

CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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CHAPTER 1

ACTIVE LEARNING QUESTIONS

1. Why does Australia have a very disparate mosaic of criminal laws?

Australia has a very disparate mosaic of criminal laws with nine criminal jurisdictions. Unlike Canada, which has a single Criminal Code (*Criminal Code 1892* (Canada)) because s 91(27) of the *Constitution Act 1867* (Canada) established the sole jurisdiction of the Federal Parliament over criminal law in Canada, Australia's criminal laws are State based because s 51 of the Australian Constitution does not give the Federal Parliament power over criminal law. Australia's criminal laws can broadly be grouped into either Code States and Territories (Queensland (1899), Western Australia (1902), Tasmania (1924), the Northern Territory (1983) and the Australian Capital Territory (2002)), or common law States (New South Wales, Victoria, and South Australia, although each of these States has significant statute law: *Crimes Act 1900* (NSW); *Crimes Act 1958* (Vic); and *Criminal Law Consolidation Act 1935* (SA)). In 2006, the Northern Territory followed the example set by the Australian Capital Territory and began the process of transitioning to the *Model Criminal Code* as found in Chapter 2 of the *Criminal Code 1995* (Cth). Thus it is possible to further sub-divide the Code States and Territories into those that are based on the Griffith Codes (Queensland, Western Australia and Tasmania) and those that are based on the *Model Criminal Code* (Australian Capital Territory and the Northern Territory).

Superimposed above State legislation is Commonwealth legislation (*Criminal Code 1995* (Cth) and *Crimes Act 1914* (Cth)), and the distinction relates to the powers given to the Commonwealth under s 51 of the Federal Constitution: *Commonwealth of Australia Act 1900* (Imp). Section 51 of the Constitution lists the legislative powers of the Federal Parliament. So, for example, the Commonwealth's capacity to deal with people smuggling under the *Migration Act 1958* (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.

2. What is the difference between a Code and a Crimes Act?

The conventional view is that there is a divide between the Griffith Codes and the so called 'common law' States which have adopted Crimes Acts. The basis of this view is said to be the predominance of the common law in these Acts, whereas the Griffith Codes, as the name implies, have sought to change the criminal law by incorporating a General Part which deals with criminal responsibility and a Specific Part which covers individual offences. 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. 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.

This book contends that there is no such 'divide', and that effectively there is no foundational difference between the Griffith Codes and the so called common law states of New South Wales, Victoria and South Australia. Such a premise is based on the proposition that Griffith's original code, the Criminal Code 1899 (Qld), is not a code at all, judged against the widely used criteria for a code that a code must be (1) comprehensive in describing the rules of conduct and (2) must communicate those rules effectively to the general public, as Griffith merely restated the common law. Indeed, it is further contended that Griffith rebadged Sir James Stephen's English Criminal Code Bill (1880), which was a narrow code that retained the common law. The High Court regularly turns to Stephen's *History of the Criminal Law of England* (1883) when seeking to interpret sections of Griffith's code 'lifted' wholesale from the English Criminal Code Bill (1880).

The conclusion drawn from such an analysis is that the mosaic of criminal law jurisdictions in Australia is not characterised by a code and common law 'divide', but rather a suite of calcified Griffith Codes (Qld, WA and Tasmania) locked into 19th century common law principles on the one hand, and a disparate collection of Crimes Acts (Victoria and NSW) or Criminal Law Consolidation Act (SA), which are also based on the common law, on the other hand. The only unifying theme that binds the six states is a rejection of the Model Criminal Code legislated as Chapter 2 of the Criminal Code 1995 (Cth)—but sensibly adopted by the ACT and NT—which is the only Australian code remotely worthy of the title of a 'code'. The real pity is that there was no one of the calibre of John A. Macdonald, Canada's first Prime Minister, amongst the founding fathers of the *Australian Constitution* with the vision to ensure that criminal laws were a federal and not a state responsibility.

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 (Statutory Interpretation in Australia (Butterworths, 5th edn, 2001) [8.8]) 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. Kirby J has addressed this question in several judgments (see for example *R v Barlow* (1997) 188 CLR 1, and *Murray v The Queen* (2002) 211 CLR 193) but the most succinct version is to be found in *Charlie v The Queen* (1999) 199 CLR 387, 394 [14].

Although a code is enacted by legislation and thus attracts the general rules applicable to the task of statutory construction, it is a special type of legislation. It does not (unless expressly stated) set out to be a mere restatement of the pre-existing or common law. It is not uncommon for codes, including in the area of criminal law, to introduce fundamental changes. Accordingly, it 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, 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 (footnotes omitted).

The above passage is helpful as far as it goes. References to first loyalties being to the code and reading the code as a whole are familiar tenets of statutory construction and could equally be applied to the *Australian Constitution* which is the very epicentre of Australian law. The *Australian Constitution* is a very sparsely written document and the High Court has wrestled with its interpretation since Federation. The Griffith Codes suffer from the same defect; they are too sparsely written and per force require the judiciary to develop the law around the substantive sections. While it is recognised that there is a danger that the more dense the language of the sections, the more scope for ambiguity, the failure to fully specify the physical and fault elements of an offence necessitates turning to either the common law or the interpretation given to similar sections within the Griffith Code 'family'.

However, for present purposes the focus is on the statement in the extract above to it not being 'uncommon for codes ... to introduce fundamental changes'. If that be the perception, then it follows that codes are not mere restatements of the common law and it is erroneous to approach code interpretation with such a presumption. This book contends that such a perception is misplaced and that all Griffith was seeking to achieve, like Stephen before him, was a restatement of the existing law.



3. What are the main differences between the Commonwealth Criminal Code and the Griffith Codes?

In the Griffith Codes offences are defined by reference to conduct and circumstances, which may sometimes include the existence of a specific state of mind. If the elements of an offence are proved, the offence has been committed unless the accused is relieved of criminal responsibility by virtue of authorisation, justification or excuse.

In the Griffith Codes unless there is some evidence raising a ground of authorisation, justification or excuse (see Chapter 5 [ss 22–36] of the Queensland Code) it is unnecessary to direct the jury upon that ground. In many cases it is unnecessary to say anything in the charge regarding the mental state required for the offence. It is otherwise when the mental state is an element of the offence itself, such as intention for murder.

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’. The replacement test expressed negatively in s 23 Criminal Code 1899 (Qld) and s 23A and s 23B Criminal Code 1913 (WA) is whether the act or omission occurred independently of the person’s will or is an event that occurs by accident.

The underlying fault element in the Griffith Codes is negligence given the reasonably foreseeable consequence test (objective) in s 23(1)(b) in Qld and s 23B(2) in WA. See Stephen Edward 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 Commonwealth Criminal Code is based on the Model Criminal Code. The most important component of the Criminal Code 1995 (Cth) is Chapter 2, 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 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. The underlying fault element is recklessness which straddles the subjective requirement of awareness of a substantial risk and the objective



requirement of the taking of the risk being unjustifiable. See *R v JS* [2007] NSWCCA 272 for an extended analysis of the statutory interpretation of Chapter 2 of the Criminal Code 1995 (Cth).

Thus, it can be seen that the Commonwealth Criminal Code has a binary structure of identifying for each offence a matching physical and fault element, whereas in the Griffith Codes unless a mental element is prescribed, the offence is determined by reference to conduct and circumstances and the absence of authorisation, justification or excuse.

4. What are the main differences between the 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; and (2) Criminal procedure, which is the process whereby a person is brought before a court, ranging from arrest and bail to sentencing and appeals.

Criminal procedure 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; applications for trial by jury and for trial by judge alone; search warrants; searching people; forensic procedures; interviewing suspects; arrest and dealing with arrested people; and seizure.

In Western Australia, but not in Queensland, criminal procedure matters have been removed from the Criminal Code (WA) and placed in two pieces of legislation: Criminal Procedure Act 2004 (WA) and the Criminal Investigation Act 2006 (WA). In Queensland, the investigative powers of the police come under the Police Powers and Responsibilities Act 2000 (Qld).

5. How does the burden of proof differ between the prosecution and the defence?

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: *Woolmington v DPP* [1935] AC 462.

Where there is a legal onus on the defence, such as insanity, 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.



The *Criminal Code 1995* (Cth) defines the two types of burdens of proof in Division 13.

13.1 Legal burden of proof--prosecution

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

13.2 Standard of proof--prosecution

(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

13.3 Evidential burden of proof--defence

(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

13.4 Legal burden of proof--defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

13.5 Standard of proof--defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

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?

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,¹ 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 MCCOC² 'has been piecemeal [with] Queensland largely ignoring the *Model Criminal Code* [whilst] in other jurisdictions, a selective approach to codification has prevailed'.³ 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'.⁴ The authors give as an

¹ Model Criminal Code Officers Committee (MCCOC), *Model Criminal Code, General Principles of Criminal Responsibility*, Report (1992), i.

² 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.

³ S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd edn, 2010), 85.

⁴ *Ibid.*

example in New South Wales the express abolition of the common law governing intoxication,⁵ 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).⁶ However, by 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) into their respective Codes. In the case of the Northern Territory, this commenced with the insertion of Chapter 2 as Part IAA of the *Criminal Code 1983* (NT) effective from 20 December 2006.⁷ There was no historical attachment to a long lived Code in the Territories nor a well-established body of case law built up over a century, unlike in Queensland and Western Australia.

The history of Canada’s *Criminal Code* (1892) is one of John A. Macdonald, the first Prime Minister of Canada, ably assisted by John Thompson, the Justice Minister,⁸ picking up Stephen’s Code and passing it into law across Canada in the wake of the North–West Rebellion of 1885.⁹ Macdonald was a leading figure during Canada’s confederation debates that led to the passage of the *British North America Act 1867*, who ‘pushed hard to allocate jurisdiction over criminal law to the proposed federal government’.¹⁰ There were a variety of reasons for Macdonald’s position ranging from the U.S. Civil War where decentralised State rights over criminal law was ‘perceived as a contributing factor’,¹¹ to security concerns given ‘American aggression during the War of 1812 followed by politically motivated raids by American residents’¹² in 1838 and 1866. In light of potential threats

⁵ S 428H *Crimes Act 1900* (NSW).

⁶ 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* 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).

⁷ *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). Part IAA presently applies predominantly to only to a very narrow range of offences against the person listed in Schedule 1.

⁸ Another influential figure was Sir James Gowan, a judge and Senator, ‘who emerges as the *eminence grise* behind the legislative history of the *Code*’: N. Kasirer, ‘Canada’s Criminal Law Codification Viewed and Reviewed’ (1990) 35 *McGill Law Journal* 841, 852.

⁹ The North–West Rebellion was an unsuccessful uprising of the Metis people of Saskatchewan under Louis Riel. The Metis believed that Canada had failed to protect their rights, land and culture. Riel was hanged for treason.

¹⁰ B. Wright, ‘Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples’ (2007) 26(1) *The University of Queensland Law Journal* 39, 50.

¹¹ *Ibid.*

¹² *Ibid.*

to national defence, no opposition to federal criminal law jurisdiction is to be found in the 1865 confederation debates records in the Province of Canada.¹³

There was no parallel impetus to place criminal law with the new Federal Parliament in the Convention Debates of the 1890s in Australia. With the passage of time, the Griffith Codes have become embedded in Queensland and Western Australia. As with the uniform evidence legislation, Queensland and Western Australia are opposed to ceding control of their criminal laws by adopting the *Model Criminal Code* whose update and amendment are under the control of the Federal Parliament. The most likely outcome for the future is that the States may 'cherry pick' parts of the *Model Criminal Code* but with no consistency.

For example, self-defence has been the subject of extensive legislative reform in Australian jurisdictions, with no clear dividing line between those jurisdictions which have elected to follow the common law as expressed in *Zecevic v DPP (Vic)*,¹⁴ and those jurisdictions that have followed the *Model Criminal Code* as expressed in s 10.4 of the *Criminal Code 1995 (Cth)*.¹⁵ Categorisation is not clear cut, although the self-defence provisions of South Australia, Western Australia and Tasmania can be said to follow the common law as expressed in *Zecevic v DPP (Vic)*,¹⁶ while Victoria, New South Wales, the Australian Capital Territory and the Northern Territory have adopted s 10.4 of the *Criminal Code 1995 (Cth)*.¹⁷ Queensland is the only jurisdiction to have retained the original self-defence provisions in s 271 and s 272 of the *Criminal Code 1899 (Qld)*, which are more akin to *Zecevic* than the *Model Criminal Code*, although Queensland has introduced

¹³ P. Waite (ed), *The Confederation Debates in the Province of Canada* (McGill-Queen's University Press, 2nd edn, 2006) 24-25.

¹⁴ (1987) 162 CLR 645. *Zecevic* is the leading common law case on self-defence. Wilson, Dawson and Toohey JJ at 661 framed the critical question as follows: 'It is whether the accused believed upon reasonable grounds that it was necessary to do what he did.'

¹⁵ Section 10.4(2) states: 'A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary: (a) to defend himself or herself or another person ... and the conduct is a reasonable response in the circumstances as he or she perceives them.'

¹⁶ (1987) 162 CLR 645. Section 15(1) of the *Criminal Law Consolidation Act 1935 (SA)* reads as follows: 'It is a defence to a charge of an offence if (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat the defendant genuinely believed to exist.' Section 248(4) of the *Criminal Code 1902 (WA)* states: 'A person's harmful act is done in self-defence if the person believes the act is necessary to defend the person or another person from the harmful act, including a harmful act that is not imminent; and (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and (c) there are reasonable grounds for those beliefs. Section 46 of the *Criminal Code 1924 (Tas)* reads: 'A person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.'

¹⁷ See s 322K(2) *Crimes Act 1958 (Vic)*; s 418 *Crimes Act 1900 (NSW)*; s 42 *Criminal Code 2002 (ACT)*; s 43BD *Criminal Code 1983 (NT)*.

304B Killing for preservation in an abusive domestic relationship into the *Criminal Code 1899* (Qld), which has the effect of reducing murder to manslaughter and statutorily overruled *Zecevic v DPP (Vic)*¹⁸ which abolished excessive self-defence.

However, the Northern Territory has provided a model as it transitions from the original *Criminal Code 1983* (NT) to Chapter 2 of the *Criminal Code 1995* (Cth). In a process that started in 2006, Chapter 2 of the *Criminal Code 1995* (Cth) in the form of a new Part IIAA is progressively applied to all offences. Thus, if an offence in the original *Criminal Code 1983* (NT) is revised in line with the binary formula in Chapter 2 of the *Criminal Code 1995* (Cth), then it is listed in Schedule 1 which specifies the offences to which Part IIAA applies. There appears little prospect that any State will follow suit.

There needs to be a momentum for change to overcome the resource-intensive task of examining each section of the *Code* and allocating the necessary parliamentary priority rather than adopting a quick-fix 'law and order' platform.¹⁹ Goode puts his finger on the catalyst.

Reform of the criminal law, including codification or re-codification of the criminal law, is a political exercise. If the aspiring law reformer does not own or control a significant part of the politics of the exercise, the project is doomed to failure.²⁰

In the end, the decision to abandon the original *Criminal Code 1983* (NT) in 2006 reduced to the Northern Territory sensibly following the Australian Capital Territory in adopting Chapter 2 of the *Criminal Code 1995* (Cth) as Part IIAA. The political element involved in changing Codes should be recognised, in the same way as historically the political process has determined the success (Griffith) or failure (Stephen) of criminal codes in general.

The *Criminal Code 1983* (NT) was introduced by the Country Liberal Government, which was in power from the arrival of Self Government in 1978 to 2001. The incoming Northern Territory Labor Government was open to the pursuit of a different criminal code landscape. From a practical perspective, such a code landscape was easiest to achieve by adopting an off the shelf code model complete with second reading speech notes and a *Guide for Practitioners*.²¹ In so doing, the Northern Territory Labor Government did not face a legal profession that fully embraced and supported the then existing *Criminal Code 1983* (NT), which is the opposite of the long entrenched and parochial code landscape situation in Queensland.

¹⁸ (1987) 162 CLR 645.

¹⁹ M. Goode, 'An Evaluation of Judicial Interpretations of the Australian Model Criminal Code' in W. Chan, B. Wright and S. Yeo (eds) *Codification, Macaulay and The Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, 2011) 313, 316.

²⁰ *Ibid.* Griffith fitted this criterion perfectly for Queensland in the 1890s.

²¹ I. Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Canberra; Cth A-G Dept, 2002).



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