAINST A GENERAL ENDANGERMENT OFFENCE

When the general endangerment offence was introduced in Western Australia no less than 14 specific endangerment offences in the Western Australian Code were repealed (eg, causing an explosion likely to endanger life;[39] endangering the safety of persons travelling by railway;[40] and endangering steamships by tampering with machinery).[41] Nevertheless, many specific offences remain in Western Australia and in the other three Australian jurisdictions under consideration.[42] All four jurisdictions have specific driving endangerment offences.[43] The result is too many overlapping offences. This is undesirable. One of the main functions of the criminal law is to communicate clearly with citizens exactly what conduct is prohibited and the consequences of a violation of that law. If any individual action can give rise to a myriad of offences, that communication will necessarily be obscured. A further and very significant objection to having too many overlapping offences is that this confers too much discretion on the prosecution as to which charge(s) to bring. In some cases the general endangerment offence is charged alongside specific endangerment offences as well as general harm-based criminal offences.[44] Apart from the general problems associated with conferring too much discretion on those administering the criminal justice system, the result is that defendants may feel pressured into pleading guilty to lesser offences rather than face the more serious charges.

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39. Criminal Code 1913 (WA) s 298.
40. Ibid, s 307.
41. Ibid, s 309. The other repealed offences were: intentionally endangering safety of persons travelling either by railway (s 296) or by aircraft (s 296A); attempting to cause an explosion likely to endanger life (s 299); maliciously administering poison with intent to harm (s 300); failure to supply necessaries (s 302); endangering life or health of apprentices or servants (s 303); endangering life of children by exposure (s 304); sending or taking unworthy ships to sea (s 308); engineer in charge of machinery on a steamship that is endangered by tampering with machinery (s 310); evading laws as to equipment of ships and shipping dangerous goods (s 311); landing explosives (s 312).
42. Eg, endangering life of child by exposure: Criminal Code Act 1983 (NT) s 184; failing to provide food: Criminal Law Consolidation Act 1935 (SA) s 30; using firearm to resist arrest: Crimes Act 1958 (Vic) s 29; carrying dangerous goods on board an aircraft: Criminal Code Act 1913 (WA) s 294A.
43. Dangerous driving: Traffic Act 1987 (NT) s 30(1); careless driving: Road Traffic Act 1961 (SA) s 45; reckless and dangerous driving: Road Traffic Act 1961 (SA) s 46; dangerous driving and careless driving: Road Safety Act 1986 (Vic) ss 64 and 65 respectively; reckless driving, dangerous driving and careless driving: Road Traffic Act 1974 (WA) ss 60, 61 and 62 respectively.
44. Eg, in the South Australian case of *R v Jason* (2002) 36 MVR 474 the defendant was charged with the general endangerment offence, with two counts of damaging property and with illegal use of a motor vehicle.

Proponents of a general endangerment offence would argue that it is preferable to have overlapping offences rather than gaps in the law. As seen, one of the main reasons for having a general endangerment offence is to ensure there are no gaps, which could exist where there are only specific endangerment offences. However, a perusal of 39 cases decided since 1989 (all the author has discovered to date)[45] reveals that in 35 cases an alternative prosecution was or could have been brought. Six cases involved the discharge of firearms; six involved arson or causing explosions; 12 involved stabbing or hitting the victim; five involved atrocious driving with three of those cases being ones where a motor vehicle was used as a weapon; four involved criminal damage[46] with three of these cases concerning the throwing of rocks at passing cars; one case involved suspending the victim from a second-floor balcony; one case involved choking the victim during sexual intercourse to heighten the effects of an orgasm with the result that the victim died.[47] There have been similar cases to this last one in England, which have led to manslaughter convictions.[48] If the victim had not died, difficult questions could have arisen concerning the validity of any consent that might have been given; but these questions and their answers would arguably[49] have been the same irrespective of whether the charge was an offence against the person or a general endangerment offence.

What of the four cases where an alternative charge was not immediately obvious? Three of these were Victorian cases involving the defendant having unprotected sexual intercourse while being HIV positive.[50] Had the other party become infected, charges of causing serious injury would have been available.[51] Whether merely having sexual intercourse while HIV positive should be a criminal offence is a

45. Fourteen of these cases were unreported Northern Territory cases which are cited in Blockland above n 33, 76-77. Most of the 12 cases from South Australia were appeals against sentence. There were no accessible cases from Western Australia where the general endangerment offence only came into force on 21 May 2004. However, the author has been informed by the Department of Justice that by 23 April 2005 there had been seven successful prosecutions for this new offence.
46. Many of the other cases, for example the driving cases, also involved criminal damage.
47. *R v Maurice* (1992) 61 A Crim R 30 (NT).
48. *R v Billia* [1996] 1 Cr App R (S) 39; *R v Williamson* (1994) 15 Cr App R (S) 364.
49. The extent to which one can consent to an act of endangerment is an unresolved matter. In *R v Brown* [1994] 1 AC 212 it was held that, apart from the recognised exceptions such as sport, one can only consent to relatively minor injuries. Accordingly, it is possible to argue that if no injury at all results one should be able to consent to any act of endangerment. The alternative view is that, given the rationale of endangerment offences, one should only be able legally to consent to acts that pose a danger of relatively minor injury. In practice, of course, if there is consent and nothing more than minor injury has occurred, the crime is unlikely to come to the attention of enforcement authorities.
50. *R v B* (unreported) Vic Sup Ct, 3 Jul 1995; *R v D* above n 26; *Mutemeri v Cheesman* above n 26.
51. This would also have been a serious offence punishable by a maximum of 25 years' imprisonment under the Crimes Act 1958 (Vic) s 19A.

controversial matter that requires careful consideration[52] rather than being automatically swept within the umbrella of a general endangerment offence. The final case where a conviction for an alternative offence failed involved the pilot of a hot air balloon who was involved in a collision with another hot air balloon which caused the death of 13 people.[53] The defendant was charged with 13 counts of manslaughter and, in the alternative, one count of a dangerous act. He was acquitted of manslaughter but convicted of doing a dangerous act. This was one clear scenario where, if no deaths had been caused, no other charges could have been brought. However, as will be argued below, in such a case it is difficult to see how there could be sufficient evidence to support a dangerous act conviction. And, given that deaths were actually caused, it is strongly arguable that, for fair labelling reasons, manslaughter should have been the only available count. The law of manslaughter covers cases where persons act dangerously (with gross negligence or through the commission of a dangerous unlawful act) and cause death. If a manslaughter conviction is not obtained, this is presumably (in most cases) because the requisite standard of dangerousness has not been met. It seems inappropriate, and amounts to false labelling, to convict the defendant instead of the very dangerous act that was not sufficiently dangerous for manslaughter.

It is clear from these cases that the main reason the endangerment offence was charged either in addition to, or instead of, other offences may have been because of the higher maximum penalty available on conviction for it. For example, in the South Australian case of *R v Nemer,*[54] the defendant shot the victim, causing grievous bodily harm.[55] The defendant, who had acted recklessly (as opposed to intending grievous bodily harm), could have been charged with malicious wounding[56] but as this only carries a maximum penalty of five years' imprisonment he was instead charged with the general endangerment offence punishable by a maximum of 15 years' imprisonment. In another South Australian case, *Police v CB,*[57] where stones had been thrown at passing cars causing criminal damage, the court emphasised that while damaging property is only a summary offence in South Australia,[58] the offence of endangering life is a 'serious indictable offence'. This seems an inappropriate use of the endangerment offence. Where someone has been shot and sustained grievous bodily harm or, where damage has been caused, the principle of fair labelling dictates that there be a conviction for the appropriate grievous bodily

52. See eg the discussion of this issue by the Model Criminal Code Officers Committee above n 13, 75-87; DC Ormerod & MJ Gunn 'Criminal Liability for the Transmission of HIV' [1996] 1 Web Journal of Current Legal Issues.
53. *R v Sandby* (1993) 117 FLR 218, discussed by Blockland above n 33.
54. (2003) 87 SASR 147, 168.
55. The bones of the eye socket and temple were fractured and blindness resulted.
56. Criminal Law Consolidation Act 1935 (SA) s 23.
57. [1999] SASC 371.
58. It is a serious indictable offence punishable with a maximum of ten years' imprisonment under English law: Criminal Damage Act 1971 s 4(2).

harm or criminal damage offence. If the penalties for these offences are thought to be too low, consideration should be given as to whether they should be raised. Charging an endangerment offence simply becomes a mechanism for avoiding confronting this central issue.

As this survey demonstrates, it is difficult to see that the existence of a general endangerment offence has actually been necessary in the Australian jurisdictions. But, further, it is difficult to see how such an offence could plug any gaps that might present themselves. One of the problems with all endangerment offences is that the dangerous activity is 'often transient and either unwitnessed or lacking residual probative evidence'.[59] In short, it cannot be monitored in the same way as specific activities such as health and safety and driving. Many of the activities that are the subject of specific endangerment offences (eg, health and safety at work) are regulated and inspected. Danger can be identified before a harm has occurred. But with many of the activities instanced earlier as being situations that were not covered by specific endangerment offences (eg, the electrician rewiring a house) the extent of the danger will only be revealed when a harm has been caused. But at that stage, when a death or serious injury will have been caused, a standard criminal offence such as manslaughter will most likely have been committed and will be the most appropriate charge. For example, in the balloonist case, mentioned above, it is inconceivable that there would have been sufficient evidence of endangerment to bring a prosecution if the deaths had not occurred. And, given that they did occur, for the reasons given above, manslaughter was the appropriate charge.

A more radical argument in favour of a general endangerment offence would involve the abolition of many of the existing specific offences so that the danger of overlapping offences would be reduced and there would be more need for such an offence as fewer alternative charges would be available. This raises a central issue that has been debated in England for many years. Should offences be structured in a broad manner or in a specific manner and, if the latter, with how much specificity? For example, it has been suggested that the specific offences of murder and manslaughter (and infanticide and causing death by dangerous driving) should be abolished and replaced by a single broad offence of unlawful homicide. The various circumstances and degrees of seriousness of the killing could be taken into account by the sentencing judge.[60] Similarly, the Law Commission in England has considered collapsing most of the existing property offences into a broad general offence of dishonesty.[61] That argument having been rejected, the Law Commission has recently

59. Smith, above n 14, 135.
60. *Hyam v DPP* [1975] AC 55, Lord Kilbrandon 98. It has recently been announced that the Law Reform Commission of Western Australia will be considering the structure of homicide offences (Reference from Attorney-General, 26 April 2005).
61. Law Commission *Legislating the Criminal Code: Fraud and Deception* Consultation Paper No 155 (London: HMSO, 1999).

proposed merging the various deception and fraud offences into a single offence of fraud.[62]

However, the prevailing view (in England, at any rate) is against this approach. The criminal law is a communicative enterprise and the principle of fair labelling dictates that offences be labelled and structured in a manner that conveys the wrongdoing involved and the level of seriousness of the offence. Having specific endangerment offences enables one to focus on the wrongdoing and the risks involved to determine the appropriate level of liability and punishment. For example, dangerous driving and recklessly endangering life while damaging the property of another involve different wrongs with different degrees of culpability and risk. They ought not to be collapsed into a single broad offence. Having separate offences enables them to 'fulfil the educative or "fair warning" function of singling out situations which carry a particular risk of danger'.[63] On the other hand, having offences as broad as those mentioned above is morally uninformative. As has been said of the Law Commission's proposal to introduce a broad offence of dishonesty: it would simply make it a crime to do anything naughty.[64] These considerations suggest that a broad endangerment offence would similarly be in breach of the principle of fair labelling.

A final, but perhaps the most important, objection to the introduction of a general endangerment offence is that is could lead to over-criminalisation and offend the minimalism principle (ie, the last resort principle).[65] The paradigmatic crime involves an intentional causing of harm.[66] Many offences involve a departure from the paradigm in that no harm is caused (as in attempts) or culpability less than intention suffices (as in crimes that can be committed recklessly or negligently). Endangerment offences, however, involve a double departure from this paradigm. There is no direct harm and no intent. Of course, such a double departure can be justifiable but it is generally accepted that there are rigorous criteria to be overcome before this can be done. For example, consideration needs to be given to whether the conduct causes or risks harm (and how harm is to be defined for this purpose), whether such risks are unjustifiable and whether it is necessary to employ the criminal law (rather than any other area of law) for this purpose.[67] Whether dangerous conduct is

62. Law Commission *Report on Fraud* Cm 5560, Report No 276 (London: TSO, 2002). This was done in Western Australia in 1990 when a new broad offence of fraud (s 409(1)) was introduced to replace the five pre-existing separate offences. See G Syrota 'Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence' (1994) 24 UWAL Rev 261.
63. Ashworth above n 37, 310.
64. 'Comment: Fraud and Deception' (1999) 5 *Archbold News* 4.
65. Ashworth above n 37, 32; D Husak 'The Criminal Law as Last Resort' (2004) 24 OJLS 207.
66. CMV Clarkson *Understanding Criminal Law* 4th edn (London: Fontana, 2005) 163.
67. This was recognised by the Model Criminal Code Officers Committee, above n 13, 69, which accepted that endangerment offences 'extend the core of criminal liability by punishing reckless endangerment in addition to intentional endangerment'; it therefore advocated that the general offence should be 'limited to risks consciously taken in relation to serious harms'.

criminalised generally depends on balancing the seriousness of the possible harm and the likelihood of its occurrence against the social value of the conduct.[68] On this basis, drunken driving is prohibited while walking drunkenly on the street is not.[69] Similarly, possession of firearms is prohibited while possession of other dangerous weapons with greater social value, such as kitchen knives or garden shears, is not unlawful.

A potential problem with a general endangerment offence is that it can be so broad as to sweep conduct within its ambit that would not warrant criminalisation under these strict criteria. Controversial examples that have been cited include the following: the solo yachtsman sailing around the world, or the mountain climber who causes someone to undertake a dangerous rescue,[70] or firemen going on strike.[71] Given the much publicised dangers of passive smoking it could well be argued that smoking in public threatens the life, health and safety of those around the smoker. Such conduct could presumably be swept within the ambit of a general endangerment offence. Turning to specific examples that have come before the Australian courts, it has already been seen that sexual activity while HIV positive can be brought within a general endangerment offence. In one Northern Territory case, a prosecution was brought against a drunken pedestrian on the ground that his drunkenness posed a serious potential danger to the public.[72] The prosecution was persuaded to abandon the charge, but the mere fact that a charge could have been brought raises important questions about what type of risk-taking activities should be criminalised – especially in a jurisdiction such as the Northern Territory where public drunkenness was decriminalised so as to reduce the number of Aboriginal people being taken into custody.[73] In another Northern Territory case, the court had to consider whether an endangerment offence had been committed by a mother telling her 12-year-old daughter to switch the ignition of a parked car on so as to operate the air-conditioning system.[74]

Decisions to make it an offence to be drunk in the street or to smoke in the presence of others or to engage in sexual activity while HIV positive (bearing in mind that in Australia the general endangerment offences are relatively serious offences) require

68. Clarkson above n 66, 176.
69. A von Hirsch 'Extending the Harm Principle: "Remote" Harm and Fair Imputation' in AP Simester & ATH Smith (eds) *Harm and Culpability* (Oxford: OUP, 1996) 262.
70. Model Criminal Code Officers Committee above n 13, 69, 71. The Committee concluded that the taking of such risks would be justifiable.
71. In the New York case of *People v Vizzini* (1974) 359 NYS 2d 143 it was held that firemen being on a 5-1/2 hour strike could be convicted of a general endangerment offence.
72. See Blockland above n 33.
73. This was in response to the Royal Commission into Aboriginal Deaths in Custody *National Report* (Canberra, 1991). See C Cunneen & D McDonald *Keeping Aboriginal and Torres Strait Islander People Out of Custody* (Canberra: Office of Public Affairs, 1996).
74. *Findlay v Northern Territory* (2000) 114 A Crim R 292. This was a claim for civil injuries compensation in which it had to be established whether a crime (under Criminal Code Act 1983 (NT) s 154) had been committed. It was held that a crime had not been committed.

careful debate before being swept within the ambit of a broad new offence. The existence of a general endangerment offence means that full discussion of whether such conduct should be criminalised is avoided. One of the fundamental principles underpinning the criminal law is that of fair warning.[75] People should know in advance what conduct is impermissible. In all these above scenarios this principle is violated.

CONCLUSION

This article has suggested that, as a broad proposition, general endangerment offences are unjustifiable and unnecessary. They result in too many overlapping offences, offences that are too broad and can lead to overcriminalisation. This is certainly true of the provisions as drafted and applied in the Northern Territory, South Australia and Victoria (and under the Model Criminal Code). However, while the first two criticisms (overlapping offences and offences too broad) can also be levelled at the Western Australian provision, that provision has a redeeming feature in that the dangerous conduct must arise from an unlawful criminal act.[76] This clearly means that some of the more controversial instances given of conduct that could be criminal under the other endangerment laws (eg, the mountaineer) would not qualify under the endangerment law of Western Australia. Such an approach is to be welcomed in not allowing conduct to be criminalised when no reasoned debate has taken place as to the desirability of such criminalisation. It also becomes more acceptable that the offence be regarded as relatively serious. A person who has committed a criminal act has crossed a moral threshold and there are well known justifications for holding such persons liable for more serious consequences when they occur,[77] or, in this instance, for the more serious crime of endangerment. Without the endangerment offence, the fact that the unlawful act is dangerous would be an aggravating factor in sentencing. What the endangerment offence essentially does is to incorporate this aggravating feature into the substantive law.

However, despite this redeeming feature, there remain problems with the Western Australian provision. First, it is difficult to support the introduction of a criminal offence of this seriousness that does not specify a culpability element as a necessary prerequisite.[78] Further, given the seriousness of the offence and the fact that it is such a significant departure from the paradigmatic criminal offence, causing a danger to 'life, health or safety' is simply too broad. A better solution would be to limit the offence to unlawful conduct that poses a risk of death or, at the most, serious bodily harm.

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75. Ashworth above n 37, 75.
76. Assuming this interpretation is accepted by the West Australian courts: see above n 15.
77. J Horder 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759.
78. As discussed earlier, it remains to be seen how the courts in Western Australia will interpret section 304 in this regard.

Any jurisdiction contemplating the introduction of an endangerment offence should respond to these observations and criticisms: there would need to be a criminal act that was dangerous to, or better, likely to cause death (or, perhaps, serious bodily injury). The mental element of the offence should be spelt out: there would need to be knowledge or recklessness as to the creation of such a risk. This still leaves the central issue unresolved. Would the introduction of such a provision be desirable?

It is submitted that the answer is no for three reasons. First, the problem of too many overlapping offences would remain. Secondly, while there are sound reasons for insisting on the commission of an unlawful (criminal) act, the reality is that such a requirement means that the endangerment offence would not be available in many of the classic instances where it is argued that such an offence is necessary to plug gaps in the criminal law – for example, the electrician who dangerously rewires a house or the dangerous balloonist. Finally, such an offence would almost invariably breach the principle of fair labelling. If an unlawful act is required, a prosecution for that criminal act is more appropriate. The level of danger involved in that unlawful act can and should be reflected at the sentencing stage. Further, as seen, prosecutions for the endangerment offence are usually only brought, for evidential reasons, when there has been a resultant harm. In such cases, a prosecution and conviction for the complete result crime is more appropriate.

In short, little is to be gained, and much may be lost, by the introduction of a general endangerment offence. English law and the law of the remaining Australian jurisdictions would be ill-advised to go down this route.