

CHAPTER 1

INTRODUCTION TO THE CRIMINAL CODES

COVERED IN THIS CHAPTER

In this chapter you will learn about:

- Australia's criminal law landscape
- the *Model Criminal Code*
- the Griffith Codes
- interpretation of Codes
- principles of criminal law and criminal procedure
- difference between a crime and a tort
- burden of proof
- reception of imperial law and customary criminal law.

CASES TO REMEMBER

R v JS [2007] NSWCCA 272

Woolmington v DPP [1935] AC 462

AUSTRALIA'S CRIMINAL LAW LANDSCAPE

Australia has a very disparate mosaic of criminal laws with nine criminal jurisdictions. Unlike Canada, which has a single Criminal Code,¹ Australia's criminal laws are state based and can broadly be grouped into either Code states and territories² or common law states.³ Superimposed on state legislation is Commonwealth legislation,⁴ and the distinction relates to the powers given to the Commonwealth under s 51 of the Federal Constitution.⁵

Since Federation in 1901, this mosaic of criminal laws has been subjected to two countervailing forces. On the one hand, the trend of non-Code jurisdictions to place the criminal law in statutes has in some cases 'brought some Code jurisdictions closer to some of their common law cousins than to their Code siblings and vice versa'.⁶ On the other hand, there 'is the modern tendency of the courts, and particularly the High Court of Australia, in interpreting the law of one jurisdiction, to do so in a way which will provide a uniform solution for as many as possible of the other jurisdictions'.⁷

The impetus towards the unification of Australian criminal law began in June 1990 when the Standing Committee of Attorneys-General placed a uniform criminal code on its agenda,⁸ and established the Model Criminal Code Officers' Committee

(MCCOC). The Committee's first report in 1992 dealt with general principles of criminal responsibility, which was substantially adopted as Chapter 2 of the *Criminal Code 1995* (Cth).

The response to the series of reports produced by the MCCOC⁹ 'has been piecemeal [with] Queensland largely ignoring the *Model Criminal Code* [while] in other jurisdictions, a selective approach to codification has prevailed'.¹⁰ As Bronitt and McSherry point out, under such a selective approach, 'the relationship between the reforms based on the *Model Criminal Code* and the existing common law has not been consistent, even within the same jurisdiction'.¹¹ The authors give as an example in New South Wales the express abolition of the common law governing intoxication,¹² as compared to the absence of any such specification when the law of self-defence was 'codified' in similar language to the *Model Criminal Code* within the *Crimes Act 1900* (NSW).¹³ However, in contrast, both the Australian Capital Territory in 2002 and the Northern Territory in 2006 have taken up the *Model Criminal Code* by incorporating Chapter 2 of the *Criminal Code 1995* (Cth) in their respective Codes.

THE MODEL CRIMINAL CODE

It is important to understand that in the case of federal offences, the relevant law is the law of the Commonwealth. Chapter 2 of the *Criminal Code 1995* (Cth), which is based on the *Model Criminal Code*, is the reference point for criminal responsibility for Commonwealth statutes. Thus, a person charged with people smuggling or a counterfeiting offence will come under the *Migration Act 1958* (Cth) or the *Crimes (Currency) Act 1981* (Cth) respectively. However, it should be noted under s 77(iii) of the Federal Constitution, the Commonwealth Parliament has invested state courts with federal jurisdiction 'in all matters' where the High Court could be invested with original jurisdiction: s 39(2) *Judiciary Act 1903* (Cth).

The most important component of Chapter 2 of the *Criminal Code 1995* (Cth) is Part 2.2, which covers the elements of an offence. The formula adopted is that an offence consists of physical (the *actus reus* in common law parlance) and fault elements (the *mens rea*, although an offence may provide for a no-fault element in the case of strict or absolute liability). Physical elements can be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct happens. Fault elements can be intention, knowledge, recklessness or negligence—all of which are defined. These fault elements can be conceived as a ladder of criminal responsibility, with intention at the top and negligence at the bottom.

Essentially, the basic structure of the *Criminal Code 1995* (Cth) is that the conduct (act) must be intentional and the person engaging in the conduct must be reckless (the residual threshold for criminal liability), either as to the result of conduct or as to the circumstance in which conduct happens, unless another fault element is specified. An example is given below of the offence of murder under s 156 of the *Criminal Code 1983* (NT), which has incorporated Part 2.2 of the *Criminal Code 1995* (Cth) for offences against the person listed in Schedule 1.

Section 156 Murder

- (1) A person is guilty of the crime of murder if:
- (a) the person engages in conduct; and
 - (b) that conduct causes the death of another person; and
 - (c) the person intends to cause the death of, or serious harm to, that or any other person by that conduct.

The elements of s 156(1) can be broken down as follows:

1. The person engages in conduct
 - *Physical element*—Conduct
 - *Fault element*—Intention (s 43AM(1)¹⁴ default fault element)
2. That conduct causes the death of another person
 - *Physical element*—Result
 - *Fault element*—Intention to cause the death of, or serious harm to, that or any other person by that conduct.

A CASE TO REMEMBER

R v JS [2007] NSWCCA 272

New South Wales Court of Criminal Appeal

In *R v JS*, Spigelman CJ gave an extended analysis of the statutory interpretation of Chapter 2 of the *Criminal Code 1995* (Cth). In that case, the court was concerned with the intentional destruction of data that might later be required in judicial proceedings, contrary to s 39 of the *Crimes Act 1914* (Cth). Spigelman CJ drew attention to the need for the elements of s 39 to be interpreted within the context of the relevant *Criminal Code 1995* (Cth) provisions 'which require a particular analysis, in accordance with the requirements of that Code'.¹⁵ Because there is an express reference to knowledge in s 39 of the *Crimes Act 1914* (Cth), the relevant fault element is 'knowledge', which is defined in s 5.3 of the *Criminal Code 1995* (Cth) as: 'A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.'

THE GRIFFITH CODES¹⁶

As Leader-Elliott has observed, the enactment of the *Criminal Code 1899* (Qld) was heavily influenced by Sir Samuel Griffith's stature and dominance in the political life of Queensland.

Few law reformers have enjoyed comparable advantages. He was successively Attorney-General, Premier, and Chief Justice of the Supreme Court of Queensland. The Code was drafted during his term as Chief Justice. He presided over the Royal Commission that scrutinised its provisions and as Acting Governor of the State exercised the Royal Prerogative to give it legal effect. Subsequently, as Chief Justice of the High Court of Australia, he presided over the first appellate decisions on the meaning of its provisions.¹⁷

Griffith drew heavily on Stephen's Code for England, which was drafted in the late 1870s but never enacted. Western Australia adopted Griffith's Queensland Code in 1902 (later revised in 1913), and while there are now differences between the two Codes, such as the removal of criminal procedure in Western Australia to separate statutes, they have fundamentally shared the same Code for criminal offences for over a century. Tasmania introduced a Code in 1924, which reflects a hybrid of the Queensland Code and the common law. The Northern Territory introduced a modernised Griffith Code in 1983, but since 2006 has commenced a conversion to the Commonwealth Code.

Codification has been defined as 'the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or in common law'.¹⁸ This aspiration was certainly shared by Sir Samuel Griffith, who 'envisaged that the Code should be a collected and explicit statement of the criminal law in a form that could be ascertained by an intelligent person'¹⁹ while pointing out to the Attorney-General in his well-known Explanatory Letter that the criminal law of Queensland was scattered throughout nearly 250 statutes outside of the applicable common law.²⁰

However, the Griffith Codes are not codes at all, but sparsely written restatements of the common law. To be a true code, the relevant law needs to be spelt out in detail for each offence and defence, with offences conforming to the general part of the code, unlike the Griffith Codes, which were demolished by Dixon CJ in *Vallance v The Queen* (1961) 108 CLR 56, 61. Dixon CJ's essential point was that the central criminal responsibility section of the *Criminal Code 1924* (Tas), s 13(1), the equivalent of s 23 in the Queensland and Western Australian Codes, was irrelevant to working out the operation of individual provisions of the Code. This issue will be developed in Chapter 2, where s 23 is fully discussed.

In *Widgee Shire Council v Bonney* (1907) 4 CLR 997, 981, Griffith CJ famously observed that 'under the criminal law of Queensland, as defined in the *Criminal Code*,

it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which was the subject of much discussion'. Nevertheless, as Goode noted, 'whether or not the terms "actus reus" and "mens rea" have been used in the Griffith Code, equivalent concepts have been widely employed in a variety of guises'.²¹

At the very least, the Griffith Codes require the doctrine of *mens rea* in the form of intention where there is an express provision, such as in s 302(1)(a) *Criminal Code 1899* (Qld), which deals with murder. The better view is that *mens rea* is an essential element of an offence unless expressly excluded,²² such as where the statute defines the offence as one of strict or absolute liability. *Mens rea* also applies to offences where the fault element is negligence, because liability is imposed for the intentional doing of the act given the risk involved.

The underlying *sub silentio* fault element of the Griffith Codes is negligence, which requires a purely objective test. Fairall has pointed out, '[i]n Queensland and Western Australia, Courts have interpreted the Griffith Codes in such a way that negligence is the underlying fault standard',²³ citing as authority *R v Taiters* (1996) 87 A Crim R 507, 512: 'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.' The underlying fault element of negligence in the Queensland and Western Griffith Codes follows from their being drafted in the nineteenth century, when the common law reflected objective, as opposed to subjective, criminal responsibility.

INTERPRETATION OF CODES

The golden rule of code interpretation is one of not looking outside of the code to the common law unless the meaning is either unclear or has a prior technical meaning.²⁴

The enactment and operation of criminal codes in Australia for over a century has inevitably required the High Court to consider on numerous occasions the appropriate principles to be applied to code interpretation. Pearce and Geddes have suggested that the main issue that has required the attention of the courts is the extent to which regard may be had to the common law or previous statutes in interpreting a criminal code.²⁵ Kirby J addressed this issue in *Charlie v The Queen* (1999) 199 CLR 387, 394 [14]:

[I]t is erroneous to approach the meaning of a code with the presumption that Parliament's purpose was to do no more than restate the pre-existing law. The first loyalty ... 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.

Fisse has made the significant point that codification tends 'to fix the content of the law as at one point in time',²⁶ and without regular amendments 'obliges the judiciary either to do increasing violence to its literal terms or else abandon progress'.²⁷ Fisse also observed in discussing the need for Codes to be regularly revised 'that in this matter the Australian Code States have been neglectful, for none of the three Codes has been properly revised since inception'.²⁸ Leader-Elliott has suggested that for the Griffith Codes even by the mid-twentieth century 'the general principles were an anachronism, and their subsequent history of judicial reinterpretation ... has been one of continuing fruitless dissension'.²⁹

Colvin, McKechnie and O'Leary have observed in reference to the various criminal law jurisdictions in Australia, that '[t]he jurisprudential difference between the common law and the code traditions is perhaps best regarded as one of emphasis rather than of kind'.³⁰ Schloenhardt has described the *Criminal Code 1899* (Qld) as reflecting 'very strongly Australia's common law tradition',³¹ going on to state that 'Griffith's principal intention was to reproduce (not change) the common law by way of codification'.³²

Colvin et al. further point out that in common law jurisdictions, while the criminal law is essentially statute based,³³ this legislation leaves 'many gaps to be filled by the invocation of common law rules and principles'.³⁴ At the same time, neither are Australian criminal codes exhaustive or comprehensive, because 'some gaps still remain which have to be filled by reference to the common law'.³⁵ The difficulties presented by the 'gaps' are compounded by 'the inherent vagueness of statutory language [which] presents problems of interpretation' in the resolution of which 'reference is often made to the common law'.³⁶

PRINCIPLES OF CRIMINAL LAW AND CRIMINAL PROCEDURE

Criminal law can be divided into two main areas:

- (1) principles of criminal law, which deal with the substantial criminal law in the form of criminal responsibility, offences and defences
- (2) criminal procedure, which is the process whereby a person is brought before a court, ranging from arrest and bail to sentencing and appeals.

For over a century, the Queensland and Western Australian Codes both included criminal procedure as part of their respective Codes. This changed in Western Australia with the passage of the *Criminal Procedure Act 2004* (WA) and the *Criminal Investigation Act 2006* (WA). The former covers such areas as prosecutions in courts of summary jurisdiction and superior courts, procedures on a charge of a simple offence and an indictable offence, procedures for dealing summarily with any charge, and applications for trial by jury and for trial by judge alone. The latter covers such areas as search warrants, searching people, forensic procedures, interviewing suspects, arrest and dealing with arrested people, and seizure. In Queensland, the investigative powers of the police come under the *Police Powers and Responsibilities Act 2000* (Qld).

There is an important procedural distinction between simple and indictable offences. Generally, a simple offence is tried summarily in Magistrates Courts, where there is no jury and the magistrate is both the trier of fact and sentencing officer. Indictable offences are more serious offences, and are usually tried in a District Court or a Supreme Court by a judge and jury.

Under s 3 of the Queensland Code, offences are divided as follows:

3 Division of offences

- (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
- (2) Criminal offences comprise crimes, misdemeanours and simple offences.
- (3) Crimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.
- (4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.
- (5) An offence not otherwise designated is a simple offence.

It can be seen from s 3(3) above that crimes and misdemeanours are indictable offences. However, some indictable offences may be tried summarily: see s 552A Charges of indictable offences that must be heard and decided summarily on prosecution election, and s 552B Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial.

In Western Australia, s 3(2) of the Code states: 'An indictable offence is triable only on indictment, unless this Code or another written law expressly provides otherwise.' This section is qualified by s 5(2).

- (2) Despite section 3(2), the court is to try the charge summarily unless—
 - (a) on an application made by the prosecutor or the accused before the accused pleads to the charge, the court decides under subsection (3) that the charge is to be tried on indictment; or
 - (b) this Code or another written law expressly provides to the contrary.

Section 5(3) of the *Criminal Code* (WA) then sets out a series of criteria whereby the court may decide the charge is to be tried on indictment, which include

the seriousness of the offence, whether other offences are involved, whether a co-accused is to be tried on indictment, and that the interests of justice require that the charge be dealt with on indictment.

DIFFERENCE BETWEEN A CRIME AND A TORT

A tort is a civil wrong, where the usual remedy is compensation in the form of damages. The burden of proof lies on the plaintiff on the balance of probabilities. A crime, on the other hand, is an act that the law prohibits and carries penal consequences. The burden of proof lies on the Crown to the standard of beyond reasonable doubt. Crimes, as opposed to regulatory offences or offences of strict or absolute liability, require a mental element or *mens rea* or a fault element to use the Commonwealth Code's nomenclature. The difference between a crime and a tort can be illustrated by the tort of negligence and the crime of gross criminal negligence manslaughter.

To succeed in a civil action for negligence, the plaintiff must demonstrate (a) a duty of care; (b) breach of duty; and (c) damage. The breach element finds expression in s 9(1) of the *Civil Liability Act 2003* (Qld) and s 5B of the *Civil Liability Act 2002* (WA).

A person does not breach a duty to take precautions against a risk of harm unless—

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

Compare the above standard for breach of duty in a civil action for negligence with the standard required for a conviction for gross criminal negligence manslaughter, which is taken from the definition of negligence in s 5.5 of the *Criminal Code* 1995 (Cth).

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.

Both tests are objective in the sense that the reasonable person is the benchmark, but for the fault element of criminal negligence the 'falling short' or breach of the standard of care must be so great that the conduct merits criminal sanction. See, for example, *R v Adomako* [1994] 3 WLR 288 (House of Lords), where an anaesthetist

was convicted of gross negligence manslaughter for failing to notice an oxygen pipe had become disconnected.

BURDEN OF PROOF

In a criminal case, the Crown always bears the legal burden of proof to prove beyond reasonable doubt all the elements of an offence as well as to negative beyond reasonable doubt all defences raised by the defence where the defence only has an evidentiary burden in raising the defence. The classic case of *Woolmington v DPP* [1935] AC 462 below will serve to explain the concepts.

A CASE TO REMEMBER

Woolmington v DPP [1935] AC 462

House of Lords

Woolmington was charged with the wilful murder of his wife. Woolmington's version of events was that he did not intend to kill his wife, but rather he wanted her to return to him. To show his wife he was serious he threatened to kill himself if she did not come back to the marital home. By accident, the gun went off, shooting his wife in the heart.

The trial judge directed the jury that the legal onus (on the balance of probabilities) was on Woolmington to show that the shooting was accidental. The subsequent appeal was dismissed by the Court of Criminal Appeal, who cited *Foster's Crown Law* (1762) as authority:

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.³⁷

The Attorney-General gave his fiat certifying that Woolmington's appeal involved a point of law of exceptional public importance, which brought the issue of the correctness of the above statement in *Foster's Crown Law* to the House of Lords. This was the background to Viscount Sankey's famous 'golden thread' speech:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.³⁸

Thus, from 1935 onwards, it has been settled law that where an accused person raises the defence of accident, it is for the Crown to negative that possibility beyond reasonable doubt. It is otherwise where there is a legal onus on the defence, which Viscount Sankey referred to in the case of the defence of insanity and any statutory exceptions such as the partial defences to murder of diminished responsibility and provocation in Queensland (Western Australia has neither defence). Where there is a legal onus on the defence, the defence must prove the defence on the balance of probabilities. Where the defence only faces an evidentiary burden, such as for mistake of fact or self-defence, then it only needs to convince the court that there is a reasonable possibility the defence exists. Once the evidential burden of raising a particular defence has been satisfied by the defendant, then the onus of proof switches to the Crown to negative that defence beyond reasonable doubt.

RECEPTION OF IMPERIAL LAW AND CUSTOMARY CRIMINAL LAW

In Blackstone's *Commentaries* (1773) Book 1, 107, there is to be found this famous passage pertinent to Australia in 1788: 'Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony.' In *Walker v New South Wales* (1994) 182 CLR 45, Mason CJ addressed the question of whether the Parliament of New South Wales had legislative competence to regulate or effect the rights of Aboriginal people, holding that customary Aboriginal criminal law is not recognised by the common law in New South Wales.

In *Quan Yick v Hinds* (1905) 2 CLR 345, 359, Griffith CJ when dealing with the more general question whether the entirety of Imperial law was in force in Australia stated: 'It has never been doubted that the general provisions of the criminal law were introduced by the [*Australian Courts Act 1828* (Cth)].' Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In *Mabo* [*No. 2*], the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.³⁹

Thus, from 1828 the general provisions of English criminal law have applied in Australia, and such provisions are of universal application. These general provisions altered in Queensland in 1899 and Western Australia in 1902 with the passage of each state's criminal code.

Important References

For more extensive coverage of the overview of criminal law in the Australia, students should consult the following textbooks:

Eric Colvin, John McKechnie and Jodie O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 7th edition, 2015) Chapter 1.

Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 4th edition, 2015) Chapter 1.

ASSESSMENT PREPARATION

ACTIVE LEARNING QUESTIONS

1. Why does Australia have a very disparate mosaic of criminal laws?
2. What is the difference between a Code and a crimes act?
3. What are the main differences between the *Criminal Code 1995* (Cth) and the Griffith Codes?
4. What are the main differences between the principles of criminal law and criminal procedure?
5. How does the burden of proof differ between the prosecution and the defence?

Problem Question

Discuss the reasons why the states, but not the territories, have refused to adopt the *Model Criminal Code*. In the future, is there any prospect that Australia will have a single criminal code, as in Canada?

Notes

- 1 *Criminal Code 1892* (Canada).
- 2 The Code states and territories are Queensland (1899), Western Australia (1902), Tasmania (1924), the Northern Territory (1983) and the Australian Capital Territory (2002).
- 3 The common law states are New South Wales, Victoria, and South Australia, although each of these states has significant statute law. See for example *Crimes Act 1900* (NSW); *Crimes Act 1958* (Vic); and *Criminal Law Consolidation Act 1935* (SA).
- 4 See for example *Criminal Code 1995* (Cth).
- 5 *Commonwealth of Australia Act 1900* (Imp). Section 51 lists the legislative powers of the Federal Parliament. So, for example, the Commonwealth's capacity to deal with drug offences under the *Criminal Code 1995*. (Cth) is based on two heads of power under s 51: (i) trade and commerce; and (xxix) external affairs. Other relevant heads of power for federal criminal offences include: (ii) taxation; (v) postal, telegraphic, telephonic, and other like services; (ix) quarantine; (x) fisheries in Australian waters beyond territorial limits; (xii) currency, coinage, and legal tender; and (xviii) copyrights, patents of inventions and designs, and trademarks.
- 6 D. Lanham, B. Bartal, R. Evans, and D. Wood, *Criminal Laws in Australia* (Federation Press, 2006) 1. The authors give as an example the similarity of the law of theft between the Northern Territory and Victoria, as compared with the Northern Territory and other Code States.
- 7 *Ibid*, 2. The authors cite at page 4 *Masciantonio v The Queen* (1995) 183 CLR 58, 66, 71 as authority that *Stingel v The Queen* (1990) 171 CLR 312 'laid down the law not only for the Tasmanian Code but also for the common law and other statutory provisions on provocation'.
- 8 Model Criminal Code Officers' Committee (MCCOC), *Model Criminal Code, General Principles of Criminal Responsibility*, Report (1992), i.
- 9 The chapters of the *Model Criminal Code* are: Chapters 1 and 2: General Principles of Criminal Responsibility; Chapter 3: Theft, Fraud and Bribery Related Offences and Conspiracy to Defraud; Chapter 4: Damage and Computer Offences; Chapter 5: Offences Against the Person; Chapter 6: Serious Drug Offences; Chapter 7: Administration of Justice Offences; Chapter 8: Public Order Offences and Contamination of Goods; Chapter 9: Offences Against Humanity, Slavery.

- 10 S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd edition, 2010) 85.
- 11 *Ibid.*
- 12 S 428H *Crimes Act 1900* (NSW).
- 13 See s 10.4 *Self-Defence Criminal Code 1995* (Cth) and ss 418–422 *Crimes Act 1900* (NSW). The *Crimes Amendment (Self-Defence) Act 2001* (NSW) effectively repealed the common law defence without expressly stating such an outcome, and contained two departures from the *Model Criminal Code* relating to the re-introduction of excessive self-defence (s 421) and self-defence in the context of defence of property (s 420).
- 14 S 43AM(1) states: 'If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element'.
- 15 *R v JS* [2007] NSWCCA 38 [8].
- 16 This textbook takes the Griffith Codes to be the *Criminal Code 1899* (Qld), the *Criminal Code 1913* (WA) the *Criminal Code 1924* (Tas) and the *Criminal Code 1983* (NT). While the Northern Territory has imported Chapter 2 of the *Criminal Code 1995* (Cth) as Part IIAA effective from 20 December 2006, this presently predominantly applies only to a range of offences against the person listed in Schedule 1.
- 17 I. Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon' (2006) 9 *Buffalo Criminal Law Review* 391, 394–395, footnote 12.
- 18 Mr Justice Ronan Keane, '30 Years of Law Reform 1975–2005', speech delivered at the 30th Anniversary of the Law Reform Commission of Ireland, Farnleigh House, Phoenix Park, Dublin, 23 June 2005, 9.
- 19 Bronitt and McSherry, above n 10, 81, citing Sir Samuel Griffith, 'Explanatory Letter to the Attorney-General Queensland with Draft Code' in K. Whitney, M. Flynn and P. Moyle, *The Criminal Codes* (Lawbook Co, 5th edition, 2000) 5.
- 20 Sir Samuel Griffith, Letter to the Queensland Attorney-General, 29 October 1897, iv. Another former Chief Justice of the High Court has stated that Griffith 'intended his Code to be an exhaustive statement of the law, and not merely a consolidation of part of it [but] the decisions that would interpret the Code would mean that the Code was not an exclusive source of law'. Sir Harry Gibbs, 'The Queensland Criminal Code: From Italy to Zanzibar', Speech delivered at the Opening of Exhibition at Queensland Supreme Court Library, Brisbane, 19 July 2002, 11.
- 21 M. R. Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', (2002) 26 *Criminal Law Journal* 152, 159.
- 22 *Lim Chin Aik v The Queen* (1963) AC 160, 173 (JCPC).
- 23 P. Fairall, *Review of Aspects of the Criminal Code of the Northern Territory*, March 2004, 41.
- 24 *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell).
- 25 D. Pearce and R. Geddes, *Statutory Interpretation in Australia* (Butterworths, 5th edition, 2001) [8.8].
- 26 B. Fisse, *Criminal Law* (The Law Book Company Limited, 5th edition, 1990) 5.
- 27 *Ibid.*
- 28 *Ibid.*, 5–6. The three codes states referred to are Queensland, Western Australian and Tasmanian.
- 29 I. Leader-Elliott, above n 17, 396.

- 30 E. Colvin, J. McKechnie and J. O'Leary, *Criminal Law in Queensland and Western Australia* (LexisNexis, 7th edition, 2015) 7 [1.12].
- 31 A. Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 4th edition, 2015) LXVII.
- 32 *Ibid*, 28 [2.2.1.1].
- 33 See above n 3 referring to *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic) and *Criminal Law Consolidation Act 1935* (SA).
- 34 Colvin, McKechnie and O'Leary, above n 30, 7 [1.12].
- 35 *Ibid*.
- 36 *Ibid*.
- 37 Sir Michael Foster, *Foster's Crown Law* (1762) 255.
- 38 *Woolmington v DPP* [1935] AC 462, 481.
- 39 *Walker v New South Wales* (1994) 182 CLR 45, 50.