IS BENTHAM’S VISION OF A
COMPREHENSIVE CRIMINAL CODE
SUITABLE AS A MODEL DESIGN FOR A
CODE?

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Declaration

I hereby declare that the work herein, now submitted as a thesis for the degree of Doctor of Philosophy of the Charles Darwin University, is the result of my own investigations, and all references to ideas and work of other researchers have been specifically acknowledged. I hereby certify that the work embodied in this thesis has not already been accepted in substance for any degree, and is not being currently submitted in candidature for any other degree.
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Abstract

This thesis question examines whether Jeremy Bentham’s concept of a criminal code having ‘no blank spaces’, thereby minimising the role of the common law and judicial interpretation, is first, desirable and secondly, achievable. Desirability and achievability are clearly interwoven. The disparity between the theory that a code should be internally self-consistent and self-sufficient with the practice that ‘inevitable ambiguities of language make this impossible’ is a central theme. The thesis seeks to test whether the latter statement can be overcome. An alternative way of considering the central question is to examine whether Bentham’s vision of the legislature clearly stating its intentions sufficient for the ordinary citizen to fully comprehend his or her criminal liability is beyond the capacity of any criminal code architect in the 21st century.

A criminal code should be as comprehensive as practicable in its description of rules of conduct. Second, it must communicate those rules effectively to the general public. Australian Criminal Codes will be evaluated against these two criteria. The
Model Criminal Code which became Chapter 2 of the Criminal Code (Cth) is the most ‘Benthamite’ Criminal Code in Australia, and has been taken up by both the Australian Capital Territory in 2002 and the Northern Territory in 2006. As such the Model Criminal Code can be compared to the ‘Griffith’ Codes of Queensland (1899), Western Australia (1902) and Tasmania (1924). The Indian Penal Code (IPC) is presented as the best example of a Benthamite Code in the 19\textsuperscript{th} century. Building on Macauley’s work on the IPC, it is argued that the development in criminal law theory since Bentham’s death in 1832, most notably the U.S. Model Penal Code in 1962 and the Model Criminal Code in Australia in 1992, leave open the possibility that Bentham’s vision is more achievable today than in Bentham’s own era.
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List of Publications

A: PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS


B: PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS BUT NOT FORMING PART OF IT

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CHAPTER 1 INTRODUCTION

1.1. 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 above 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

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 (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 Customs Act 1901 (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; (xii) currency, coinage, and legal tender; and (xviii) copyrights, patents of inventions and designs, and trade marks.
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’. 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’.

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, 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 (Cth).

The response to the series of reports produced by the MCCOC ‘has been piecemeal [with] Queensland largely ignoring the Model Criminal Code [whilst] in other jurisdictions, a selective approach to codification has prevailed’. As Bronitt and McSherry point out, under such a selective approach, ‘the relationship between the

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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 R (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’.
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.
reforms based on the *Model Criminal Code* and the existing common law has not been consistent, even within the same jurisdiction’.

The authors give as an example in New South Wales the express abolition of the common law governing intoxication, as compared with 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). 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* (Cth) in their respective Codes. In the case of the Northern Territory, this commenced with the insertion of Chapter 2 as Part IIA of the *Criminal Code* (NT) effective from 20 December 2006.

1.2. THE CENTRAL THEMES OF THE THESIS

This thesis question examines whether Jeremy Bentham’s concept of a criminal code having ‘no blank spaces’, thereby minimising the role of the common law and judicial interpretation, is first, desirable and secondly, achievable. Desirability and achievability are clearly interwoven. Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient with the

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11 Ibid.
12 S 428H *Crimes Act 1900* (NSW). See s 10.4 Self-Defence *Criminal Code* (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).
13 *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). Part IIA presently applies predominantly to only to a very narrow range of offences against the person listed in Schedule 1.
practice that ‘inevitable ambiguities of language make this impossible’. A central theme of this thesis is to test whether the latter statement can be overcome. An alternative way of considering the central question is to examine whether Bentham’s vision of the legislature clearly stating its intentions sufficient for the ordinary citizen to fully comprehend his or her criminal liability is beyond the capacity of any criminal code architect in the 21st century.

Simester, Spencer, Sullivan and Virgo, writing of the situation in the United Kingdom, put their finger on the heart of the problem to be examined:

A degree of imprecision is inherent in the enterprise of legal ordering: statutes are necessarily expressed in general terms, and must be interpreted and applied to particular cases. The agent of this process is the court. In practice, the judicial task is more substantial than it need be. While legislators cannot be expected to foresee every variant case that might arise when they create an offence, the standard of draftsmanship in this country is such that offences frequently omit to specify quite obvious matters …

The implication behind Fisse’s observation is that the ambiguities of language in a legal context mean that judges will always be required to interpret the law. It follows from such a conclusion that Bentham’s vision of the legislature clearly stating its intentions sufficient for the ordinary citizen to fully comprehend his or her criminal liability was beyond the capacity of any criminal code architect. Yet, even in a common law context, judges regularly appeal to the common sense of the jury in

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eschewing definitions of well known phrases such as ‘beyond reasonable doubt’, 18 or, in a code context, the meaning of the word ‘intent’. 19

Bentham’s science of legislation was part of the broader political theory of the Enlightenment that elected representatives of the people should determine the criminal law rather than unelected judges. This was the genesis of criminal codes ‘in the hope that they would stipulate with clarity the content of crimes and conditions of liability, reducing the role of the judge to that of an agent executing the will of the legislature’. 20 Simester, Spencer, Sullivan and Virgo conclude that such hopes while optimistic were not unfounded, pointing out that ‘the vast majority of developed countries now have criminal codes’. 21 To some extent, ambiguity (in the sense that a provision is capable of having two meanings) can be overcome by favouring ‘the meaning which Parliament must have intended the words to convey’. 22 This is consistent with a purposive approach to statutory interpretation.

Nevertheless, in interpreting statutes, 23 courts ‘can cut them down, or expand them’. 24 Courts can treat the principle that strict construction of a criminal statute should favour the defendant ‘as a rule of last resort … if all other grounds of determining

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18 Green v The Queen (1971) 126 CLR 28, 31-32. In Green, the High Court approved previous authority ‘not to attempt needless explanations of the classical statement of the nature of the onus of proof resting on the Crown’ (32).
19 In Bruce Henry Wilmot (1985) 18 A Crim R 42, 46, Connolly J was of the view that there is ‘no ambiguity about the expression [‘intent’] as used in s 302(1) [Criminal Code (Qld)] and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language’.
20 Simester, Spencer, Sullivan and Virgo, above n 17, 46.
21 Ibid.
23 ‘At the time of writing [2010], there are believed to be something like 8,000 different criminal offences on the statute books [in England and Wales]’: Simester, Spencer, Sullivan and Virgo, above n 17, 46. A higher figure of some 10,000 offences, excluding offences created by by-laws, is cited by D. Ormerod, Smith and Hogan’s Criminal Law (Oxford University Press, 13th ed, 2011) vii and 3.
legislative intent have failed’. 25 Williams has suggested that the principle of strict construction ‘is rarely applied in practice, if there are social reasons for convicting’. 26 While a ‘strict approach to construction helps to prevent criminal liability from coming as a surprise to defendants’, 27 the real problem goes to ‘two centuries of draftsmanship of very uneven quality … the product of changing views of morality and of when and how penal measures should be used’. 28 Glazebrook was referring to England, but the comment is even more applicable to Australia with its mosaic of criminal laws.

In a nutshell, the best that can be said for the current approach to interpretation of a criminal law statute is: (a) to ascertain the ordinary meaning in context; (b) if a clear meaning does not emerge on the face of the legislation, undertake a review of the legislative history; (c) if the provision remains open to reasonable dispute, then a strict construction should be adopted. 29 The question being addressed here is whether, under a Benthamite code design, the overwhelming number of enquiries would cease at step (a) above, without recourse to voluminous texts explaining the meaning of each section of the code. 30

The starting hypothesis is that a criminal code should be as comprehensive as practicable. As Gardner points out ‘people must be able to find out what the law is …

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25 R (on the application of Junttan Oy) v Bristol Magistrates’ Court [2003] UKHL 55 [84] (Lord Steyn).
26 Williams, above n 24.
27 Simester, Spencer, Sullivan and Virgo, above n 17, 53.
29 Simester, Spencer, Sullivan and Virgo, above n 17, 53.
the law must avoid taking people by surprise'. Robinson, Cahill and Mohammad have developed two criteria to evaluate a code’s effectiveness in stating the rules of conduct (defined as conduct that is prohibited or required by the criminal law): ‘First, the code must be comprehensive in describing the rules of conduct. Second, it must communicate those rules effectively to the general public.’ Under the criterion of comprehensiveness, Robinson, Cahill and Mohammad argue that ‘a truly comprehensive criminal code must sufficiently define all relevant terms that reference to outside sources is unnecessary’. Under the criterion of effective communication, Robinson, Cahill and Mohammad suggest that clarity is required at two levels: ‘(1) within each rule, and (2) in the organisation of the rules into a code.’

Bentham’s concept of a code is at the extreme end of a possible spectrum of code detail, which was driven by Bentham’s dislike of the common law. The benchmark of practicability is not wholly objective as different views are open on the extent judicial discretion is necessary to decide any case on its particular facts. An alternative way of considering the question is to commence with the proposition that the sparser the criminal code design, the greater will be judicial recourse to the common law by default. Over time, precedent and decided cases will determine the way any given code section will be interpreted, subject to legislative amendment. Thus, the degree of practicability of having a comprehensive code is bound up with a view on the desirability of retaining judicial discretion. Furthermore, even allowing for an additional proposition that judicial discretion should be minimised, the limitations of

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33 Ibid 9.
34 Ibid.
language may impose another restriction on the practical ambit of the model of a comprehensive criminal code.

Whilst Bentham can lay claim to being the intellectual father of codification he never obtained a codification commission and ‘nor did he ever produce a completed code, penal or otherwise’. Bentham’s major contribution was to create a distinct methodology of codification ‘proceeding systematically from basic principle to practical corollary to the construction of an internally harmonious and philosophically grounded system’. Bentham’s detailed plans for civil and penal codes addressed the same general questions that face modern codifiers. The main issues that confront those embarking on codification have been usefully collected separately by Dubber and Ferguson. The list below collates and combines the issues identified by both authors:

What is a criminal code as distinct from a series of criminal statutes? Should it contain the substantive criminal law, criminal process and evidence?

What is the purpose of a criminal code as regards either restating the current law or attempting law reform at the same time? How much reform is practical?

Should the code be structured into a General Part and a Special Part? If so, what should the General Part contain?

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36 Ibid.
What is the audience of a criminal code as regards the adoption of technical as opposed to
plain language?

Should a criminal code be exclusive or should the common law continue to develop alongside
the criminal code?

How should a criminal code be kept up-to-date?

Bentham’s answers to these questions can be readily deduced from his writings, discussed further in Chapter 2. Thus, for example, Bentham would accept a code structured into a General Part and a Special Part as being compatible with a comprehensive code design; the audience would be the general public; the code would be exclusive and establish the full control of the legislature; and the code would be regularly updated in keeping with its overall structure.

Bentham’s plan for a criminal code is more achievable today than during the 19th century with the developments in criminal law theory, as illustrated by the *Model Criminal Code*. Thus, in Australia, as opposed to countries like England, Scotland and Ireland, which have thus far eschewed criminal codes, much of the groundwork for undertaking law reform at the same time as introducing a new criminal code has already been achieved in Chapter 2 of the *Criminal Code* (Cth).

Chapter 2 of the *Criminal Code* (Cth) is entitled ‘General principles of criminal responsibility’. Section 2.1 defines the purpose of the Chapter as ‘to codify the general principles of criminal responsibility under laws of the Commonwealth’ going on to state that ‘[i]t contains all the general principles of criminal responsibility that
apply to any offence, irrespective of how the offence is created’. This thesis examines whether these general principles, which are more particularly defined in the *Criminal Code* (Cth) than in the Griffith Codes\(^{39}\) and represent the best comprehensive effort thus far in Australian Codes, can be usefully expanded by including far more detail and nominating specific tests. A corollary question is whether the comprehensive nature of Chapter 2 of the *Criminal Code* (Cth) is offset by a lack of clarity or ‘user friendliness’ to a member of the general public.

In this sense, the approach can be labelled a ‘rules’ based approach as opposed to a principles based approach where principles are ‘general rules … [that] are implicitly higher in the implicit or explicit hierarchy of norms than more detailed rules’.\(^{40}\) The justification for adopting a principles based approach in a regulatory context is to shift the focus from process to outcomes thereby allowing firms to ‘be free to find the most efficient way of achieving the outcome required’.\(^{41}\) The justification for adopting a rules based approach in a criminal law context, utilising the same outcomes test, is to reduce the number of appeals and to improve the efficiency of the criminal justice system, by providing greater clarification of the relevant law and the tests to be applied.

A much debated difficulty for codes lies with the interaction between the General Part, which usually deals with the principles of criminal responsibility, and the Specific Part which covers the bulk of the code and covers the individual offences. In Chapter 6 of the thesis, the selection of the General Part contained in Chapter 2 of the

\(^{39}\) The Australian Griffith Codes are: *Criminal Code* (Qld); *Criminal Code* (WA); *Criminal Code* (Tas); and *Criminal Code* (NT).


\(^{41}\) Ibid, 5.
Criminal Code (Cth), is examined in the context of the original Criminal Code (NT) only lasting 20 years. A significant contention made is that Part 2.2 of the Criminal Code (Cth), which draws heavily on the U.S. Model Penal Code (1962) and deals with the physical and fault elements, is superior to the principal criminal responsibility sections of the Criminal Code (Qld), from which all other Australian Codes (the Griffith Codes) were derived prior to the arrival of the Model Criminal Code. This superiority led to a decision by the Northern Territory Government in 2006 to abandon the youngest of the Griffith Codes (1983) in favour of Chapter 2 of the Criminal Code (Cth). However, as is discussed in 4.5 below of the thesis, the same level of appreciation cannot be extended to Part 2.3 of the Criminal Code (Cth), which deals with circumstances in which there is no criminal responsibility, because it draws far more heavily on the common law both explicitly and, more tellingly, implicitly.

In answering the first of the Dubber and Ferguson questions above, as to the nature of the distinction between a criminal code and a series of criminal statutes, the thesis develops the proposition that Criminal Codes in Australia are misnamed because they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. Colvin and McKechnie 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’. 42 Schloenhardt has described the Criminal Code (Qld) as reflecting ‘very strongly Australia’s common law tradition’, 43 going on to state that ‘Griffith’s

42 E. Colvin and J. McKechnie, Criminal Law in Queensland and Western Australia (LexisNexis, 6th ed, 2012) 6 [1.12].
principal intention was to reproduce (not change) the common law by way of codification’.  

The thesis then goes on to test whether it is possible to adopt a detailed approach to criminal code design by setting out a series of specific provisions, drawn from both offences and defences. The intention is to demonstrate that it is possible to include an appropriate level of detail in these provisions to meet the conventional definition of a true code without sacrificing clarity. Such detailed drafting has two Benthamite objectives. First, incorporating into the provision the relevant tests (rules) that the legislature accepts as appropriate, leaving the judiciary to explain rather than select these tests. Secondly, tilting the legislature-judiciary partnership firmly in favour of the legislature, as a true Code design should.

Consequently, the definition of the word ‘model’ in the title of this thesis refers both to improved drafting design and to the detailed specification of selected legal principles and tests. As such, this thesis does not ‘reflect a mood of shared despair among UK theorists of the criminal law, who fear it is a lost cause and beyond rescue’. Furthermore, the detailed drafting seeks to meet Horder’s criticism that hiving off the General Part (here Chapter 2 of the Criminal Code (Cth)) ‘inevitably ends up presenting an impoverished picture of the “special part”, in which the latter’s

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44 Ibid, 28 [2.2.1.1].
45 Although the Evidence Act 1995 (Cth) is not designed to codify the law of evidence, Chapter 3, which covers Admissibility of evidence, comes close to covering the field. One example of Bentham’s suggestion that illustrations should be used to aid understanding of the lay reader can be found in s 59, which deals with the hearsay rule, and which lists three examples of hearsay unless an exception to the hearsay rule applies. Another example can be found in s 76 which covers the opinion rule.
moral richness and diversity have been airbrushed out’. The drafting methodology goes beyond ‘a “dialogic” model of complementary interpretation between a code’s provisions and common law principles’, and actually embeds the common law principles and tests within the code sections.

The selection of the particular tests (rules) is based on Bentham’s utilitarian philosophy which seeks to maximise the overall ‘good’ of the society (‘the greatest happiness principle’), which in modern times approximates to public policy.

The business of government is to promote the happiness of society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency is pernicious, will be the demand it creates for punishment. What happiness consists of we have already seen: enjoyment of pleasures, security from pains.

However, more importantly, it is beholden on the legislature to clearly identify the appropriate test. Thus, for example, in Chapter 9, which deals with the treatment of evidence of intoxication, various options are considered. The notion of ‘good’ public policy is subjective, and is heavily dependent on the legislature’s weighting of community protection as against individual rights. A utilitarian approach seeks to limit the use of evidence of intoxication.

48 Dialogic refers to a continual dialogue.
By contrast, Criminal Codes in Australia have no underlying philosophy and essentially restate common law principles. Even where a code has been developed with an underlying penal philosophy, as in the U.S. *Model Penal Code* (1962), Dubber has argued that ‘the *Model Penal Code* is ripe for fundamental reconsideration’⁵¹ as it was based on a consequentialist model of preventing ‘crime through deterrence, and, if deterrence fails, through treatment and correction’⁵² whereas retributivism ‘has reasserted itself as a demand of penal justice’.⁵³ Dubber contends that a revised *Model Penal Code* is required with the aim of reasserting ‘the presumption of innocence, broadly understood, and thereby to shift the burden of proof back onto the state’.⁵⁴ Dubber bases his argument on the ‘momentous changes in penal lawmaking since the original Code’.⁵⁵ Many of the changes that Dubber identifies⁵⁶ are equally applicable to Australia, such as the increase in the victim’s significance, the move to punishment guidelines, the spread of strict liability offences, and importantly ‘the continued splintering of the penal law through the unsystematic multiplication of penal provisions outside the Penal Code’.⁵⁷

The absence of a coherent penal philosophy and an explicit underlying fault element underpinning the Griffith Codes reinforces the lack of a distinct fault line between common law and Code jurisdictions in Australia. Fisse has made the significant point that codification tends ‘to fix the content of the law as at one point in time’⁵⁸ and without regular amendments ‘obliges the judiciary either to do increasing violence to

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⁵¹ Dubber, above n 37, 53.  
⁵² Ibid.  
⁵³ Ibid.  
⁵⁴ Ibid, 55.  
⁵⁵ Ibid, 56.  
⁵⁶ Ibid, 56-58.  
⁵⁷ Ibid, 57.  
⁵⁸ Fisse, above n 16, 5.
its literal terms or else abandon progress’. 59 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’. 60 Significantly, Bentham, prescient as to the danger of a code becoming ossified, was already alert to the need to make allowance for the alterations to the code without inconvenience, noting that ‘no system of laws will ever, it is probable, be altogether perfect’. 61 The strength of a code based ‘upon a regular and measured plan’ 62 was that alterations ‘would give less disturbance to it’. 63

There are three central and interwoven themes of this thesis within the primary question of whether Bentham’s comprehensive vision of a code is desirable and achievable. The first concerns the very nature of a code. When a body of statute law is called a criminal code, what should that mean in the sense that it is clearly distinguishable from a body of law that is called a Crimes Act? An associated question, given there are key principles that underpin the valid description of a body of law labeled a criminal code, is what form should the detail of the sections of the code take? To what extent is it possible to achieve ‘no blank spaces’ 64 in a code such that all the relevant law is contained within the four corners of the code? Little attention has been paid by criminal law scholars in Australia to this important question, and it is intended that this thesis make a distinct contribution to knowledge in defining the nature of a code.

59 Ibid.
60 Ibid, 5-6. The three Code States referred to are Queensland, Western Australia and Tasmania.
61 Hart (ed), above n 15, 236..
62 Ibid.
63 Ibid.
64 Ibid, 246.
The significant ramifications of the seeming inability of law reformers to recommend the removal of s 23 of the *Criminal Code* (Qld), the central criminal responsibility section, appears to have been overlooked by criminal law scholars, notwithstanding Windeyer J’s insightful observation back in 1964 in *Mamote-Kulang v The Queen*.65 There, Windeyer J was discussing s 23 of the *Criminal Code* (Qld), and having noted that the general provisions of Chapter V of the Code concern criminal responsibility and are couched in an exculpatory form, went on to observe: ‘Instead of stating, *as in a more modern approach might perhaps be expected*, (emphasis added), the elements of will, intent or knowledge which the doer of an act must have for him to be held guilty of a crime, their absence is stated as a matter of defence or excuse.’ This thesis seeks to address that deficiency.

The second theme concerns the actual content of the code. It is clearly beyond the scope of a thesis to write out a complete code. Nevertheless, it is possible through the use of templates to identify the basic approach taken. The templates seek to achieve two outcomes: (a) to demonstrate that clarity and not confusion results from more comprehensive drafting; and (b) to explicitly state the law and the relevant tests to be applied. In this sense the model code is transparent and accessible. Thus, the word ‘model’ attaches to both of the above themes – the nature and content of a model criminal code.

In this context, Gani has pointed to the failure of legislatures to clarify the key interpretive principles governing criminal codes, or where parts of a criminal statute are ‘codified’, as potentially undermining the adoption of the *Model Criminal Code*.

65 (1964) 111 CLR 62, 76.
‘It is a legal paradox to codify the criminal law – to take a legislative-centric approach to it – without also legislating for how that code is to be interpreted.’\textsuperscript{66} This thesis endorses that position, but goes beyond mere clarification of the status of pre-existing common law, as in \textit{CTM v The Queen},\textsuperscript{67} and seeks to explore the practicability of ‘snuffing out once and for all the flickering flame of judicial creativity in the field of criminal law’.\textsuperscript{68} This thesis follows the spirit of Bentham and Macauley in aspiring to design a template for a true and proper code rather than a consolidation of the existing criminal law.

In similar vein to Fisse above, Gray and Blokland have noted that while ‘the twin goals of codification are that the law be set out in simple and accessible form and that it be stated exhaustively’ the authors have suggested ‘these are often impossible to reconcile’.\textsuperscript{69} The stated reason for such an observation is that ‘if the law is set out simply, then it will fail to cover the complexities of human behaviour’\textsuperscript{70} necessitating frequent recourse to the common law, whereas an exhaustive statement would make the code document enormous and ‘would be an effective reproduction of the common law itself’.\textsuperscript{71} This thesis seeks to test such a widely held view, by contending for the proposition that it is possible to write a code that is comprehensive without being voluminous.

\begin{footnotesize}
\begin{itemize}
\item [\textsuperscript{66}] M. Gani, ‘Codifying the Criminal Law: Issues of Interpretation’ in S. Corcoran and S. Bottomley (eds), \textit{Interpreting Statutes} (Federation Press, 2005) 222.
\item [\textsuperscript{67}] (2008) 236 CLR 440. In this case, the High Court held that under s 66C(3) of the \textit{Crimes Act 1900} (NSW), the New South Wales Parliament had not excluded the principle of criminal responsibility that a person who does an act under an honest and reasonable, but mistaken, belief was not criminally responsible to any greater extent than if his or her belief had been correct.
\item [\textsuperscript{68}] Horder, above n 47, 229.
\item [\textsuperscript{69}] S. Gray and J. Blokland, \textit{Criminal Laws Northern Territory} (Federation Press, 2\textsuperscript{nd} ed, 2012) 7.
\item [\textsuperscript{70}] Ibid.
\item [\textsuperscript{71}] Ibid.
\end{itemize}
\end{footnotesize}
The third theme of the thesis covers the need for an explicit underlying fault element in the General Part of a criminal code, which in turn reflects the default fault element required for offences. An associated issue is the question of the use of subjective and objective tests. For example, in the Criminal Code (Cth) the underlying fault element in relation to a result is a combination of subjective and objective recklessness, whereas the underlying sub silentio fault element of the Griffith Codes is negligence which requires a purely objective test.

This thesis develops the option of an objective test for recklessness as the underlying fault element of criminal responsibility, based on the natural and probable consequences test adopted in *DPP v Smith* 72 in the guise of *Caldwell* 73 recklessness. One aspect of a ‘comprehensive’ criminal code is that the legislature makes the decisions as to the combination of physical and fault elements, rather than delegating the task to the judiciary. Another aspect of a ‘comprehensive’ criminal code is that it should incorporate a consistent penal philosophy rather than reflect *ad hoc* political reactions to the crime du jour.

A penal philosophy in part reflects the choice between taking the objective perspective of the community versus the subjective perspective of the offender. An objective approach to determining criminal responsibility is grounded on the ‘object of the law is to prevent human life being endangered or taken … to compel men [and women] to abstain from dangerous conduct … at their peril to know the teachings of common experience’. 74 Jeremy Bentham, who claimed ‘the business of government is

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73 *Caldwell v Commissioner of Police* [1982] AC 341.
to promote the happiness of the society, by punishing and rewarding’, 75 would endorse the principle of utility or public policy guiding the hand of legislation.

Thus, the last of the Dubber and Ferguson questions above, which relates to the method by which a criminal code should be updated, is to be answered as Bentham would have answered it: namely, on a regular basis by the legislature and not by the judiciary inserting developments in the common law, consistent with the overall structure and penal philosophy of the code.

1.3. THE STRUCTURE OF THE THESIS

The structure of the thesis is set out in the Chapter outlines below. Chapters 2 to 5 encompass a broad sweep of code development, starting with Bentham’s plan of codification and contrasting this with Blackstone’s support for the flexibility of the common law, with a focus on the ambiguities of language and the dangers of fixing the criminal law at one point in time. Then, an historical development of codification post Bentham is undertaken taking in events in England culminating in Stephen’s Criminal Code Bill (1880), Criminal Codes in India, Canada and Australia in the 19th century, and the U.S. Model Penal Code and the Australian Model Criminal Code in the 20th century. Chapter 4 deals with the misnaming of the Griffith Criminal Codes in Australia in arguing that they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. Examples or templates are given as to how a comprehensive code section could be constructed without sacrificing clarity. A code requires consistency, and Chapter 5 examines the need for an underlying fault element for a criminal code.

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75 Bentham, above n 50.
Having established the overall ‘model’ for a comprehensive code, the attention in Chapters 6 to 9 shifts to the Criminal Code (NT). The Northern Territory’s Code is unique in Australia in that it started as a rebadged Griffith Code and is in the process, since 2006, of transitioning into a version of the Model Criminal Code. As such, the Northern Territory’s Code is a suitable vehicle to critically compare, from a comprehensive code perspective, the original and current provisions for selected provisions. Murder and causation are considered in Chapter 7, followed by complicity and common purpose in Chapter 8. Then, in Chapter 9, the current provisions for intoxication, a very significant issue in the Northern Territory, are rewritten to better reflect the two criteria used to evaluate a code’s effectiveness as a comprehensive statement of the rules of conduct and effective communication to the general public. Chapter 10 concludes that Australian Criminal Codes could be rewritten more comprehensively without sacrificing clarity, thereby more closely adhering to the stated purposes of a code.

Chapter 2 Bentham’s Plan of Codification and Judicial Interpretation

This Chapter examines Bentham’s vision of a criminal code, which was that a code should constitute a complete body of laws constructed from the beginning thereby limiting the scope of judicial interpretation. For Bentham, the legislator would be the supreme and sole interpreter. Bentham’s intended outcome was that any citizen should be able to read the criminal code and be able to understand the criminal liability contained therein without recourse to the common law. Underpinning Bentham’s design for codification was a relationship of conflict between the legislature and the courts. Bentham envisaged regular updating of the code so that it
did not become moribund and open to judicial importation of the more dynamic common law. Bentham’s vision is contrasted with his principal contemporary adversary, Blackstone.

The difficulties and challenges facing the judiciary in interpreting Australian Criminal Codes are examined. The issues of ambiguity of language and fixing the law at one point in time are given particular attention. Bentham identified the characterisation problem\(^\text{76}\) nearly 200 years before modern element analysis emerged in the form of the U.S. Model Penal Code in 1962. The conventional wisdom that Blackstone and the adaptability of the common law triumphed over Bentham’s grand scheme of codification is challenged now that criminal law theory has developed sufficiently to put Bentham’s vision into practice.

Chapter 3 The Historical Development of Codification Post Bentham

This Chapter considers how Bentham’s plan for codification has fared, from the perspective of the historical development of codification, over the 180 years since his death. The initial focus is on England given the impetus given to codification following the establishment of the Royal Commission on the Criminal Law in 1833. In addition, Great Britain had a substantial Empire, and the 19\(^{\text{th}}\) century history of codification is essentially one of rejection of codification in the mother country (England), but of acceptance of codification in the Empire. So it was that India (1860), Canada (1892), New Zealand (1893) and Queensland (1899) all adopted Criminal Codes. With the exception of India, these Codes owed their genesis to

\(^{76}\) The characterisation problem is defined as the need to systematically break down a criminal act or omission into its physical and fault elements, in more detail than a simplified actus reus and mens rea.
Stephen’s Criminal Code Bill (1880) in England. Thus, the events in England are pivotal in understanding the type of criminal code that was ‘exported’ to the Empire.

The final section of the Chapter examines code developments in the 20th century, particularly the U.S. Model Penal Code (1962) and the Australian Model Criminal Code (1992). The development of criminal law theory has facilitated a more detailed approach to the legislative specification of physical and fault elements for individual offences. Such an approach opens up the possibility of a code design closer to Bentham’s model, than to 19th century Codes derived from Stephen’s Criminal Code Bill (1880) in England. More recent attempts at codification in England (1968-2010), Scotland (2003), and Ireland (2002 to present) are also considered. It would appear that, with the possible exception of Ireland, codification of the criminal law will not occur in the British Isles. Hence, it is the Criminal Code (Cth), the progeny of the Australian Model Criminal Code, which offers the most fruitful springboard to develop Bentham’s code design.

Chapter 4 When is a Code a Code?

This Chapter will develop the proposition that Criminal Codes in Australia are misnamed because they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. This contention applies to all Australian Codes from the Griffith Codes of Queensland, Western Australia, Tasmania and the Northern Territory to the more recently minted Criminal Code (Cth). The reason for such failure is that all these Codes are too sparsely written, and per force of inadequate definitional detail or statement of the appropriate tests to be applied,
judges are required to have recourse to the common law or to ‘fill in the blanks’ left by the respective Code. Consequently, it is here argued that a code needs to be structured with the objective of keeping statutory interpretation of a code within the four corners of the code. Bland injunctions that recourse to the common law is only permissible when the meaning is uncertain or where a prior technical meaning existed are wholly inadequate.

It is acknowledged that provision of greater detail opens up the possibility of creating a minefield of statutory interpretation. However, one of the justifications for a code is that it has undergone Parliamentary scrutiny. The greater the intended ‘partnership’ between the legislature and the judiciary with the legislature content to identify the legal principles but to leave the interpretation (or rules) to the courts, then the greater the departure from the acknowledged purpose of a code. In what ways could it then be said that a code differs from a Crimes Act? Undoubtedly, Part 2.2 of Chapter 2 of the Criminal Code (Cth) is a far more comprehensive statement of the elements of an offence than the principal sections of the Griffith Codes in Queensland and Western Australia (section 23), Tasmania (section 13) and the Northern Territory (section 31). A considerable level of detail is evident in Part 2.2 in the elements of offences but far less so with defences in Part 2.3 of the Criminal Code (Cth).

This Chapter sets out in a series of examples which cover both offences and defences (such as causation, claim of right and duress) that are intended to demonstrate the appropriate level of detail required to meet the conventional definition of a true code without sacrificing clarity. These examples should be viewed as templates in a variety of contexts supporting the proposition that clarity not confusion can result from a
more detailed approach. The focus is directed at incorporating the relevant tests that the legislature accepts as appropriate. This has two effects. First, it reduces reliance on secondary material such as second reading speeches. Secondly, it firmly tilts the ‘partnership’ to the legislature (as a true code should) leaving the judiciary to explain the tests to the jury rather than to select which tests are appropriate. In this way at least consistency within a code rather than uniformity across codes can be promoted.

Chapter 5 The Underlying Fault Element for a Criminal Code

This Chapter argues that the General Part should contain an underlying fault element in answering one of the questions posed by Dubber and Ferguson. The selection of an underlying fault element is important both from a consistency perspective and to reflect the penal philosophy of the code. The decision to vary the underlying fault element for a specified offence, whether it be to require intention or knowledge on the one hand, or, to dispense with a fault element and make an offence one of strict liability on the other hand, is clearly one that should be made by the legislature in a criminal code context.

This Chapter seeks to develop the third theme of the thesis, namely, the selection of the underlying fault element for a criminal code, which in turn reflects the penal philosophy of the code. Bentham was concerned that a body of criminal laws was liable to fall into either weakness or tyranny: ‘Weakness from want of qualifications, tyranny from want of clearness, the one or the other as it may happen.’ Public policy is the modern form of utilitarianism or the overall ‘good’ of society, where the interest

77 Dubber, above n 37.
78 Ferguson, above n 38.
79 Hart (ed), above n 15, 232.
of the individual is secondary to the general good of society. In that sense, the underlying fault element of a criminal code, which sets the baseline of criminal responsibility between the State and its citizens, is important, in conjunction with a suite of options for the physical and fault elements from which the legislature can select for any given offence. Given the consequences, the citizen should be able to readily ascertain the elements of any offence contained in the code.

The underlying sub silentio fault element in the Griffith Codes is negligence (objective test). The underlying fault element for the result of conduct in the Criminal Code (Cth) 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. The clearest choice for the legislature for the underlying fault element of a criminal code is between a subjective or objective test of criminal responsibility. This Chapter puts forward the option of an objective test for recklessness as the underlying fault element based on the natural and probable consequences test adopted in DPP v Smith, and makes the case for the adoption of purely objective tests for provocation.

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80 See, for example, s 5.4 Criminal Code (Cth); s 43 AK Criminal Code (NT). This is not the common law position in Australia where recklessness is treated as subjective. Recklessness is unknown to the Griffith Codes where the baseline fault element is the objective test of negligence. In England, it is arguable that recklessness has both a subjective and objective component despite R v G [2003] UKHL 50 overruling R v Caldwell [1982] AC 341 as regards the interpretation of s 1 of the Criminal Damage Act 1971, because the accused’s denial of awareness of a risk ‘in the circumstances known to him’ will always be judged against the objective standard of a person of the same age and abilities (R v G concerned two boys aged 11 and 12 years).

81 Stingel v R (1990) 171 CLR 312.

82 Zecevic v DPP (Vic) (1987) 162 CLR 645.

83 [1961] AC 290. This is similar to objective ‘Caldwell’ recklessness where the defendant does not foresee the relevant risk but a reasonable person would have foreseen it, following Caldwell [1982] AC 341.
and self-defence because the current tests in Australia for both defences are confusing as they combine subjective and objective elements.

Chapter 6 Overcoming Inertia and Rewriting the Criminal Code (NT)

This Chapter seeks to answer two main questions. First, why the most recently minted Criminal Code in Australia prior to the arrival of the *Model Criminal Code* was abandoned in progressive stages shortly after its 20th birthday. The present Criminal Code in the Northern Territory can best be described as a hybrid code as it transitions from a form of Griffith Code to the *Model Criminal Code*. Secondly, whether the decision to change to a more modern code with far greater detail as regards physical and fault elements, lends support to the central theme of this thesis, namely whether Bentham’s concept of a comprehensive criminal code is desirable and achievable.

It is also appropriate to examine the change from a species of Griffith Code to the progeny of the *Model Criminal Code* at this juncture, given the newest sections of the Criminal Code (NT) reflect the drafting style of Chapter 2 of the Criminal Code (Cth) which comes closest to the Benthamite code model. The questions become more pertinent when it is understood that the drafter of the Criminal Code (NT) was seeking to modernise the Criminal Code (Qld), after extensive consultation. Such modernisation had two aspects: (1) to avoid key problems that had emerged over the some 80 years Sir Samuel Griffith’s *Code* had been in existence, and (2) to take account of changes in community attitudes that had occurred since the turn of the century when the first two Griffith Codes were produced.
Chapter 7 A Comparison Between the Original and Current Provisions for Murder in the Criminal Code (NT)

This Chapter, building on the discussion in the previous Chapter, contains a comparison between the original and current provisions for murder, focusing on causation, in the Criminal Code (NT). The chosen vehicle is the Criminal Code (NT) because of the Northern Territory Government’s decision to incorporate Chapter 2 of the Criminal Code (Cth) as Part IIAA of the Criminal Code (NT). The argument being made is that while the advantage of Part IIAA to assist in comprehensive drafting has improved the definition of physical and fault elements, the current provisions leave too many ‘blank spaces’. Attention will be given to the paucity of detail on causation. The new provision in s 149C of the Criminal Code (NT) is considered inferior to the original provisions, as measured by the criterion of communication of the rules of conduct to the general public.

Chapter 8 A Comparison Between the Original and Current Provisions for Complicity and Common Purpose in the Criminal Code (NT)

In this Chapter, the offence of murder is used as the means to examine the clarity and comprehensiveness of the statutory provision for complicity and common purpose (a doctrine by which the complicity of a secondary party in an offence may be established). The difficulties the judiciary has experienced in clearly distinguishing and defining the process of attributing criminal responsibility to offences involving

84 Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
other parties, make the doctrine of complicity and common purpose a suitable test for a Benthamite code.

The chosen vehicle is the *Criminal Code* (NT). This means that two separate but mutually exclusive provisions, depending on whether the particular offence is in Schedule 1 or not, operate side by side.\(^{85}\) This affords a comparison between these two provisions as well as providing an opportunity to contrast both provisions in the *Criminal Code* (NT) with the equivalent sections in the Griffith Codes.

Chapter 9 A Comparison Between the Current and Proposed Provisions for Intoxication in the Criminal Code (NT)

This Chapter extends the comparison between the original and current provisions of the *Criminal Code* (NT) discussed in the two previous Chapters. Here the focus is on a comparison between the current and proposed provisions for intoxication. The analysis is conducted through the relevant intoxication provisions in the *Criminal Code* (Cth) and the *Criminal Code* (NT), developing the discussion of the law on intoxication in the Northern Territory in Chapter 6. The argument is made that these two Codes have the most confusing and least effective version of the *Majewski*\(^{86}\) principle of all Australian jurisdictions, such that the relevant basic intent provisions make the prohibition virtually meaningless.

\(^{85}\) Under s 43AA(2) of the *Criminal Code* (NT), section 8 (Offences committed in prosecution of common purpose), section 9 (Mode of execution different from that counselled), and section 12 (Abettors and accessories before the fact) do not apply to Schedule 1 offences, which schedule is presently predominantly limited to offences against the person. Instead, Schedule 1 offences come under Part IIAA. For present purposes, the focus is upon s 11.2 of the *Criminal Code* (Cth) which has become s 43BG of the *Criminal Code* (NT). Thus, for criminal responsibility for complicity and common purpose in relation to murder, a Schedule 1 offence, the relevant provision is now s 43BG in Part IIAA.

\(^{86}\) [1977] AC 443 (House of Lords).
The purpose of this Chapter is not to debate the relevant merits of the policy options open to a legislature, but to focus on the need for the legislature to clearly and comprehensively state the law surrounding the option chosen. However, it will be argued that s 43AS is the worst possible outcome judged against the twin criteria of comprehensiveness and clarity for an effective criminal code. For example, if the MCCOC had explicitly opted for O’Connor.⁸⁷ then it would be a straightforward drafting matter to write s 43AS accordingly. Similarly, if the MCCOC had explicitly adopted Majewski, then it would have been a simple matter of adopting similar wording to the other Australian jurisdictions that follow Majewski, such as New South Wales whose legislation specifically identifies which offences are specific intent provisions.⁸⁸

Chapter 10 Conclusion

The overall conclusion will summarise the contentions from each of the above Chapters and link them back to the common themes set out in the Introduction. The three common threads in addressing whether Bentham’s vision of a comprehensive criminal code is desirable and achievable are: (1) What constitutes the very nature of a code in the sense when is a code a code as distinct from a Crimes Act? (2) What should be the actual content of a model code as regards level of detail versus general principles? How far can model templates comprehensively state the law without being voluminous? (3) What is an appropriate underlying fault element for a criminal code?

⁸⁷(1980) 146 CLR 64.
⁸⁸Crimes Act 1900 (NSW), s 428B.
Should the underlying fault element reflect subjective or objective tests of criminal responsibility, or a combination of both?

1.4. RESEARCH METHODOLOGY

The standard research methodology for a thesis in law is to commence with a thesis proposition; identify the legal issues; define the search to narrow the focus; search the relevant legal databases; evaluate the search results and the resources to refine the thesis; review whether the thesis has been thoroughly tested and whether further questions need to be addressed; and finally organise the material in a logical sequence such that the central thesis proposition runs with a common thread through all the Chapters.

This thesis broadly follows such a methodology, and falls into the category of non-doctrinal qualitative research. Dobinson and Johns define qualitative legal research ‘as simply non-numerical and contrasted as such with quantitative (numerical) research’. The authors then divide qualitative legal research into doctrinal research and non-doctrinal research. Doctrinal research is defined ‘as research which asks what the law is in a particular area … the researcher’s principal or even sole aim is to describe a body of law and how it applies’. All other legal research is considered to be non-doctrinal research and is ‘grouped within three categories: problem, policy and law reform based research’.

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90 Ibid, 19.
91 Ibid.
Dobinson and Johns recognise there are often links between these four categories of research, being a relevant observation for this thesis, giving as an example a researcher who commences ‘by determining the existing law in a particular area (doctrinal)’. This thesis seeks to establish the generally understood framework for a model criminal code. The proposition that Bentham’s comprehensive code design is the ‘gold standard’ model for a code is doctrinal in the sense that the numerous descriptions of the factors that constitute the proper nature of a criminal code in the literature lead to this determination.

Arlene Fink has described a research literature review as a ‘systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars and practitioners’. Fink then divides the literature review into seven tasks: 1 Selecting research questions, where a question is precisely stated to guide the review; 2 Selecting bibliographic or article databases, Web sites and other sources; 3 Choosing search terms; 4 Applying practical screening criteria designed to produce only relevant material; 5 Applying methodological screening criteria such as evaluating the coverage of a study; 6 Doing the review; 7 Synthesising the results descriptively. This thesis broadly follows this template, seeking to avoid the danger identified by Manderson and Mohr that lawyers trained as advocates may not undertake an impartial literature review.

93 A. Fink, Conducting Research Literature Reviews: From Internet to Paper (Sage, 3rd ed, 2010) 3.
94 Ibid, 5.
The next steps in the Dobinson and Johns example above involve ‘a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, for example, the flaws in such policy’. 96 This thesis examines the history of codification of the criminal law in common law jurisdictions, postulating that the problems are largely associated with minimalist restatements of the common law aided and abetted by a policy of the legislature abdicating responsibility for code interpretation in favour of the judiciary.

The final step in the example above is the identification of problems and policy flaws ‘may lead the researcher to propose changes to the law (law reform)’. 97 This thesis proposes a change to a more comprehensive code design which is regularly updated, in keeping with Bentham’s model. As such, the thesis contains a major component of proposed law reform, which is subjected to evaluative research in terms of the desirability and practicality of adopting a comprehensive code design.

Given the above steps in this thesis, there is a strong element of qualitative empirical research which is inferential in seeking ‘some level of explanation as to why particular laws were enacted’. 98 For example, the thesis contains historical explanations as to why codification was successful in some jurisdictions like India, Canada, and Queensland, but not others such as England and Victoria.

Notwithstanding the methodologies outlined above, the genesis of this thesis was not simply a product of a rote following of systematised research categories. United States Supreme Court Justice Felix Frankfurter, while a professor at Harvard, wrote an

96 Dobinson and Johns, above n 89, 20.
97 Ibid.
98 Ibid.
article on legal research\textsuperscript{99} which contains some insights that have informed this thesis. Frankfurter likened research to poetic imagination - meaning the researcher sees significance where others are indifferent, and possesses a prophetic quality that pierces the future by knowing the questions to put and what direction to take. Ever since the present author commenced the study of the criminal law, disquiet has remained at the seeming lack of a connection between the theory of the purpose of a criminal code and the practical reality in the form of the actual code legislation in Australia. This disquiet has been compounded by the passing reference in criminal law texts to the difficulty in reconciling the goals of codification (accessible and exhaustive) with the practical problems associated with a comprehensive code and the ambiguities of language.\textsuperscript{100} It is as though there is an elephant in the room that criminal law scholars consistently overlook.

Frankfurter also referred to a well-known quotation from Charles Darwin to the effect that the main reason for the success of On the Origin of Species\textsuperscript{101} was due to Darwin having long before written two condensed sketches and a larger manuscript which enabled him to select the more striking facts and conclusions. Darwin also followed a golden rule of noting publications opposed to his general results such that ‘very few objections were raised against my views which I had not at least noticed and attempted to answer’.\textsuperscript{102} This thesis shares one characteristic of Darwin’s methodology in that earlier publications have addressed a common theme of the thesis: namely, the need for criminal code sections to be expanded so that it is the

\textsuperscript{100} See, for example, Fisse, above n 16; Colvin and McKechnie, above n 42; Schloenhardt, above n 43; Gray and Blokland, above n 69.
\textsuperscript{101} C. Darwin, On the Origin of Species by Means of Natural Selection (John Murray, 1859).
\textsuperscript{102} F. Darwin (ed), Charles Darwin: Selected Letters on Evolution and Origin of Species (D. Appleton and Co, 1892) 42.
legislature and not the judiciary who identifies the relevant level of criminal responsibility for an offence, as well as the appropriate tests to be applied. The extensive analysis of the literature on particular associated topics which is an integral part of the process of submitting articles to refereed law journals, has alerted the author to various alternative perspectives.

In summary, the research methodology adopted in this thesis seeks to wed a scientific qualitative approach with an artistic imagination looking into the future of criminal code design. Consequently, there is a degree of flexibility as to method particularly through the publication of articles clustered around the central themes of this thesis, a process Frankfurter likened to sending reconnoitering parties into unknown territory.103

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103 Frankfurter, above n 99.
CHAPTER 2

BENTHAM’S PLAN OF CODIFICATION AND JUDICIAL INTERPRETATION

2.1. OVERVIEW OF CHAPTER

This Chapter of the thesis contends that Bentham’s vision of a comprehensive criminal code that displaces the common law and minimises the scope for judicial interpretation is both viable and desirable today. The difficulties and challenges facing the judiciary in interpreting Australian Criminal Codes are examined. The issues of ambiguity of language and fixing the law at one point in time are given particular attention. Chapter 2 of the Criminal Code (Cth) points the way forward in that the original 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.¹ Bentham identified the characterisation problem² nearly 200 years before modern element analysis emerged in the form of the US Model Penal Code in 1962. The conventional wisdom that Blackstone and the adaptability of the common law triumphed over Bentham’s grand scheme of codification is challenged now that criminal law theory has developed sufficiently to put Bentham’s vision into practice.

¹ (1961) 108 CLR 56, 58, 61. Vallance is fully discussed in 4.4.1.2 below. Dixon CJ’s essential point was that the central criminal responsibility section of the Criminal Code (Tas), s 13(1), was irrelevant to working out the operation of individual provisions of the Code.
² See Chapter 1, n 76.
2.2. BENTHAM’S PLAN OF CODIFICATION

2.2.1. Introduction

In discussing Chapter 2 of the Criminal Code (Cth), one of the Code’s architects labelled the Code as taking ‘a Benthamite view of its provisions’ in that ‘Chapter 2 enables the legislature to define the grounds of criminal liability’. In the preface of a recent book marking the 150th anniversary of the Indian Penal Code (1860), Macaulay’s Code has been described as coming ‘closest to Bentham’s ambitious conception of comprehensive codification – one that was designed to displace the common law entirely and characterised by the principles of lucidity and accessibility of provisions, and consistency of expression and application’.

Bentham was no admirer of either the common law or the judiciary. For Bentham, codification was a ‘plan of the complete body of laws supposing it to be constructed ab origine’ thereby restraining the ‘licentiousness of interpretation’ by the judiciary, which in turn resulted ‘from the want of amplitude or discrimination in the views of the legislator’. Indeed, in Bentham’s mind the legislator ‘would need no interpreter [but] would be himself his own and sole interpreter’. However, Bentham was also alert to the need to make allowance for the alterations to the code without inconvenience, noting that ‘no system of laws will ever, it is probable, be altogether

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4 Ibid.
5 Thomas Babington Macaulay was the legal architect of the Indian Penal Code, which was submitted to the Governor-General of India in Council in 1837 but did not come into operation, after revision, until 1862.
6 W. Chan, B. Wright, and S. Yeo, Codification, Macaulay and the Indian Penal Code (Ashgate, 2011) vii. The comparison was with other 19th century Codes: Canada (1892); New Zealand (1893); Queensland (1899); and draft Codes in Jamaica and England.
8 Ibid.
9 Ibid, 239.
The strength of a code based ‘upon a regular and measured plan’ was that alterations ‘would give less disturbance to it’.

As Leader-Elliott has observed, Bentham ‘saw the relationship between legislature and courts as one of conflict’. Bentham was seeking to achieve ‘a degree of comprehension and steadiness … given to the views of the legislator as to render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary’. Bentham’s plan was that ‘a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency’.

Chapter 2 of the Criminal Code (Cth) is entitled ‘General principles of criminal responsibility’. Section 2.1 states: ‘The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.’ The question under examination is whether these general principles, which are more particularly defined in the Criminal Code (Cth) than in the Griffith Codes and represent the best effort in Australian Criminal Codes to be comprehensive, can be usefully expanded by including far more detail and nominating specific tests.

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11 Ibid, 236.
12 Ibid.
13 Ibid.
14 Leader-Elliott, above n 3, 393.
15 Hart (ed), above n 7, 240.
16 Ibid.
In this sense, the approach can be labelled a ‘rules’ based approach as opposed to a principles based approach where principles are ‘general rules … [that] are implicitly higher in the implicit or explicit hierarchy of norms than more detailed rules’. The justification for adopting a principles based approach in a business regulatory context is to shift the focus from process to outcomes thereby allowing firms to ‘be free to find the most efficient way of achieving the outcome required’. The justification for adopting a rules based approach in a criminal law context, utilising the same outcomes test, is to reduce the number of appeals and to improve the efficiency of the criminal justice system, by providing greater clarification of the relevant law and the tests to be applied.

2.2.2. Blackstone Versus Bentham

By contrast with Bentham’s conflict model, Blackstone, a contemporary of Bentham’s, whilst being ‘aware of the potential for conflict between courts and legislature’, envisaged the general relationship as ‘one of harmony’. This is illustrated in the extract below from the Commentaries on statutory interpretation.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law …

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18 Ibid, 5.
20 Ibid.
Blackstone also identified the critically important issue of the inability of a legislature to foresee all types of cases that may fall within or without a certain section of an Act.

In general law all cases cannot be foreseen; or if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted.  

Here, Blackstone’s focus was upon the practical need for judicial discretion to interpret legislation in the absence of an all seeing legislative eye for the future (akin to Bentham’s panopticon). However, in order for the legal system to function expeditiously, it was necessary for the courts to use that discretion in accordance with the ‘signs’ exhibited in the legislation. Effectively, Blackstone put his finger on the core of the curial-legislative partnership: the legislature cannot anticipate every case and is constrained by practical considerations such as time, reliant on the courts to interpret legislation in the spirit of its purpose. Nevertheless, modern element analysis combined with regular updating of codes can reduce the importation of the common law into codes to a minimum.

Underpinning Blackstone’s harmonious view of the relationship between the judiciary and the legislature was the coupling of ‘enthusiasm for common law rulemaking with scepticism about the use of statutes to effect legal reform’.  

In a passage that follows an opinion that popular assemblies would find the work of beginning legislation afresh too Herculean a task, Blackstone attacks the notion that statute could fundamentally alter the common law. This argument would resonate in the century

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23 Posner, above n 19, 594.
following Blackstone’s death in 1780 as the debate over codification of criminal laws intensified.

But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish settlements), will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead?\(^{24}\)

Blackstone unfavourably compares the difficulty of wholesale statutory reform with an example of the ingenuity of common law judges in reforming feudal land law without the need for legislation.

Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice … \(^{25}\)

As Posner has noted, Blackstone’s *Commentaries* portray ‘the body of laws as the outcome of an evolutionary process … which had produced a complex, intricately reticulated system’. \(^{26}\) In this, Blackstone opposed Bentham’s advocacy of wholesale statutory reform of the criminal law by emphasising ‘both the capacity of the common law to reform and the high incidence of legislative miscarriage’. \(^{27}\) Posner classifies the *Commentaries* as ‘a paean to the virtues of incrementalism’. \(^{28}\) The merit of an

\(^{24}\) Blackstone, above n 21, Book III, 267.  
\(^{25}\) Ibid, 268.  
\(^{26}\) Posner, above n 19, 596.  
\(^{27}\) Ibid.  
\(^{28}\) Ibid, 604.
approach that emphasises continuity over change has found support in the criticism of judicial solvents by two members of the High Court of Australia.

Judges have no authority to invent legal doctrine that distorts or does not extend legal rules and principles … It is a serious constitutional mistake to think that the common law courts have authority to ‘provide a solvent’ for every social, political or economic problem.29

In this sense, Blackstone’s construction of a ‘concept of common law adjudication that gave judges latitude for substantive law reform’,30 has been replaced by the work of Law Reform Commissions operating on specific references from the legislature. This is more in keeping with Bentham’s view of the dominance of the legislator over the judiciary.31

The fundamental difference in approach between Blackstone and Bentham is reflected in their study, or lack of it, into the operation of the system of English law. For Blackstone, his study of an actual functioning social system, ‘revealed a system of enormous intricacy, having impressive survival and growth characteristics’.32 By contrast, Bentham ‘never studied systematically any social or legal institution’33 rather ‘[h]e deduced optimal institutions from the greatest-happiness principle and then tried to work out the details of their implementation’.34 Bentham applied deductive reasoning to his code design by starting with the general and ending with the specific,

29 Breen v Williams (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).
30 Posner, above n 19, 583.
32 Posner, above n 19, 598.
33 Ibid.
34 Ibid.
whereas the approach of the bar and the bench is to apply inductive reasoning by moving from the specific to the general.\(^{35}\)

Bentham’s lack of empirical analysis of English law leaves him open to the criticism that his ‘no blank spaces’ view of codification was insufficiently grounded in the practical realities of a court based system of administering justice. When disciples of Bentham came to implement his grand design in draft codes in the 19th century,\(^{36}\) such codes varied in their resemblance to a restatement of the common law. However, leaving aside the development of statute law, examination of the actual workings of the criminal law in the 20\(^{th}\) century, as exemplified by the US *Model Penal Code* (1962) and the Australian *Model Criminal Code* (1995), leads to the conclusion that Bentham’s model design for a code remains desirable and achievable.\(^{37}\)

One aspect of the achievability question concerns the nature of language. Posner argues that for Bentham the ‘intellectual confusion [of the legislature] was rooted in linguistic imprecision’.\(^{38}\) To this end, Bentham sought to purify language ‘of ambiguity, to increase its transparency’\(^{39}\) which in turn is underpinned by Bentham’s confidence in the power of human reasoning ‘to decide any question of policy *de novo*, without benefit of authority, consensus, precedent, etc’.\(^{40}\) Such an optimistic view of human intellect is not shared by Blackstone who considered ‘that the individual human being’s reasoning power is highly limited and should be exercised


\(^{36}\) Discussed in Chapter 3.

\(^{37}\) Discussed in Chapter 4.

\(^{38}\) Posner, above n 19, 595.

\(^{39}\) Ibid, 602.

\(^{40}\) Ibid, 603.
with humility and self-distrust'. \(^41\) Blackstone’s view sits strangely with his confidence in the exercise of judicial creativity and ‘reliance on legal fictions as the agency of legal reform’. \(^42\) The modern reliance on Law Reform Commissions is testimony to legislative preference for collective reasoning and the avoidance of a ‘wilderness of single instances’ \(^43\) of individual (sometimes idiosyncratic) judicial decisions.

Given Blackstone was elected (in 1758) to the first Chair in English law at the University of Oxford, and that his reputation is based on his *Commentaries on the Laws of England*, \(^44\) it is hardly surprising that Blackstone should view judges as ‘the depositaries of the laws, the living oracles’. \(^45\) Bentham, on the other hand, disliked judge-made law because it was unwritten, uncertain and retrospective. \(^46\) Such a divide has continued down the centuries as ‘[c]odification has always had as its object the exertion of control over the interpretive discretion of courts’. \(^47\)

Blackstone and Bentham also disagreed over ‘natural’ as opposed to ‘positive’ law. Hart has observed that Bentham’s ‘insistence that the foundations of a legal system are properly described in the morally neutral terms of a general habit of obedience’ \(^48\) signalled the ascent of the positivist tradition in England over ‘consistency with

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\(^41\) Ibid, citing Blackstone above n 21, Book I, 70.
\(^42\) Ibid, 584, citing Blackstone above n 21, Book I, 70.
\(^43\) Lord Alfred Tennyson, ‘Aylmer’s Field’, *The Poetical Works of Alfred Tennyson, Poet Laureate* (Strahan, 1869) 341. It will be recalled that in Tennyson’s poem, Leolin went and toiled: ‘Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances.’ Published in four volumes between 1765 and 1769.
\(^44\) Blackstone, above n 21, Book I, 69, cited by Posner, above n 19, 582.
\(^45\) Bentham likened the common law to the way a man makes law for his dog by breaking a habit through a beating immediately after the event since ‘the dog only learns after the punishment that what it has done is wrong’. See A. Norrie, *Crime, Reason and History* (Cambridge University Press, 2001) 19.
divinely inspired and sanctioned natural law49 favoured by Blackstone as the criterion of law. Hart has further suggested that ‘utilitarianism is on the defensive, if not on the run, in the face of theories of justice which in many ways resemble the doctrine of the inalienable rights of man’.50

Ten years after Hart penned the above comments, Dworkin wrote his influential Law’s Empire51 in which he takes an interpretive, rather than a positivist, approach to law and morality consistent with a community’s moral principles such as justice and fairness. For Dworkin, a judge correctly intervenes when preserving principles which uphold individual rights, but wrongly intervenes on matters of policy. Leaving aside the difficult distinction between policy and principle, it is not clear that in the 21st century utilitarianism remains on the defensive.52

Nevertheless, the general view would appear to be that, in a criminal law context, Blackstone’s advocacy of the incremental approach has prevailed over Bentham’s call for root and branch reform. Wright succinctly summarises the consensus assessment that in England ‘Blackstone succeeded, the common law gained modern legitimacy

49 Posner, above n 19, 605.
52 Since the collapse of the twin towers of the World Trade Centre in New York on 11 September 2001 and the increasing threat of terrorism, Federal governments have rejected the ‘rights trump utility’ argument, as evidenced in Australia by the Anti-Terrorism Act (No.2) 2005 (Cth). This legislation, inter alia, allows for ‘control orders’ that allow for the overt close monitoring of terrorist suspects who pose a risk to the community; a police preventative detention regime that allows detention for up to 48 hours without charge; and a regime of stop, question, search and seize powers exercisable at airports and other Commonwealth places. Utility and positivism it would seem remain centre stage in the modern State’s legal armoury. For example, Posner has dismissed as ‘profoundly mistaken’ concerns that national security measures taken by the United States in the wake of 11 September 2001 would erode civil liberties. R. Posner, ‘Security Versus Liberty’ (December 2001) 288 The Atlantic Monthly 46 – 48. However, it should be noted that there has also been a rise in the recognition of human rights in legislation, as, for example, to be seen in the Charter of Human Rights and Responsibilities Act 2006 (Vic).
and codification failed domestically’. However, codification was deemed appropriate for British colonies and dominions, especially those in crisis or where sovereignty was under challenge (such as India and Canada).

Codification enhanced the effectiveness and legitimacy of British rule in India where the Mutiny [1857] helped ensure the Indian Penal Code’s enactment [1860]. In Canada, concerns about the effectiveness of the new Dominion’s sovereignty, the challenges of post-colonial nation-building, and the events of the 1880s [1885 North-West Rebellion] made codification a legislative priority [1892].

Similarly, as Leader-Elliott has observed, the enactment of the Criminal Code (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.


Ibid.

55 Leader-Elliott, above n 3, 394-395, footnote 12. At the time Griffith’s Code was enacted in 1899 it did not dominate the news, being overshadowed by the Boer War and Federation. In effect, there was no opposition to Griffith’s Code and it was introduced with little fanfare.
By contrast, in England, ‘Stephen’s cautious approach began with a treatise [A General View of the Criminal Law of England (1863)], moved to a digest [A Digest of the Criminal Law (1877)] and then on to a narrow code that retained common law’ [1880]. Wright has described Stephen as ‘favouring pragmatism to conceptual abstraction, and [who] saw judicial discretion as inevitable and desirable’. Yet, even this modest code, in which ‘defences were left to the common law and a minimal general part did not attempt to define liability’, failed to pass into law largely because of judicial opposition led by Lord Chief Justice Cockburn and the fall of the Disraeli conservative government in 1880. As Smith has observed, ‘the centrepiece of explicit judicial antagonism, as before, was the expectation that codification would remove the valuable flexibility of the common law’. In this regard, little has changed since the defeat of the Stephen Code in 1880. The Law Commission of England and Wales began work on a criminal code in 1968 but ‘did not come nearly as close to success [as Stephen’s Code], its 1989 draft languished as a low legislative priority and was abandoned in 2008’. 

It is instructive to examine Wright’s conclusion on the intertwining between the two legal schools of thought represented by Blackstone and Bentham.

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56 Sir James Fitzjames Stephen (1828-1894) was an eminent English lawyer and judge. His most famous work is A History of the Criminal Law of England (Macmillan, 1883). Stephen’s draft Criminal Code Bill (1880) is fully discussed in Chapter 3.

57 Wright, above n 53, 201.


59 Ibid.


61 Wright, above n 53, 196. The reasons why some criminal codes were adopted and others rejected within the English common law tradition are more fully explored in Chapter 3.
Legal scholars allied to the common law continued Blackstone’s renovation, developed the academic discipline and the positivist heirs to Bentham wanted in on this action … Codes and treatises were important nineteenth-century forms of legal literature in the British common-law world, and while they may have been at odds at inception, a complex and dynamic relationship developed between them.\textsuperscript{62}

For Australia, with its mosaic of code and common law jurisdictions, the reference above to a complex and dynamic relationship is particularly pertinent, especially with a High Court seeking to promote consistency where possible. While England may be a lost cause as far as codification is concerned, the same does not apply to Australia with the *Criminal Code* (Cth) applying to all federal offences. Furthermore, Chapter 2 was the product of the *Model Criminal Code*\textsuperscript{63} and serves as a benchmark for all other Australian jurisdictions contemplating criminal law reform.

The more immediate purpose is to seek to establish whether Bentham has a continuing relevance to criminal code design, in so far as the type of comprehensive code he envisaged is now possible with the development of criminal law theory to match his grand design. The irony in Australia is that reference to code States and common law States masks the fact that because the original Griffith Code in Queensland was essentially a restatement of the common law, only the *Criminal Code* (Cth) can be said to resemble a code in the generally understood wider meaning of the term. This means that an opportunity exists to take codes to a higher level of comprehensiveness using Chapter 2 of the *Criminal Code* (Cth) as the starting point to test whether

\begin{footnotesize}
\textsuperscript{62} Ibid, 200-201.
\textsuperscript{63} In 1991 the Standing Committee of Attorneys-General established the Model Criminal Code Officers’ Committee (MCCOC) ‘to prepare a uniform criminal code for all Australian jurisdictions … [and the] MCCOC has since gone on to produce a further seven reports on various areas of Commonwealth criminal law: S. Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 2\textsuperscript{nd} ed, 2010) 2 [0.0.140].
\end{footnotesize}
Bentham’s ‘no blank spaces’ is achievable and desirable. In effect, the question is whether in Australia in the 21\textsuperscript{st} century Bentham might finally triumph over his 18\textsuperscript{th} century nemesis Blackstone. Leader-Elliott has suggested that Chapter 2 holds ‘the promise, and the threat, of more transparent communication between legislature and courts’ \footnote{Leader-Elliott, above n 3, 404.}

\textbf{2.2.3. Ambiguities of Language and Fixing the Law at One Point in Time}

\subsubsection{2.2.3.1 Internal Consistency Versus Ambiguities Of Language}

Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient and the practice that ‘inevitable ambiguities of language make this impossible’. \footnote{B. Fisse, \textit{Howard’s Criminal Law} (The Law Book Company Limited, 5\textsuperscript{th} ed, 1990) 4.} Such a view is valid for the Griffith Codes, but less so for Chapter 2 of the \textit{Criminal Code} (Cth), and could potentially be largely overcome by more detailed drafting. Fisse continues by making the significant point that codification tends ‘to fix the content of the law as at one point in time’ \footnote{Ibid, 5.} and without regular amendments ‘obliges the judiciary either to do increasing violence to its literal terms or else abandon progress’. \footnote{Ibid, citing inter alia \textit{R v Kusu} [1981] Qd R 136 (limited relevance of evidence of intoxication to deny mental element of offence under s 28 \textit{Criminal Code} (Qld); cf \textit{O’Connor v The Queen} (1980) 146 CLR 64); \textit{Stuart v The Queen} (1974) 134 CLR 426 (objective test of liability for complicity in relation to probable consequences of enterprises; cf \textit{Johns v The Queen} (1980) 143 CLR 108).} Fisse also observes 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’. \footnote{Ibid, 5-6. The three code States referred to are Queensland, Western Australia and Tasmania.} Australian code experience would therefore strongly suggest that
Bentham was prescient in anticipating the need for a criminal code to be regularly updated in order to retain internal consistency and minimise judicial interpretation.

Bentham not only foresaw the need for amendments but correctly predicted the dangers of *ad hoc* alterations to a carefully constructed code. Bentham referred to one criterion for a code depending ‘upon the facility with which the several parts of it may be altered and repaired, taken to pieces, and put together’. 69 The following quotation was written by Bentham in 1782, in a description fitting the situation in Australia as identified by Fisse (above) writing over 200 years later in 1990.

> At present such is the entanglement, that when a new statute [or inserted amendment] is applied it is next to impossible to follow it through and discern the limit of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea. 70

Bentham was describing individual criminal law statutes in 18th century England. However, as there is essentially little essential difference between code and non-code States in Australia, given the Griffith Codes restate the common law, Bentham’s observation is equally pertinent to the mosaic of a code interspersed with the common law. For example, Gani has differentiated between (a) codification as per the Griffith Codes or the *Model Criminal Code*, which Gani defines as a ‘complete statement of the law’ 71 on the particular issue with which it deals, 72 and (b) codification of an ‘area

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69 Hart (ed), above n 7, 236.
70 Ibid.
of law within the context of a larger statute’, 73 for instance, by ‘covering the field on a discrete subject’, 74 as exemplified by the law of self-defence within the Crimes Act 1900 (NSW). Matters are further complicated, in seeking distinctions between common law States and code States, when the common law is specifically excluded from one area of the criminal law but not others within the same statute, as per s 428H of the Crimes Act 1900 (NSW) which states that: ‘The common law relating to the effect of intoxication on criminal liability is abolished.’

There is a certain irony that the adoption of a criminal code (by a State of Australia) leaves many areas of the law frozen in time and form. As Taylor observes in an illuminating study of the failed attempts to introduce a criminal code in Victoria between 1905 and 1908: ‘In Queensland and Western Australia, the general doctrines of Griffith CJ’s Code have not undergone anything like a thorough-going reform in the last 100 years and no doubt that would have happened in Victoria too.’ 75 Taylor argues the same outcome would have applied to particular offences, and gives as an example the law of theft. On the one hand, had the Victorian Code passed into law it would have simplified the common law it replaced, whilst ‘[o]n the other hand, it is unlikely that Victoria would have adopted a version of the English Theft Act 1968’. 76 The point being that codes, without regular amendment, fix the law at one point in time, and had a Victorian Code become operative circa 1908, then later thoroughgoing statutory reforms to an area of the criminal law, such as theft, would likely have passed by the Victorian Code.

73 Ibid.
74 Ibid.
76 Ibid, citing Crimes Act 1958 (Vic) pt 1 div 2.
As to ambiguities of language, Posner has suggested that for Bentham, language ‘is valuable in proportion as it conveys precisely and unambiguously the ideas that the speaker or writer desires to communicate’.\(^{77}\) In this context, it will be recalled that in *Widgee Shire Council v Bonney*\(^ {78}\) 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’. However, the replacement test in s 23 *Criminal Code* (Qld) of whether the act or omission occurred independently of the person’s will or is an event that occurs by accident, has been aptly described by Goode in terms of ‘the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood’.\(^ {79}\) Furthermore, as Goode has 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’.\(^ {80}\)

On Griffith’s comment concerning the exact meaning of *mens rea*, as Lord Hailsham has astutely observed: ‘The beginning of wisdom in all the *mens rea* cases to which our attention was called is … that *mens rea* means a number of quite different things in relation to different crimes.’\(^ {81}\) Thus, one would expect reference to intention, the highest expression of *mens rea* on the staircase of criminal responsibility for the offence of murder. Unsurprisingly, under s 302(1)(a) *Criminal Code* (Qld) a person is liable for murder where they unlawfully kill another with intent to kill or with intent

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\(^{77}\) Posner, above n 19, 602.

\(^{78}\) (1907) 4 CLR 997, 981.


\(^{80}\) Ibid, 159.

\(^{81}\) *DPP v Morgan* [1976] AC 182 (HL), 213.
to cause grievous bodily harm. Dixon J in *R v Mullen*\(^{82}\) stated in relation to the decision of the House of Lords in *Woolmington v Director of Public Prosecutions*:\(^{83}\)

The *Criminal Code of Queensland* does not, in my opinion, contain any sufficient expression of intention\(^{84}\) to exclude the application of the rule\(^{85}\) thus established. It is true that in its text there may be traced a belief on the part of the framers that the rule of law was otherwise, a belief which was very generally held.\(^{86}\) But the *Code* does not appear to me either to formulate or necessarily to imply a principle that upon an indictment of murder the prisoner must satisfy the jury either on the issue of accident or of provocation.

This disposes of the fiction that no recourse need be had to *mens rea* in the Griffith Code. 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* (Qld) above. The better view is that *mens rea* is an essential element of an offence unless expressly excluded,\(^{87}\) 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, as liability is imposed for the intentional doing of the act given the risk involved.

By contrast, Chapter 2 of the *Criminal Code* (Cth) which deals with the general principles of criminal responsibility, ‘is a significant departure from the Australian

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\(^{82}\) (1938) 59 CLR 124, 136. In *Mullen*, the High Court rejected an appeal by the Crown against the judgment of the Court of Criminal Appeal in Queensland that the trial judge’s direction which placed upon the prisoner the burden of reasonably satisfying the jury of a defence of accident was a misdirection. *Mullen* was on point with *Woolmington* as the defence was that the victim was shot accidentally in the course of a struggle.

\(^{83}\) [1935] AC 462 (HL).

\(^{84}\) At the time, the now repealed s 301 provided as follows: ‘Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.’ Latham CJ in *R v Mullen* (1938) 59 CLR 124, 128 stated: ‘The mental element in the crime of wilful murder is expressed in Queensland by the reference to intention which has been quoted (sec. 301). In the law of England the mental element in murder is expressed by the words “malice aforethought”. The same principle must be applied to the proof of the intention required by the law of Queensland as to the proof of malice aforethought required by the law of England.’

\(^{85}\) The ‘rule’ refers to the Crown having to prove in a murder case the malice of the accused.

\(^{86}\) This is a reference to *Foster’s Crown Law* (1762) 255. See below n 146.

\(^{87}\) *Lim Chin Aik v The Queen* (1963) AC 160, 173 (JCPC).
common law of crimes and existing Australian criminal codes’. Leader-Elliott has argued, with some justification at least for offences, that as opposed to the general provisions of the Griffith Code and its descendants, ‘Chapter 2 provides a comprehensive articulation of the elements of criminal liability’. More significantly in terms of the central theme of this thesis, Chapter 2 ‘is a legislative formulary that goes much further than its predecessors in enabling parliament to avoid ambiguity in stating the relationship between the physical and fault elements of offences’. Leader-Elliott considers this a predictable outcome given the developments in criminal law theory since Griffith sought to codify the general principles of criminal responsibility at the end of the 19th century, with Chapter 2 being ‘an adaptation of article 2 of the US Model Penal Code’.

Nevertheless, when the Queensland Government established a Criminal Code Review Committee in 1990 under Mr O’Regan QC, it ignored both the US Model Penal Code and the Model Criminal Code Officers Committee (MCCOC) which was undertaking a General Principles review at the same time (1990-1992). Goode has referred to the O’Regan review in less than flattering terms.

The O’Regan review was scarcely fundamental. It was in large part a tidying up and modernising exercise which did not examine the foundational structure of the Griffith Code in any meaningful way. Not one of the O’Regan recommendations was enacted.

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88 Leader-Elliott, above n 3, 396.
89 Ibid. The Griffith Code refers to the Criminal Code (Qld), and the descendants are the Criminal Code (WA), Criminal Code (Tas), and the Criminal Code (NT).
90 Ibid.
91 Ibid, 397.
92 Queensland Criminal Code Review Committee, Report 1992. The O’Regan Committee’s recommendations aimed to retain the Code’s structure while recasting its language as gender neutral and in plain English, as well as abolishing archaic offences.
93 Goode, above n 79, 165.
What followed was a redraft of the entire Criminal Code enacted as the *Criminal Code 1995* (Qld) which ‘paid no attention to the MCCOC project’. A change of State Government meant that the 1995 Code failed to come into operation. A further review, which also ignored the MCCOC reports, produced the *Criminal Law Amendment Act 1997* (Qld). Goode concludes that ‘[t]hree superficial but supposedly major reviews of a *Criminal Code* … produced what can only be described as a mouse’.95

The above short history of recent failed attempts to reform fundamentally the *Criminal Code* (Qld) and to ignore developments in criminal law theory in America and Australia, is testimony to the entrenched support in the legal profession in Queensland for the comfort of the status quo. One can juxtapose the judicial opposition to the introduction of codification in the 19th century with judicial opposition to reforming a code over a hundred years old. For example, Goode has highlighted the critical remarks of Justice Thomas of the Supreme Court of Queensland in relation to the physical and fault elements adopted by the MCCOC and incorporated into Chapter 2 of the *Criminal Code* (Cth) as ‘mere unreasoned abuse’.96

Given that Chapter 2 adopts recklessness as the underlying fault element in the absence of a legislative intention to the contrary, Leader-Elliott summarises Chapter 2 ‘as nothing more than a formalisation of legislative grammar that provides an implicit manual of instructions for legislators’.97 Thus, the primary audience is neither the courts nor the general public, but the legislature. The implicit strength of Chapter 2 is

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94 Ibid.
95 Ibid.
97 Leader-Elliott, above n 3, 399.
that it ‘equips the legislator with an array of techniques to compel courts to impose strict or absolute liability, to require defendants in criminal cases to prove their innocence or to abrogate other fundamental presumptions and principles of the common law’. The net result of an increase in clarity flowing from the provisions of Chapter 2 is ‘a more democratically responsive relationship between legislature, electorate, and courts’, which Bentham would have readily endorsed.

Leader-Elliott ‘accepts the spirit of Bentham’s insistence that the object of codification is to enable the legislature to express its intentions in a way that reduces the need or temptation for courts to engage in … “licentious” interpretation of criminal statutes’. A similarly critical view is taken by Robinson regarding ‘the improper manipulation of legislative handiwork in judicial interpretive practice’.

Further support can be found in the remarks of a former Chief Justice of Australia commenting on the history of the general principles of the Criminal Code (Qld) showing ‘that it is impossible in the common law system to frame a law which precludes the judges from giving their own meaning to it’. Such an assessment from an eminent judge, who had served on the Supreme Court of Queensland, underscores the pervasive reach of the common law in the Criminal Code (Qld).

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98 Ibid, 400. Leader-Elliott cites the codification of the law against the illicit manufacture and trafficking of controlled drugs in Chapter 9, Part 9.1 of the Criminal Code (Cth) as providing numerous examples of these legislative techniques in action.

99 Ibid, 402.

100 Ibid, 393.

101 Ibid, citing P. Robinson, Structure and Function in Criminal Law (Oxford University Press, 1997) 50. Inadequate definition of the conduct element in the United States Model Penal Code results, in Robinson’s view, in opportunities for courts ‘to manipulate improperly a defendant’s liability by altering the content of the categories “conduct”, “result”, and “circumstance”, thereby altering the applicable culpability requirement’.

102 Rt Hon Sir Harry Gibbs, ‘Queensland Criminal Code: From Italy to Zanzibar’ (2003) 77 Australian Law Journal 232, 236. Wright, above n 58, 54, notes that Burbidge and Sedgewick, the drafters of the Canadian Criminal Code (1892), which like the Criminal Code (Qld) drew heavily on Stephen’s English Criminal Code Bill of 1880, ‘agreed with Stephen’s view of the impossibility of excluding the common law’.
reach of the common law is further broadened where judicial interpretation of the code implies a common law meaning into the text. For example, Colvin and McKechnie\(^{103}\) argue that ‘[i]t is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions of the [Queensland and Western Australia] Codes’. However, the authors noted that the High Court in *Callaghan v R*\(^{104}\) justified such importation as being appropriate for criminal liability, whilst critically observing that ‘[s]uch a liberal use of common law doctrine does not sit easily with orthodox views regarding the proper approach to interpreting the Codes’\(^{105}\).

Nevertheless, the Queensland legislature would appear to be comfortable with such ‘a liberal use of common law doctrine’, which in turn suggests that Bentham’s view that the relationship between the legislature and the judiciary was one of conflict is misplaced in modern times. The relationship is better described as one of power-sharing. For example, s 304 of the *Criminal Code* (Qld), which covers the partial defence to murder of provocation, has been judicially interpreted in line with the development of the common law. Thus, in *Pollock v The Queen*,\(^{106}\) the High Court stated that ‘[i]n interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of “sudden provocation” subsequent to the Code’s enactment’\(^{107}\).

\(^{103}\) E. Colvin and J. McKechnie, *Criminal Law in Queensland and Western Australia* (Butterworths, 6th ed, 2012) 76 [4.36].

\(^{104}\) (1952) 87 CLR 115.

\(^{105}\) Colvin and McKechnie, above n 103, citing *inter alia* Brennan *v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

\(^{106}\) [2010] HCA 35.

\(^{107}\) *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).
Section 304 was substantially expanded in 2011. The amendments to s 304 leave the original section intact as s 304(1). The explanatory notes merely assume an objective test based on past judicial interpretation of developments in the common law being read into s 304, rather than specifically incorporating an objective test. The effect of the additions is to restrict the partial defence in two ways: by limiting its scope through the exclusion of provocation based on words alone other than in exceptional circumstances and for domestic relationships where the deceased sought to end or change the relationship; and, by reversing the onus of proof. Thus, the elements of the defence are unchanged in s 304(1) as Griffith’s original language is retained.

This would clearly suggest that the legislature was sufficiently satisfied with the judicial interpretation of the original s 304 to deem amendment unnecessary. Such legislative satisfaction, taken in conjunction with the discussion above of courts implying the common law standard of criminal negligence into the duty-imposing provisions, leads to the conclusion that the relationship between the judiciary and the legislature is not one of conflict today. Indeed, when the Queensland legislature finally amended s 23(1)(b) to remove the misnamed word ‘accident’, the amendment merely substituted the judicial test already in use. This legislative-judicial
‘partnership’ is contrary to Bentham’s view of the legal world in the late 18th and early 19th centuries. Although, in the United States, Robinson has identified a different outcome to a ‘partnership’: namely, ‘the breakdown of communication between legislature and courts in jurisdictions that have adopted versions of the US Model Penal Code’.112

On closer examination, Fisse’s point concerning Australian code States being neglectful of revising their codes may be closer to the mark. Arguably, the ‘satisfaction’ of the legislature with past judicial interpretation of s 304 is in reality inertia, with the 2011 amendments representing a minimalist position. Certainly, when the judiciary has drawn the attention of the Queensland legislature to perceived deficiencies in the Criminal Code (Qld), these concerns have often failed to generate legislative action.

The self-defence provisions in the Criminal Code (Qld) are unique in Australia in distinguishing between self-defence against an unprovoked assault (s 271) and self-defence against a provoked attack (s 272). Where a disputed factual scenario involves a sequence of events the judge may be required to direct the jury on both of the above self-defence sections with attendant complexities and difficulties. In R v Young,113

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112 Robinson, above n 101, 41: ‘Dulled by generations of offence analysis, courts ignore general code provisions that, together with offence definitions, define every objective and culpability element required for liability. They continue to define unstated culpability requirements according to their own view of public policy interests. The result is that in nearly every criminal case in the United States the statement of the law defining the offence charged suffers a significant risk of inaccuracy.’

113 [2004] QCA 84 [15].
McPherson JA noted that ‘[i]t is impossible to avoid the impression that these provisions, which were copied from the English draft Bill of 1880, are in urgent need of simplification’. The pertinence of McPherson JA’s remarks was reinforced two years later in *R v Wilmot*¹¹⁴ where on appeal a conviction for murder was set aside and a re-trial ordered based on the trial judge’s misdirection to the jury as to self-defence and whether the case fell to be decided under s 271 or s 272.

In the eight years that have passed since McPherson JA made his *obiter* observation, no legislative effort has been made to address the complexities of self-defence in Queensland. His Honour was adding judicial weight to previous academic criticism of the self-defence provisions. For, as Kift, writing in 2001 had already pointed out, ‘[i]n the past decade in Queensland, there have been no less [sic] than four substantial reviews of the *Criminal Code* (Qld), none of which succeeded in forcing amendment of the substantive law of self-defence’.¹¹⁵ Thus, Fisse’s 1990 criticism of code neglect by the legislature remains valid and underscores Bentham’s foresight in calling for regular alterations to the penal code.

By way of contrast, and consistent with the political imperatives of the *crime du jour*, the newly elected Queensland Government (March 2012) wasted no time in fulfilling an election promise to increase the penalty for murder and to increase the maximum penalty for the offence of serious assault of a police officer.¹¹⁶ The incoming

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¹¹⁶ The *Criminal Law Amendment Act 2012* (Qld) increased the non-parole period for murder from 15 to 20 years imprisonment; increased the non-parole period for multiple murders from 20 to 30 years imprisonment; and inserted a new minimum non-parole period of 25 years imprisonment for the offence of murder where the victim was a police officer. The Act also increased the maximum penalty for the offence of serious assault of a police officer from seven years imprisonment to 14 years imprisonment.
Government had campaigned on a law and order platform that focused on the protection of the community from serious offenders, and strengthened protection to police officers acting in the performance of their duties.¹¹⁷

In concluding this section on internal consistency versus ambiguities of language, the disparity between the theory and the practice of code interpretation has been magnified in Australia. This is because the Griffith Codes are not really codes at all, but rather a restatement in statutory form of the common law of the 19th century. The conflict that Bentham perceived between the courts and the legislature has been replaced by a working partnership. The partnership operates on the basis of the legislature delegating Code interpretation to the courts, except when a pressing crime du jour amendment is deemed politically necessary. In the main, the courts have ‘updated’ the Griffith Codes by importing developments in the common law, as in the case of s 304 Provocation of the Criminal Code (Qld) discussed above. The ‘porous’ Griffith Codes have allowed the courts to infuse sections of the Codes with common law developments, which has been facilitated by the ambiguity of language of these sparsely written 19th century sections.

2.2.3.2 Legislative Inertia

The legislative inertia factor, once the major effort of adopting a criminal code has been expended, is relevant from both a broad and a specific impact perspective on Code development in Australia. While Bentham was writing about codification in England, a similar debate was unfolding in Germany. The two main protagonists were
Professor Thibaut of the University of Heidelberg, the leader of the philosophical school that supported a natural law position based on moderate rationalism, and Professor von Savigny of the University of Berlin, the leader of the historical school of jurisprudence. In 1814, Thibaut published a plan for a single unifying code which ‘assumed that all that was necessary for successful codification was to set up a drafting committee of jurists and practitioners, and for the sovereign to enact the draft it produced’.119

Savigny’s response was ‘that a people’s law cannot be made by a drafting committee, but must grow from a people’s experience and character’.120 Savigny particularly addressed the difficulty of a code containing by anticipation the capacity to decide all types of future cases.

This has been often conceived, as if it were possible and advantageous to obtain, by experience, a perfect knowledge of the particular cases, and then to decide each by a corresponding provision of the Code. But whoever has considered law-cases attentively, will see at a glance that this undertaking must fail, because there are positively no limits to the varieties of actual combinations of circumstances.121

Savigny was essentially expounding the virtues of the organic common law contending that ‘[l]aw is not the product of an autonomous craft but only one aspect

119 J. Stone, Social Dimensions of Law and Justice (Maitland Publications Pty Ltd, Sydney, 1966) 94.
121 Stone, above n 119, 94.
of social life’, an argument later taken up by opponents of codification in England. For present purposes, the significance of the Thibaut/Savigny debate for Australian codes is that the sparsely written sections of Australian codes, which largely simply restated the common law, per force retain the organic development of the common law. For example, in Pollock v The Queen, the High Court endorsed Queensland Court of Appeal authority on s 304 Provocation, whereby ‘[j]udges of the Supreme Court of Queensland have for many years interpreted the provision by reference to the common law’. Schloenhardt has described the Criminal Code (Qld) as reflecting ‘very strongly Australia’s common law tradition’, going on to state that ‘Griffith’s principal intention was to reproduce (not change) the common law by way of codification’. Griffith himself described codification as merely meaning ‘the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed’. Griffith further observed that he had ‘endeavoured to include all the

123 Stone, above n 119, 95. Stone suggests that ‘[f]rom the transient debate with Thibaut emerged a formulation, admittedly a crude one, of sociological jurisprudence’.
124 Leader-Elliott, above n 3, 395, has observed in relation to the Criminal Code (Qld) that: ‘The central provisions of his draft were taken from the Italian Criminal Code [citing A. Cadoppi, ‘The Zanardelli Code and Codification in the Countries of the Common Law’ (2000) 7 James Cook University Law Review 116 (K.A. Cullinane trans)], though Griffith believed that his translation expressed the common law.’ For a generous appreciation of the Queensland Code, see Wright, above n 58, 39, who suggests that ‘unlike the Canadian code, Griffith’s effort reflects a comprehensive conception of codification originally promoted by Jeremy Bentham’. However, Wright does acknowledge that ‘the vast majority of provisions were founded on English criminal law and colonial amendments to that law’ (57).
127 Ibid, 30.
rules of the unwritten common law which are relevant to the question of criminal responsibility’.  

Furthermore, the extensive use of the underlying fault element of negligence in the Griffith Codes, with its benchmark of the ordinary person, reflects changing community standards. Consequently, the historical or sociological school of jurisprudence represented by Savigny, is accommodated within Australian codes by virtue of the dependence of these codes on judicial interpretation which is in turn informed by the development of the common law. Such a position can be supported by the observation of Colvin and McKechnie 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’. Colvin and McKechnie further point out that in common law jurisdictions, while the criminal law is essentially statute based, this legislation ‘leaves many gaps to be filled by the invocation of common law rules and principles’. At the same time, neither are Australian criminal codes exhaustive or comprehensive as ‘some gaps still remain which have to be filled by reference to the common law’. The difficulties presented by the ‘gaps’ are compounded by ‘the

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129 Ibid, iii.  
130 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’, citing as authority 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’: P. Fairall, Review of Aspects of the Criminal Code of the Northern Territory, March 2004, 41.  
131 Ehrlich has tempered Savigny’s fear for the development of the common law by pointing out that codes have been judicially adjusted by the pressure of social change. ‘The development of the living social law as well as of the art and science of drawing up legal documents and of judicial decision continues the even tenor of its way … As soon as life has caught up with the Code, juristic science begins to function with renewed vigour.’ E. Ehrlich, Fundamental Principles of the Sociology of Law (Harvard University Press, 1936) 433 – 434.  
132 Colvin and McKechnie, above n 103, 6 [1.12].  
133 See Crimes Act 1900 (NSW), Crimes Act 1958 (Vic) and Criminal Law Consolidation Act 1935 (SA).  
134 Colvin and McKechnie, above n 103, 6 [1.12].  
135 Ibid.
inherent vagueness of statutory language [which] presents problems of interpretation, in the resolution of which reference is often made to the common law’.  

Two High Court case illustrate the point that the fault line between code and statute based jurisdictions is largely illusory in terms of the need for judicial interpretation and the invocation of the common law. The first case is Stevens v The Queen, where the main issue was the trial judge’s decision not to direct the jury on accident under s 23(1)(b) of the Criminal Code (Qld). In the second case, CTM v The Queen, the issue rested on the availability of the defence of mistake of fact under the Crimes Act 1900 (NSW).

In Stevens v The Queen, a murder case hinging on the intention of the defendant who claimed he was trying to prevent the deceased from committing suicide when he seized the gun, the High Court split 3-2 as to whether the jury should have been directed on an event that occurs by accident under the then s 23(1)(b) of the Criminal Code (Qld). The majority, comprising McHugh, Kirby and Callinan JJ, in separate judgments, held a direction under s 23 was necessary, and therefore an objective test for accident was appropriate in that an ordinary person could not reasonably have foreseen it (as opposed to the subjective test for intention to kill given the Crown’s case that there was no mishap). Thus, under the test for s 23 in the context of a murder

136 Ibid.
138 (2008) 236 CLR 440. This case is discussed more fully in Chapter 5.
139 See above n 111.
140 In Queensland, under s 302(1)(a) Criminal Code (Qld) a person is liable for murder where they unlawfully kill another with intent to kill or with intent to cause grievous bodily harm. The Criminal Code (Qld) does not define the word ‘intention’. In Bruce Henry Willmot (1985) 18 A Crim R 42, 46, Connolly J was of the view that there is ‘no ambiguity about the expression [“intent”] as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language’. So much for no recourse to mens rea in the Griffith Code: see Widgee Shire Council v Bonney (1907) 4 CLR 997, 981 (Griffith CJ), above n 78; Goode, above n 79.
trial, the majority of the High Court appears to move seamlessly between subjective and objective tests.

By contrast, the minority, Gleeson CJ and Heydon J, whilst accepting the objective test under *R v Van Den Bemd* when s 23 was relevant, cited *Murray v The Queen* as framing the question for decision whether s 23 was engaged as whether ‘there was an issue for the jury about whether there was an unwilled act, or an event occurring by accident, that was an issue separate from the issue about the intention with which the appellant acted’. Gleeson CJ and Heydon J answered that question in the negative, because the threshold issue was causation and the trial judge’s directions were clear that an acquittal should be returned if the Crown failed to negative the appellant’s account.

When s 23 is relevant, this two-step process between the subjective test for murder and the objective test for accident would appear to be inevitable given that s 23 was drafted before the House of Lords decision in *Woolmington v DPP*. When Sir Samuel Griffith designed s 23, the law was as stated in *Foster’s Crown Law*, which meant that the legal onus was on the defence to prove accident. As Gummow and Heydon JJ pointed out in *DPP (NT) v WJI*, ‘[a] particular theory of the framers of

\[141\] (1994) 179 CLR 137. The test is whether death was such an unlikely consequence of a willed act of the accused that an ordinary person could not reasonably have foreseen it.


\[143\] *Stevens v The Queen* (2005) 227 CLR 319, 327 [18].

\[144\] Ibid.


\[146\] Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; And of Other Crown Cases: to which are Added Discourses Upon a Few Branches of the Crown Law* (E. and R. Brooke, 1st ed, 1762). Foster was a judge of the King’s Bench. The book has two parts. The first part (Crown Cases) is a series of law reports. The second part (Crown Law) is a textbook.
State Codes may have been displaced by later common law decisions.\footnote{147} The failure to amend substantively s 23, the principal section dealing with criminal responsibility in the Griffith Code, since the decision in \textit{Woolmington} was handed down in 1935, is further testimony to judges filling in the gaps in the face of legislative inertia. Bentham would be rightly appalled.

The difficulties of statutory interpretation in the face of legislative silence can be given as a further example in the case of \textit{CTM v The Queen}.\footnote{148} The High Court was required to consider s 66C(3) of the \textit{Crimes Act 1900} (NSW) which deals with the offence of sexual intercourse with a minor. Before the Act was amended in 2003 it provided a defence to heterosexual acts with under-age people if the offender reasonably believed that the child to whom the charge related was aged at least 16, and provided that the child was at least 14 and had consented to the sexual activity. After the 2003 amendments, the Act said nothing expressly about mistake as to age. The majority\footnote{149} held that the defence of honest and reasonable mistake of fact applied under s 66C. The majority followed the reasons of Cave J in \textit{R v Tolson} concerning the relationship between the courts and Parliament. The majority stated that the common law principle of mistake of fact reflected fundamental values of criminal responsibility and ‘\{t\}he courts should expect that, if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary

\footnote{147} (2004) 219 CLR 43, 54 [31]. Gummow and Heydon JJ exampled \textit{Woolmington v DPP} regarding ‘the placement of the burden respecting issues of accident or provocation in the trial of a murder indictment’, citing \textit{R v Mullen} (1938) 59 CLR 124, 136, where Dixon J stated that: ‘\{O\}nce the jury are satisfied beyond reasonable doubt that the prisoner brought about the deceased's death, then that he did so accidentally is a defence or ‘excuse’ which must be made out to their reasonable satisfaction. The decision of the House of Lords in \textit{Woolmington v. Director of Public Prosecutions} declares that at common law such a rule or principle no longer exists.’


\footnote{149} Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

\footnote{150} (1889) 23 QBD 168, 182. ‘But such a result [the enactment by the legislature ousting the defence of reasonable mistake] seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.’
implication’. By contrast, Heydon J, who dissented on this point, following an extensive history of the relevant legislation, concluded that the pattern ‘points strongly towards reading the legislation creating the offences of sexual intercourse below specified ages as excluding the Proudman v Dayman principle’. 

Thus, effectively, the majority asserted that the common law was embedded in the Crimes Act 1900 (NSW) unless specifically excluded by Parliament. The same observation can be made for the Griffith Codes given the sparse language adopted, the wholesale importation of Stephen’s Draft English Code of 1880, and Griffith’s intention to reproduce the common law.

Section 24(1) of the Criminal Code (Qld) deals with mistake of fact as follows:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

151 CTM v The Queen (2008) 236 CLR 440, 456 (Gleeson CJ, Gummow, Crennan and Kiefel JJ). The joint judgment at 445 also pointed to s 24 Mistake of fact Criminal Code (Qld) and Dixon J’s comment in Thomas v The King (1937) 59 CLR 279, 305-306 that s 24 reflected the common law with complete accuracy.

152 (1941) 67 CLR 536.

153 CTM v The Queen (2008) 236 CLR 440, 502. Heydon J at 497 defined the ‘defence’ in Proudman v Dayman as follows: ‘Legislation will be construed so as not to render criminally liable an accused person provided that, first, the accused person satisfies an evidential burden of establishing an honest belief on reasonable grounds in the existence of a state of factual affairs which, had it existed, would have made the acts alleged by the prosecution non-criminal, and, secondly, the prosecution fails to discharge a legal burden of establishing beyond reasonable doubt that the accused did not have that honest belief on reasonable grounds.’

154 Wright, above n 58, 59, has given an enlightening insight into the influences bearing on the Griffith Code. ‘A simple quantitative measure of outside influences, based on a count of Griffith’s explicit references, stands at over 100 to Stephen’s Draft English Code, 1880, 75 references to the common law, 15 references to the 1889 Italian Criminal Code, and 9 references to the 1881 New York State Code.’

155 Schloenhardt, above n 126.
Sitting behind these sparse lines is a body of common law contained in numerous cases invisible to the lay reader which is often contradictory.\textsuperscript{156} The High Court’s concerns over the abrogation of fundamental principles of criminal responsibility expressed above in \textit{CTM v The Queen}\textsuperscript{157} in the context of the \textit{Crimes Act (1900)} NSW are equally applicable to s 24(1) of the \textit{Criminal Code} (Qld). The need for the Parliament to make its intentions plain is even more pressing in the case of a code, and goes to the heart of Bentham’s notion of a code.

Waller and Williams have argued that ‘[o]nce the Code is enacted, the law must so to speak, stand still until Parliament decides to vary it’,\textsuperscript{158} contending that the legislature is more likely ‘to rectify what it regards as an error in the course of common law development than modify the provisions of a Code to which it has given birth after much effort’.\textsuperscript{159} There is considerable substance to the claim, although there are two qualifications to be made. First, the High Court favours a meaning ‘which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions [and] as between such jurisdictions and the general principle in the common law obtaining elsewhere’.\textsuperscript{160}

Secondly, the courts retain the authority to interpret statutory provisions. For example, in construing s 271(2) of the \textit{Criminal Code} (Qld), which deals with self-defence

\textsuperscript{156} For example, in \textit{R v Gould and Barnes} [1960] Qd R 283, 291-292 the term ‘existence of any state of things’ in s 24(1) was given a narrow meaning such that the defence could only apply to mistakes about present facts and not mistakes about future consequences, whereas in \textit{Pacino v R} (1998) 105 A Crim R 309 a different, broader interpretation was taken. Again, in \textit{Larsen v G.J. Coles and Co Ltd} (1984) 13 A Crim R 109, 111 it was held that the ‘belief’ must be positively held in contrast to the view of Colvin and McKechnie, above n 103, [12.11], that inadvertence and ignorance suffice. See also Schloenhardt, above n 126, [14.3, 14.3.1].

\textsuperscript{157} (2008) 236 CLR 440.

\textsuperscript{158} L. Waller and C. R. Williams, \textit{Criminal Law: Texts and Cases} (Lexis Nexus, Sydney, 2009) [1.39].

\textsuperscript{159} Ibid.

\textsuperscript{160} \textit{The Queen v Barlow} (1997) 188 CLR 1, 32 (Kirby J).
against an unprovoked attack, the High Court of Australia in *Marvey v The Queen*\(^{161}\) endorsed previous Queensland Court of Appeal authority in *R v Muratovic*\(^{162}\) that ‘made the law in this State the same as the common law declared in *Zecevic v DPP (Vic)*’.\(^{163}\) In *R v Muratovic*, the Queensland Court of Appeal had split 2 to 1 on the meaning of the expression ‘otherwise preserve the person defended from death or grievous bodily harm’ in s 271(2). Hart J, who was in dissent, listed four possible constructions of ‘otherwise’.\(^{164}\) The selection of one of those alternatives by the majority happened to be consistent with the common law declared twenty years later in *Zecevic v DPP (Vic)*,\(^{165}\) which in turn had overturned previous High Court of Australia authority in *Viro v The Queen*.\(^{166}\)

Thus, the broad impact of legislative inertia in code States in Australia is that the Thibaut/Savigny debate has been overtaken by events, because legislative reluctance to regularly update codes has meant that the organic development of the common law has infused code development and interpretation. Bentham would be disappointed to learn that effectively the common law operates in tandem with codes in Australia, and that the legislature has failed to stamp an exclusive imprint on the codes. There appears to be an embedded assumption that the Australian ‘codes’ are the type of code Bentham envisioned.\(^{167}\) There is a strong counter argument to that assumption.

The Thibaut/Savigny debate was premised on the assumption that a code would be rules based, whereas the reality for Australia code States is that broad principles

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\(^{161}\) (1977) 138 CLR 645.

\(^{162}\) [1967] Qd R 15.


\(^{165}\) (1987) 162 CLR 645.

\(^{166}\) (1978) 141 CLR 88.

\(^{167}\) Wright, above n 58, 39.
drawn from the common law are enshrined in the codes, with the judiciary filling in the ‘gaps’ whilst a passive legislature appears to only intervene when prodded by specific public concerns and media campaigns.\textsuperscript{168} Taylor has colourfully described the political system in these terms:

\begin{quote}
    The system we have rewards politicians for winning votes. It does not reward them for getting through codifications, but for enacting popular measures that interest the general public and make a difference to everyday life outside the courts.\textsuperscript{169}
\end{quote}

The boot would be very much on the other foot if instead there was a single comprehensive criminal code for Australia which was regularly updated, as Bentham envisaged for any code. Thus, Savigny’s fears for the organic development of the common law, which in Australia have not materialised due to judicial incorporation of the common law into sparsely written codes, would be replaced by the organic development of the single code following regular reviews. Hence, the situation of a fossilised code, as pertains in Queensland after over a century of inertia, dependent on the inventiveness of judges to make it work, would be avoided.

Turning then to the specific impact of legislative inertia, such a passive or deferential approach by the legislature, both to the ‘historic’ code and to judicial decisions embedded by precedent, has led to an \textit{ad hoc} focus on the \textit{crime du jour}. Robinson has identified the predilection of politicians to overreact to public concerns over a

\textsuperscript{168} Schloenhardt, above n 126, iv, has a more charitable view: ‘Since the enactment of the \textit{Criminal Code} (Qld) in 1899 the Code has seen more than 150 amendments and has changed in many aspects and facets – often leading the way in codification and law reform, but sometimes falling behind developments elsewhere.’

\textsuperscript{169} Taylor, above n 75, 203.
particular type of crime by enacting a new offence when an existing provision could have sufficed to mount a prosecution.\textsuperscript{170}

In Australia, the legislative response to a \textit{crime du jour} can take different paths depending on the code jurisdiction. One example is the legislative response to the public concerns over the so called ‘one-punch’ assaults causing death. Western Australia has addressed the issue by introducing s 281 Unlawful assault causing death into the \textit{Criminal Code} (WA) in 2008,\textsuperscript{171} which requires neither intention nor foresight (effectively a strict liability offence) yet carries a possible ten year prison term. Section 281 is an alternative offence to both murder (s 279) and manslaughter (s 280). The Western Australian Attorney-General described the new offence, in terms Bentham would have endorsed as part of the business of government to punish and reward, as reinforcing ‘community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour’.\textsuperscript{172}

Conversely, the Queensland Government declined to introduce a new section of unlawful assault occasioning death into the \textit{Criminal Code} (Qld), based on a recommendation against such a section from the Queensland Law Reform Commission.\textsuperscript{173} The Commission was concerned that ‘the introduction of an offence


\textsuperscript{171} Section 281 reads as follows: ‘(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years. (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.’

\textsuperscript{172} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 19 March 2008, 1210 (James McGinty, Attorney-General).

\textsuperscript{173} Queensland Law Reform Commission, \textit{A Review of the Excuse of Accident and the Defence of Provocation}, Report No 64 (September 2008) 9 [10.7].
of unlawful assault occasioning death could have the effect that manslaughter is not charged when it would normally be the appropriate charge’. However, the Commission appeared to be most concerned with such an offence’s relationship with the overall structure and policy of the Code. For example, the Commission set out a table illustrating the relationship between other key provisions of the Code and the proposed new section 341.

Bentham would be supportive of Ferguson’s view that, whilst there is little to prevent a criminal code being amended ‘to include overlapping or indeed superfluous offences, having a well structured code at the outset, with clear offence provisions, may well make this less of a problem’. Although the reverse situation can apply where there is a reluctance to restructure fundamental provisions of a long standing code. Thus, the prospect of replacing s 23 of the early Griffith Codes can lead to possible new offences not being introduced because to do so is perceived to require a succession of other amendments. For example, in 2008 the Queensland Law Reform Commission recommended that s 23(1)(b) should be retained as the Commission was apparently unable to envisage any other alternative but the repeal of s 23(1)(b). The Commission pointed out that the repeal of s 23(1)(b) would have far reaching consequences, because accident applies generally to criminal offences and not just to

174 Ibid, 204 [10.86]. There is some limited empirical support for such a view in a study of 12 completed one-punch convictions, where a third of the men convicted had a history of domestic violence against their victims (contested by the DPP who claimed his office always charged a person with the most serious offence available on the evidence), following the introduction in 2008 of s 281 of the Criminal Code (WA): D. Emerson, ‘One-punch killers had form: study’, The West Australian, 16 August 2012. http://au.news.yahoo.com/thewest/a/-/newshome/14561675/one-punch-killers-had-form-study/ accessed 11 September 2013.

175 Section 302 Murder; s 303 Manslaughter; s 320 Grievous bodily harm; s 335 Common assault; s 339(1) Unlawful assault occasioning bodily harm; 339(3) Unlawful assault occasioning bodily harm while armed, or pretending to be armed, with any dangerous or offensive weapon or instrument or in company with one or more other persons.

176 Queensland Law Reform Commission, above n 173, 203.


178 Section 23 is the main criminal responsibility section of the Criminal Code (Qld) and the Criminal Code (WA), which deals with voluntariness and the excuse of accident.
manslaughter. The Commission concluded that the excuse of accident was ‘a critical provision of the Code’ and therefore the ‘Code should continue to include an excuse of accident’.\textsuperscript{180}

The Commission’s approach underscores Fisse’s observation that codification tends ‘to fix the content of the law as at one point in time’.\textsuperscript{181} Leader-Elliott has suggested that for the Griffith Codes even by the mid 20\textsuperscript{th} century ‘the general principles were an anachronism, and their subsequent history of judicial reinterpretation … has been one of continuing fruitless dissension’.\textsuperscript{182}

2.2.4. Conclusion

This Chapter commenced with an examination of Bentham’s plan of codification, and contrasted Bentham’s ‘science of legislation’ with that of his arch rival, Blackstone, who favoured the organic development of the common law. The difficulties that Blackstone in England and Savigny in Germany identified with codification of the criminal law, were addressed from two particular perspectives. First, the ambiguity of language was considered. There is an inherent ambiguity in language, and legal drafting attempts to be more precise by providing more detail open up the possibility of further complications. Greater detail may lead to even more discretion in judicial interpretation than the interpretation of sparse criminal code sections with ‘gaps’. Such a view was met by the argument that the developments in criminal law theory in the 20\textsuperscript{th} century, have meant that the legislature can avoid such ambiguity by

\textsuperscript{179} Queensland Law Reform Commission, above n 173, 184 [10.3].
\textsuperscript{180} Ibid, 185 [10.5].
\textsuperscript{181} Fisse, above n 65, 5.
\textsuperscript{182} Leader-Elliott, above n 3, 396.
specifying the exact relationship between physical and fault elements in a formulaic manner.

Secondly, the reality of legislative inertia, specifically in the context of the Griffith Codes in Australia, was examined. The fact that the original Griffith Code, the *Criminal Code* (Qld), strongly reflects the common law has led to two outcomes. In the first place, the organic development of the common law has been infused into code interpretation, thereby reducing the great divide that Blackstone and Savigny envisioned if codification replaced the common law. In the second place, fundamental inadequacies in the Griffith Codes, arising both from developments in the common law and code design defects, have not been remedied. These inadequacies focus on the change in the onus of proof for the defence of accident post *Woolmington v DPP*,\(^{183}\) and the failure to specifically link s 23 of the *Criminal Code* (Qld), the principal section dealing with criminal responsibility, to the elements of offences.

Dixon CJ’s well known criticism in *Vallance v The Queen*\(^ {184}\) of s 13(1) of the *Criminal Code* (Tas), which was derived from s 23 of the *Criminal Code* (Qld), is pertinent to the latter inadequacy above, in ‘that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially’.\(^ {185}\) The Griffith Codes suffer the fatal flaw, recognised by Dixon CJ in *Vallance v The Queen*,\(^ {186}\) that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences. This was problematic

\(^{183}\) [1935] AC 462 (HL).
\(^{184}\) (1961) 108 CLR 56.
\(^{185}\) *Vallance v The Queen* (1961) 108 CLR 56, 61.
because the central provision of the Tasmanian Code (s 13) came *ab extra* restraining the operation of what followed even though common sense dictated resolution outside of s 13 itself.\(^{187}\)

More recently, the above observations of Dixon CJ have been taken up by members of the High Court. In *Murray v The Queen*,\(^{188}\) Gaudron J noted that ‘[w]hen regard is had to the different approaches taken to the act causing death in *Ryan v The Queen*,\(^{189}\) the wisdom of what was said by Dixon CJ in *Vallance*\(^{190}\) becomes apparent’. As Gaudron J further observed, the definition of murder in s 302(1) of the *Criminal Code* (Qld) ‘contains no provision permitting a person to be convicted of murder simply for an act done with reckless indifference’\(^{191}\) as the Griffith Code does not recognise recklessness as a fault element. A similar approach was adopted by Gummow and Heydon JJ in *DPP (NT) v WJI*,\(^{192}\) who commented that ‘in relating the general to the specific portions of the Code,\(^{193}\) there is a risk that the requisite intent which has to be proved may be distorted’.

The significant ramifications of the seeming inability of law reformers to recommend the removal of s 23 of the *Criminal Code* (Qld) and s 23 of the *Criminal Code* (NT) are examined in more detail in Chapter 4.

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1. Dixon CJ’s criticisms of the Griffith Codes are examined in more detail in Chapter 4.
2. (2002) 211 CLR 193, 198 [12]. Murray admitted to having pointed the gun at the deceased with the intention of frightening him, but denied having deliberately pulled the trigger.
3. (1967) 121 CLR 205. Ryan had pointed a loaded and cocked rifle at a service attendant, and while still pointing the rifle with one hand, tried to tie the attendant up with the other. According to the accused, the attendant made a sudden movement and the accused’s finger pressed the trigger in a reflex action without any intention to do so on his part.
6. (2004) 219 CLR 43, 54 [31]. The case dealt with the interaction between s 31 (the equivalent of s 23 in the Griffith Code) and s 192(3) sexual intercourse without consent of the *Criminal Code* (NT).
7. The case concerned the *Criminal Code* (NT) but as Gummow and Heydon JJ note at 50 [16] ‘[t]he Code has apparent affinities with the Griffith Code’.
(WA),\textsuperscript{194} appears to have been overlooked by criminal law scholars, notwithstanding Windeyer J’s insightful observation back in 1964 in \textit{Mamote-Kulang v The Queen}.\textsuperscript{195} There, Windeyer J was discussing s 23 of the \textit{Criminal Code} (Qld), and having noted that the general provisions of Chapter V of the Code concern criminal responsibility and are couched in an exculpatory form, went on to observe: ‘Instead of stating, \textit{as in a more modern approach might perhaps be expected} (emphasis added), the elements of will, intent or knowledge which the doer of an act must have for him to be held guilty of a crime, their absence is stated as a matter of defence or excuse.’

The deficiency is remedied by building on a comment made by Gummow and Heydon JJ in \textit{DPP (NT) v WJI}.\textsuperscript{196}

\begin{quote}
What then is to be seen in the framing of Australian Codes is an application to statutory schemes of what has been described as ‘top-down reasoning’,\textsuperscript{197} whereby general principle is imposed by a particular theory rather than derived from decisions upon particular instances.
\end{quote}

The argument being advanced is consistent both with the architecture of Chapter 2 of the \textit{Criminal Code} (Cth) with its interconnecting formulae and Bentham’s concept of ‘no blank spaces’. The formulaic nature of Part 2.2 dealing with physical and fault elements marks a major break with the architecture of the Griffith Codes, and avoids


\textsuperscript{195} (1964) 111 CLR 62, 76. The ‘more modern approach’ is adopted in Chapter 2 of the \textit{Criminal Code} (Cth). One of the problems with s 23 of the \textit{Criminal Code} (Qld) is avoided by s 4.2(1) in Chapter 2 whereby ‘conduct can only be a physical element if it is voluntary’. Then, in s 4.2(3) examples of conduct that is not voluntary are given. Bentham would have approved of the use of such examples for clarification. Furthermore, s 4.2(6) states that ‘evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary’, thereby avoiding the need for judicial interpretation as in the Griffith Code of the relationship between s 23 and s 28 (which deals with intoxication). In cases such as \textit{R v Kusu} [1981] Qd R 136, the courts have stated that where intoxication leads to a state of automatism, there can be no reliance on s 23(1)(a) which requires an act or omission to be accompanied by an exercise of the will.

\textsuperscript{196} (2004) 219 CLR 43, 53-54 [30].

\textsuperscript{197} \textit{Roxborough v Rothmans of Pall Mall Australia Ltd} (2001) CLR 516, 544-545 [72]-[74].
the criticism of Dixon CJ of the difficulty ‘in the use in the introductory part of the Code of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do’.\textsuperscript{198}

In the next Chapter, which examines Bentham’s influence on 19\textsuperscript{th} century criminal code design and content, Leader-Elliott’s observation that ‘the more articulate the structure of a code, the more vulnerable it becomes to criticism on the ground of incoherence or inconsistency’\textsuperscript{199} will be examined through the lens of legal history.

\textsuperscript{198} Vallance \textit{v} The Queen (1961) 108 CLR 56, 58.
\textsuperscript{199} Leader-Elliott, above n 3, 452.
CHAPTER 3

THE HISTORICAL DEVELOPMENT OF CODIFICATION POST BENTHAM

Mr Peel is for consolidation in contradistinction to codification; I for codification in contradistinction to consolidation.¹ – Bentham.

‘I am desirous of proceeding gradually in the course of improvement [in the criminal statutes], and to avoid as much as possible the use of rash experiments’.² – Peel.

3.1. OVERVIEW OF CHAPTER

This Chapter of the thesis considers how Bentham’s plan for codification has fared, from the perspective of the historical development of codification, over the 180 years since his death. The initial focus is on England given the impetus given to codification following the establishment of the Royal Commission on the Criminal Law in 1833. In addition, Great Britain had a substantial Empire, and the 19th century history of codification is essentially one of rejection of codification in the mother country (England), but of acceptance of codification in the Empire. So it was that India (1860), Canada (1892), New Zealand (1893) and Queensland (1899) all adopted Criminal Codes. With the exception of India, these Codes owed their genesis to

¹ Works of Jeremy Bentham 10 (Bowring ed, 1843) 595. Sir Robert Peel became Home Secretary in 1822 and later Prime Minister after Bentham’s death. Peel reformed the criminal law by reducing the number of offences punishable by death and consolidated the number of criminal law statutes such as the Malicious Injuries to Property Act 1827, the Larceny Act 1827 and the Offences against the Person Act 1828.
Stephen’s Criminal Code Bill (1880) in England. Thus, the events in England are pivotal in understanding the type of criminal code that was ‘exported’ to the Empire.

India was the jewel in the Empire’s crown, and the fact that the Indian Penal Code (IPC) was substantively written in 1837, whilst the Royal Commissioners back in England were still in the midst of their labours, is significant. Macaulay, the architect of the IPC, was heavily influenced by Bentham’s ideas on codification. The IPC is the closest to Bentham’s model of all the codes written for various dominions, colonies and territories that were part of an Empire marked in red on the world map. Along with the IPC, this Chapter will focus on Canada and Queensland in Australia as examples of 19th century criminal codes.

The final section of the Chapter examines code developments in the 20th century, particularly the US Model Penal Code (1962) and the Australian Model Criminal Code (1992). The development of criminal law theory has facilitated a more detailed approach to the legislative specification of physical and fault elements for individual offences. Such an approach opens up the possibility of a code design closer to Bentham’s model, than to 19th century codes derived from Stephen’s Criminal Code Bill (1880) in England. More recent attempts at codification in England (1968-2010), Scotland (2003), and Ireland (2002 to present) are also considered. It would appear that, with the possible exception of Ireland, codification of the criminal law will not occur in the British Isles. Hence, it is the Criminal Code (Cth), the progeny of the Australian Model Criminal Code, which offers the most fruitful springboard to develop Bentham’s code design.

3 In the 19th and early 20th centuries, maps of the world produced by Great Britain traditionally showed all parts of the British Empire in red.
3.2. THE ROYAL COMMISSION ON THE CRIMINAL LAW (1833-1845) AND THE ENGLISH CRIMINAL CODE BILL (1880)

Bentham died in 1832, and a year later Henry Brougham, the Lord Chancellor, established a Royal Commission on the Criminal Law with broad terms of reference and which produced eight reports between 1833 and 1845. Farmer has argued that an understanding of Bentham’s theory of legislation ‘makes explicit many of the broader political assumptions that guided the Commissioners and allows us to understand the precise nature of their codification project’. In Farmer’s view, the main achievement of the Commissioners, whose work was never enacted, ‘was that they succeeded in putting the new science of legislation at the centre of the modern understanding of the criminal law’.

Such a view has been challenged by Lobban, who considered the issue of ‘how far the Commissioners were informed by Benthamic ideas and what they understood their task to be’. Lobban’s answer, following an examination of the views of the Commissioners, was that both Henry Ker (who with Thomas Starkie was the principal author of the Commission’s reports) and Brougham ‘talked of “codes” in a sense far removed from Bentham’s pannomion’. Ker himself ‘stated that his plans to digest the law aimed at “nothing more than an authenticated exposition of the actual law …

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6 Ibid, 424.


8 Ibid, 429. A pannomion is a complete utilitarian code of law.
whereas a new Code would lead to endless difficulties”9… [and] was clearly aimed against the kind of codification associated with Bentham and his acolytes’.10

The reason that underpins Ker’s position is essentially pragmatic: judicial opposition to codification and to the repeal of the common law.11 The same hostility was evidenced by Chief Justice Cockburn in 1880 in response to James Stephen’s draft English Criminal Code Bill.12 Lobban concluded that ‘given the experimental and haphazard nature of much 19th century legislation’13 judicial resistance to repeal of the common law was unsurprising, whilst conceding that ‘the Commissioners played a key role in developing a modern criminal jurisprudence’.14

However, Farmer goes further by arguing that the systematic approach adopted by the Commissioners ‘was founded on the command of the legislator … [marking] a distinct moment in the transition to a modern law founded on legislation rather than common law adjudication’.15 Dubber has a different perspective stressing that ‘the political significance of codification reveals itself as a process of constant legitimation’.16 Dubber continues by noting that the common law’s concern for individual justice at the expense of systematic justice ‘helped to obscure punishment’s

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9 Brougham MS 11608 (9 September 1843).
10 Lobban, above n 7, 429. In a similar vein, the current work on a draft criminal code for Ireland refers to the technique of codification in prosaic terms. ‘Unlike its more exotic cognates, the model of codification employed in the current draft is essentially a form of enhanced restatement’: Irish Criminal Law Codification Advisory Committee, Draft Criminal Code and Commentary (31 May 2010) Doc. No: DC/04, 4 [7].
11 Ibid, 430-432.
13 Lobban, above n 7, 432.
14 Ibid.
15 Farmer, above n 5, 423.
identity as a weapon in the coercive arsenal of the state’, 17 which returns the focus to Bentham’s insistence that defining penal norms ‘required legitimation insofar as it caused pain’. 18

In practical terms, ‘[a] quarter century of endeavours to codify the law had ended, ignominiously, in a legislative consolidation of existing anomalies’, 19 with Stephen categorising the consolidation of English criminal law statutes in 1861, known as Greaves’s Acts, as ‘a sort of imperfect Penal Code in respect of all the common offences’. 20 Leader-Elliott has argued that such codification attempts ‘founded, in part, on the intractable problem of reducing common law principles of criminal responsibility to statutory form’. 21 On this view, the failure of codification in 19th century England goes beyond judicial resistance because ‘codification of the general principles of criminal responsibility was never likely and probably impossible, at that time’. 22 As Smith has pointed out, ‘fundamental questions, right down to the function of fault in a criminal justice system, remained almost totally judicially unaddressed’. 23 Leader-Elliott has contended that it was not until the publication of the US Model Penal Code in 1962 ‘that a theory of criminal fault adequate for the purposes of codification was to emerge’. 24

There is considerable merit in this argument but it underplays the significance of the fall of the Disraeli Conservative government in 1880 and judicial opposition to

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17 Ibid, 439.
18 Ibid.
21 Leader-Elliott, above n 19, 392.
22 Ibid, 394.
24 Leader-Elliott, above n 19, 394.
codification. Stephen came to his commission of drafting the English Criminal Code Bill (1880) extremely well qualified for the task.25 Unlike Bentham, Stephen was no radical but rather ‘a profound conservative in politics and a social Darwinian in morals’.26 Furthermore, Stephen did not share Bentham’s disdain for the judiciary, not finding ‘law-making by judges, the great Benthamite bete noir, to be a serious problem’,27 even acknowledging that judicial ‘discretion was sometimes desirable’.28

Common law offences were eliminated because parliamentary responsiveness sufficed to deal with newly developed evils, but all common law defences were retained – to restate them in statutory terms would have frozen their shape since judges would have had to apply them ‘according to their words’, while to have left them as common law defences would have kept them fluid because judges would be able to apply them ‘according to [their] substance’.29

Kadish has identified three circumstances which, when combined, gave Stephen’s Draft Code its character and distinguished it from Macaulay’s Indian Penal Code:30 ‘the Code was meant for Victorian England [not the colonies], that the codification movement had matured, and Stephen’s cast of mind.’31 In this context, maturing of the Benthamite codification spirit refers to ‘growing old … [and] growing up as well’.32 As Lieberman has pointed out, for the defenders of codification who came

25 Stephen had continued the work of codification in India (1869-1872), had drafted the English Homicide Law Amendment Bill (1874), had produced a Digest of the Criminal Law (1877), and had drafted the Criminal Code (Indictable Offences) Bill (1878): Sanford Kadish, ‘Codifiers of the Criminal Law: Wechsler’s Predecessors’ (1978) 78 Columbia Law Review 1098, 1122.
26 Ibid.
27 Ibid, 1127.
28 Ibid.
30 To be discussed in the next section of this Chapter.
31 Kadish, above n 25, 1125.
32 Ibid, 1123. Kadish, at footnote 199, gave as an example John Austin, one of Bentham’s most significant disciples who was appointed as one of the original members of the Royal Commission on the Criminal Law (1833-1845) before resigning after the production of the Second Report, and who had a more modest view of codification than his mentor. ‘He [Austin] did not favour a beau ideal of all possible codes, preferring a code based on existing law; he did not think it important that the average
after Bentham, ‘it became a frequent priority to separate Bentham’s jurisprudence and law reform program from his controversial democratic politics’. Would be codifiers were faced with the emergence of statute consolidation of the criminal law in 19th century England, which ‘offered a way to embrace legislative reform that acknowledged the need to order and compress the statute law while shielding the common law from Parliamentary interference’. Stephen summarised the rationale of the Royal Commissioners’ Draft Code of 1879 as ‘the reduction of the criminal law of England, written and unwritten, into one code’. Nevertheless, Kadish argues that Stephen’s Criminal Code Bill 1880 ‘was a significant achievement … cosmos to chaos … drew together, systematised and pruned the English law, not radically but still not trivially, and made of it a more manageable whole’.

Why then did Stephen’s Criminal Code Bill 1880 not come into law in England? Stephen was no outsider like Bentham, but more in the tradition of Blackstone with his accommodation of the common law into the Royal Commissioners’ Draft Code of 1879, which was primarily Stephen’s work. Kadish has suggested that, ‘[g]iven the strong conservative influences of the period, so large a piece of criminal law reform

reader be able to understand and know the code’s provisions; and he thought the arguments against judge-made law exaggerated.’

34 Ibid 8.
36 Kadish, above n 25, 1126, citing the Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) 5.
37 Ibid, 1128.
was too much for Parliament to bite off and too important to be swallowed whole’.  

Wright is more pragmatic.

A final version went to Parliament in early 1880 but all momentum was lost with Cockburn’s not unexpected hostile intervention and parliamentary preoccupation with the Irish question, and the bill died with the fall of the government. Stephen’s cautious middle course and narrow code failed to satisfy the defenders of the common law. The Lord Chief Justice declared, disingenuously, that the proposal was inconsistent with the idea of codification and that no code was better than a half-baked one.

It is a moot point whether Lord Chief Justice Cockburn’s opposition would have been sufficient to block the Criminal Code Bill 1880 had the Disraeli government not fallen in April 1880. Cockburn died on 20 November 1880 some seven months after publication of his second letter criticising the Criminal Code Bill 1880. Interestingly, Cockburn’s opposition to the Criminal Code (Indictable Offences) Bill 1879 expressed in his first letter to the Attorney-General, did not prevent the presentation of the Criminal Code Bill 1880 before Parliament. Furthermore, the 1880 Bill had the imprimatur of three judges of the High Court who had sat on the 1879 Royal Commission considering the law relating to indictable offences. Indeed, as

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38 Ibid, 1130.
39 In the 1880 general election in Britain, the Liberals under Gladstone ousted the Conservatives led by Disraeli. The Liberals secured a large majority after a campaign (often referred to as the Midlothian campaign as Midlothian was Gladstone’s seat in Parliament and his speeches to constituents were widely reported) based on attacking the allegedly immoral foreign policy of the Disraeli government in supporting the Ottoman Empire. See T. Lloyd, The General Election of 1880 (Oxford University Press, 1968) 142; M. Rathbone, ‘Gladstone, Disraeli and the Bulgarian Horrors’, History Review (December, 2004).
41 Cockburn, above n 12. Cockburn’s second letter to the Attorney-General is dated 7 February 1880 and was published by the Law Journal on 10 April 1880.
Smith has observed, both Sir John Holker, the Attorney-General, and Stephen thought little of Cockburn’s criticisms, ‘revealing in private correspondence a clear and firm resolve not to be thwarted’. However, Smith does note two factors which would have worked against the Code’s chances of being enacted. First, Stephen was regarded by officials in the Lord Chancellor’s department and the Home Office ‘as something of a self-seeking interloper, attempting to interfere with the existing gradual and staged pace of change’. Secondly, the Judicature Acts had been recently enacted ‘and the prospect of further innovation on the scale of a new penal code must have proved singularly resistible to most’.

Of more importance for present purposes is the nature of Cockburn’s opposition expressed in both of his letters to the Attorney-General. These letters are significant not only to help explain the fate of Stephen’s Criminal Code Bill 1880 in England, but because they impacted on the reaction of Gowan in Canada and Griffith in Australia. In the first letter, Cockburn addresses the work of the Royal Commissioners. After assuring the Attorney-General that he approaches the subject ‘in no hostile spirit’ and has long been ‘a firm believer in, not only the expediency

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44 Ibid 81.
45 Ibid 82.
46 See 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, 53. ‘Judge Gowan also advised [John Thompson, the Canadian Justice Minister on codification], but perhaps his most noteworthy “contribution” was to remove a book from the Parliamentary Library that contained the hostile criticism of Lord Chief Justice Cockburn and others of the English Draft Code.’ Such a comment is indicative of the perceived power of senior members of the judiciary to influence legislative outcomes.
47 Sir Samuel Griffith, *Explanatory Letter to Draft of a Code of Criminal Law* (1897) iv. In his famous letter to the Queensland Attorney-General in 1897, Sir Samuel Griffith observed that the work of the English Commissioners, who prepared the Draft Code of Criminal Law upon which the 1880 Bill was based, ‘did not, however, escape severe criticism, especially from Sir Alexander Cockburn, then Lord Chief Justice of England, who pointed out some serious defects in the Draft Code as prepared by the Commissioners’.
48 Cockburn, above n 42, 1.
and possibility, but also in the coming necessity of codification’, Cockburn goes on to reveal his true colours.

We have to thank the Commissioners for having collected abundant materials for a complete and perfect code. But I cannot concur in thinking that they have as yet presented us with such a code; and I am bound to say that in my opinion a great deal remains to be done to make the present code a complete and perfect exposition, or a definitive settlement of the criminal law. Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisos, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated.

After this critical overview, Cockburn continues by dissecting many of the sections of the Criminal Code (Indictable Offences) Bill 1879. An examination of just two of Cockburn’s criticisms will suffice to draw out the nature of his attack on the work of the Royal Commissioners. The first criticism goes to the completeness of the Code. Section 5, in conjunction with Schedule 2, kept alive criminal law statutes in whole or in part that did not relate to offences in the Code. Cockburn takes the opportunity to criticise this pragmatic arrangement against the gold standard of a comprehensive code.

The main purpose of a codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes, which are still to remain in force, but are not embodied in it.

49 Ibid.
51 Ibid, 6.
Objectively, this criticism is overstated although Cockburn makes a legitimate point. Stephen acknowledged that the Bill was not a complete expression of the criminal law.\textsuperscript{52} Ideally, a comprehensive code should be comprehensive from the outset rather than moving incrementally towards total coverage. Nevertheless, codification is hardly ‘utterly defeated’ if a staged process of absorption of other statutes into the code is adopted. Indeed, arguably this is the more responsible course given the pragmatic constraints on parliamentary time and the legal resources necessary to draft the legislation,\textsuperscript{53} leaving aside the need for the police and the courts to absorb the changes. For example, when the Northern Territory incorporated Chapter 2 of the \textit{Criminal Code} (Cth) into the \textit{Criminal Code} (NT) as Part IIAA in 2006,\textsuperscript{54} only selected offences against the person were placed in Schedule 1 and only offences in Schedule 1 applied to Part IIAA.\textsuperscript{55} Furthermore, under the Commonwealth regime, Chapter 2 of the \textit{Criminal Code} (Cth) is the reference point for criminal responsibility for other Commonwealth statutes such as the \textit{Customs Act 1901} (Cth).\textsuperscript{56}

The adoption by the Northern Territory of an incremental approach to switching codes is not necessarily to be preferred, more recognising the practical difficulties of a wholesale change in criminal code on a specific date. The fact that Stephen’s 1880 Bill left some statutes in force was not a fatal weakness. However, if the Bill had

\textsuperscript{52} Smith, above n 43, 80.
\textsuperscript{53} In Chapter 6, it is suggested that one of the attractions for the Northern Territory Government to abandon its existing version of the \textit{Criminal Code} (Qld) in favour of the \textit{Criminal Code} (Cth) was the availability of all the supporting explanatory material.
\textsuperscript{54} \textit{Criminal Code Amendment (Criminal Responsibility Reform) Act 2005} (NT).
\textsuperscript{55} Section 43AA, \textit{Criminal Code} (NT).
\textsuperscript{56} For example, in \textit{R v Saengsai-Or} [2004] NSWCCA 108 (19 August 2004), the appellant appealed against his conviction under s 233B(1)(b) \textit{Customs Act 1901} (Cth) of importing into Australia a trafficable quantity of heroin concealed in two bottles of brandy. Bell J considered that the physical element of the offence created by s 233B(1)(b) was one of conduct: the act of importing into Australia any prohibited import to which the section applies. Her Honour found at [72] that ‘in respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the \textit{Criminal Code} apply. Intention is the fault element’. Significantly, as the above analysis demonstrates, the \textit{Criminal Code} (Cth) avoids the criticism of s 23 of the Griffith Code made by Dixon CJ in \textit{Vallance v The Queen} (1961) 108 CLR 56, 61 discussed in Chapter 2.
passed, it would have been the thin edge of the wedge in the eyes of common law opponents.

The second Cockburn criticism relates to Part III, section 19 of the Criminal Code (Indictable Offences) Bill 1879, which essentially left defences to the common law except to the extent they were altered or inconsistent with the Code. This provision might have been expected to meet with the approval of supporters of the organic nature of the common law. However, Cockburn once again took the purist view of a code.

Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worthwhile to codify at all, whatever forms a material part of the law should find its place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether unwritten or written.57

Stephen admitted that the Code was not independent of the common law, but denied this meant it was untenable as a comprehensive code.58 Stephen argued that ‘it was not inconsistent to remove ill-defined common law offences whilst retaining common law defensive principles of justification and excuse’.59 Stephen also responded to Savigny’s notion that law is found not made through a process of evolving national consciousness. Stephen pointed out that ‘codification did not arrest the law’s

57 Cockburn, above n 42, 14.  
58 Smith, above n 43.  
59 Ibid.
development and … much of the so-called “elasticity” [of the common law] was far from elastic in nature and bound the judiciary as tightly as any statute’.  

Cockburn’s second letter to the Attorney-General followed up his earlier criticisms, this time focusing on ‘the defects which appear to me to exist in the second main division of it [the proposed Criminal Code] – namely, that which contains the substantive penal law’.  

This letter is more technical and Cockburn’s main thrust is the observation that there is ‘something anomalous and inconsistent in the varying manner in which the definition of offences occurs in the Code’. Much of the letter is devoted to the appropriate definition for such offences as treason, assaults on the Queen, inciting mutiny, unlawful assembly, unlawful drilling, prize fights, sedition, piracy, offences affecting the administration of justice and the maintenance of public order, indecent acts, and offences against public morality. Cockburn also suggested that offences should ‘be classed under a twofold division – I. Offences against the public; II. Offences against individuals’.  

There is little of substance in Cockburn’s second letter to deflect passage of the Criminal Code Bill 1880. Cockburn’s main criticisms are contained in his first letter (1879) which did not deter the Disraeli government from bringing forward the legislation in 1880 based on the work of the Royal Commissioners on the Criminal Code (Indictable Offences) Bill 1879. Indeed, as the 1880 Bill also enjoyed the support of the Law Times and the Trade Union Congress (whose working class membership had good reason to dislike the common law), Horder has suggested that

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60 Ibid, 82. Smith cites Maitland as describing Savigny as the ‘man who is nervously afraid lest a code should impede the beautiful processes of natural growth’: ibid.
61 Cockburn, above n 12, 184.
62 Ibid.
63 Ibid, 208.
‘the Bill was set fair to be one of the major pieces of legislation in the 1880 session’. However, when the Disraeli government fell in April 1880, ‘there was subsequently said to be no time to re-introduce it’. It would seem then that Taylor’s observations as to why the State of Victoria’s attempt at codification in 1905 was unsuccessful, may be pertinent to explain the failure of the Stephen’s Criminal Code Bill in 1880.

Rather than being entrusted to a committee that could have conducted a detailed review and reported to Parliament on the Code, it was simply dumped into Parliament’s lap. It was, apparently, expected that Parliament would have sufficient enthusiasm, energy and specialist knowledge to be willing and able to take it from there. This was a wildly over-optimistic assessment of the interest that Parliament could be expected to show in the subject … By the time a politician of more than usual talent and perspicacity, Eggleston A-G, had recognised that Parliament could not be expected to deal in detail with a Code, it was too late; the political process swept him out of office soon afterwards.

Yet, even this explanation of the need to build broad cross party support to overcome the political election cycle may be inadequate, in the absence of a codification champion with a foot in both the political and judicial camps. It is perhaps not widely known that the Queensland Government referred Griffith’s draft Code of Criminal Law to a Royal Commission which was chaired by Sir Samuel Griffith himself. The Commissioners, who were largely drawn from the judiciary, went through the draft Code section by section.

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65 Ibid.
67 There were eleven commissioners including Griffith, five of whom sat as judges of the Supreme Court, three judges of the District Court, a Crown Solicitor, a Crown prosecutor, and a former Attorney-General.
Griffith’s draft code was largely preserved in the 1899 Royal Commission recommendations that were adopted by the government. The code bill introduced by Attorney-General Rutledge\(^69\) passed in less than five weeks with a broad degree of cross-party support.\(^70\)

Griffith undoubtedly took account of Cockburn’s criticisms,\(^71\) but, as noted in Chapter 2, Griffith possessed unique advantages as a law reformer.\(^72\) Neither did Griffith’s Code face the vagaries of the political cycle that had worked against Stephen’s Code in 1880 with the fall of the Disraeli government, the Victorian Code with the fall of the Bent government in 1909, and the revised Queensland Code in 1995 with the fall of the Goss government.

What conclusions can be drawn from the English dalliance with codification from 1833 to 1880? There are two countervailing forces that appear to leave supporters of codification with little room for manoeuvre. On the one hand, a consistent hallmark is judicial opposition. On the other hand, modest statutory reform of the criminal law that commenced with Peel’s Acts in 1827\(^73\) and culminated in the consolidation of English criminal law statutes in 1861,\(^74\) reduced both the need and Parliamentary appetite for wholesale reform in codification. As van Caenegem has observed ‘if [English] common law stands for anything, it is the absence of codes, and likewise

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\(^69\) Rutledge had been a member of the Royal Commission, had been a member of Griffith’s cabinet when Griffith was Premier, and was a close personal friend of Griffith. See entry by J.C.H. Gill on Rutledge, Sir Arthur (1843-1917) in the *Australian Dictionary of Biography*, National Centre of Biography, Australian National University.

\(^70\) Wright, above n 46, 63.

\(^71\) Griffith, above n 47, iv and vi. For example, Cockburn had criticised Stephen for not including defences and instead leaving them to the common law. Griffith took heed of the omission and specifically included defences in his draft code.

\(^72\) Leader-Elliott, above n 19, 394-395.

\(^73\) See above n 1.

\(^74\) The *Criminal Law Consolidation Acts 1861*, sometimes referred to as Greaves’s Acts after their drafter, consolidated criminal law provisions from a number of earlier statutes in an attempt to simplify the criminal law. These Acts are essentially revised versions of Peel’s Acts and included the *Accessories and Abettors Act 1861*, the *Larceny Act 1861*, the *Malicious Damage Act 1861*, the * Forgery Act 1861*, the *Coinage Offences Act 1861*, and the *Offences against the Person Act 1861*. 
[European] civil law stands for codification'. However, as will be discussed in the next section, the same cannot be said for British Dominions and Colonies. Faced with different pressures, such as on the one hand the abuse of power through the criminal law and on the other hand the need to control colonial populations, the Colonial Office actively encouraged codification.

3.3. CRIMINAL CODES IN INDIA, CANADA AND AUSTRALIA IN THE 19TH CENTURY

3.3.1. Macaulay and the Indian Penal Code

That the Indian Penal Code is founded on the English Criminal Law is true only in the sense in which it might be contended that without a Blackstone to excite his critical faculty we might never have had a Bentham.

While the English criminal law Royal Commissioners were labouring over their task between 1833 and 1845, Thomas Macaulay drafted a proposed Penal Code for India. Macaulay was engaged in a life of public service, like Stephen, and had been appointed to the Supreme Council of India, later becoming Chairman of the Indian Law Commission in 1834. As Kadish has noted, the Commission’s task ‘was to prepare “a code of laws common (as far as may be) to the whole people of India” …

77 Friedland, above n 35, 307, has noted that in 1870 Mr R.S. Wright ‘was asked by the Colonial Office to draft a criminal code for Jamaica which could serve as a model for all of the colonies’.
Thus was Macaulay provided with a key role in a plan for the comprehensive codification of laws for India’.  

In the same manner as Stephen shouldered the main burden of the writing of the Royal Commissioners’ Draft Code of 1879, so too for a variety of reasons including illness ‘[v]irtually the entire burden of drafting the Code, therefore, fell on Macaulay’ which he completed between 1835 and 1837. Kadish has identified three aspects of Macaulay’s character and beliefs that ‘affected the style and substance of his Code’: namely, his utilitarianism, his Whig politics, and his practical expediency.

Macaulay was a utilitarian in the Benthamite tradition … He shared fully the premises of the tradition with respect to the unacceptability of judge-made law; the desirability of a root-and-branch legislative remaking of the law responding to what it ought to be, judged by the utility ethic … he departed from those implications of the Benthamite creed that favoured a large role for the state in redressing social evils and dislocations. Comprehensive codification in the style of Bentham he favoured fully, but only to render the administration of law more efficient and rational, not to restructure society … Macaulay was not a man of speculative, philosophical bent … as a politician he was hard headed, pragmatic, and expedient.

The above summary of Macaulay raises the question: what was Macaulay trying to achieve with his Indian Penal Code (IPC)? Kadish suggests that Macaulay was seeking to modernise the Indian criminal law ‘but not a modernisation which involved

80 Kadish, above n 25, 1107, citing Public Dispatch of 10 December 1834.
81 Ibid, 1108.
82 Ibid.
83 The Whigs were the forerunners of the Liberal party, heavily influenced by the ideas of John Locke and Adam Smith, who supported the supremacy of Parliament, the extension of the franchise, the reduction of Crown patronage, and the interests of merchants and bankers. See W. Hay, The Whig Revival: 1808-1830 (Palgrave Macmillan, 2005).
84 Kadish, above n 25, 1108.
the transplanting of English law’,

rather a major rewriting ‘rooted in the universal science of jurisprudence’. As Stokes has observed, ‘[t]o neglect this universality of outlook, this cast of mind that was of the 18th century *philosophe*, is to lose the historical atmosphere in which the Code [IPC] took shape’. Wright has argued that ‘[t]he IPC is a comprehensive presentation of criminal law, a taxonomy that precludes the common law, and very different in form from existing British legislation’. Wright based this assessment on Macaulay’s aim (following Bentham’s prescription) of ‘a systematic and exhaustive statement of criminal harms and attendant prohibitions, liability standards and penalties (maximums) expressed precisely and consistently … within a rationally organised and self-contained legislative whole’.

As discussed in 2.2 above, Bentham had particular views about the style of a code which in practice are difficult to combine in terms of internal self-consistency and self-sufficiency. Kadish has usefully drawn out the similarities and differences in approach between Bentham and Macaulay. For Bentham, ‘[t]he code should speak in the language of command and yet integrate statements of reasons to serve both as a means for popular accountability of the legislature and for greater understanding by the citizen of why he should comply’. For Macaulay, ‘[t]he language should be clear, brief, and simple for ready understanding even by the less sophisticated, yet it

85 Ibid, 1111.
86 Ibid.
87 E. Stokes, *The English Utilitarians and India* (Oxford University Press, 1959) 227
88 Wright, above n 40, 190.
89 Ibid, citing Stokes, above n 87, 230.
should draw lines between the permitted and the prohibited with such elegant precision as to leave no room for judicial lawmaking’.  

Macaulay’s pragmatism led to him not following Bentham’s prescription of integrating statements of reasons within the body of the code. Macaulay did provide a set of Notes for the benefit of the legislature, but as Stokes has observed the omission of reasons was to simplify the process of obtaining legislative consensus. Given that Macaulay’s Penal Code was not enacted until 1860 following the Indian Mutiny, due to ‘the great dead weight power of governmental and administrative inertia’, such an omission appears fully justified.

Macaulay’s technique has been summarised by Stephen as follows:

In the first place the leading idea to be laid down is stated in the most explicit and pointed form that can be devised. Then such expressions in it as are not regarded as being sufficiently explicit are made the subject of definite explanations. This is followed by equally definite exceptions … and in order to set the whole in the clearest possible light the matter thus explained and qualified is illustrated by a number of concrete cases.

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93 Ibid, iv.

94 Stokes, above n 87, 199-200.

95 Act XLV of 1860.

96 Stephen, above n 35, 299, has suggested the delay reflected a resistance to replace native with European institutions: ‘It appeared in every way the safer course to alter and interfere as little as possible.’


98 Stephen, above n 35, 302-303.
The purpose behind the illustrations was to neatly combine statute with legislative case law such that ‘the Code will be at once a statute book and a collection of decided cases … cases decided not by judges but by the legislature’. Stephen recognised the value of the illustrations ‘but believed they would be unacceptable to the English Parliament and English judges’. Stephen’s tribute to Macaulay’s Code is pertinent to the argument being made in this thesis: ‘After twenty years’ use it is still true that anyone who wants to know what the criminal law of India is has only to read the Penal Code with a common use of memory and attention.

These illustrations are still to be found in the IPC. For example, in s 300 which deals with murder, four illustrations are listed which cover intention; knowledge that Z (always the victim) is labouring under a disease that a blow is likely to cause death; an intention to wound sufficient to cause death in the ordinary course of nature; and A (always the accused) without excuse fires a loaded cannon into a group of people and kills one of them. These illustrations have been well received in India, with Pollock extolling their virtues ‘as an instrument of new constructive power, enabling the legislature to combine the good points of statute-law and case-law … while avoiding all their respective drawbacks’.

For present purposes, the key point is that the illustrations achieve two of Bentham’s objectives for a code: clarity and legislative control. The illustrations, in conjunction

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99 Kadish, above n 25, 1112-1113, citing A Penal Code Prepared by the Indian Law Commissioners (1838) v.
100 Ibid, 1113, footnote 117, citing Stephen, above n 35, 304. Stephen’s view may have been influenced by Brougham’s Royal Commissioners who in their 4th Report of 1839, Command No 168, xvi, rejected the idea of illustrations essentially saying if the illustration fell within the rule it was redundant and if the illustration was needed for clarification then the rule needed revision.
101 Stephen, above n 35, 322.
with the listed exceptions and provisos (for example, in the case of murder in s 300 of the IPC, the circumstances under which the defence of provocation is available),\textsuperscript{103} point the way towards an explicit Benthamite statement of the law without the common law cases sitting invisible behind the sparse words of the statute. Significantly, Queensland has produced a Benchbook\textsuperscript{104} which provides guidance to judges on how to interpret each section of the \textit{Criminal Code (Qld)} through the use of decided cases. In addition, the latest edition of \textit{Carter’s Criminal Law of Queensland} runs to 2,934 pages.\textsuperscript{105} The very existence of the Benchbook and the \textit{Carter} text refute Griffith’s proud boast that he had ‘endeavoured to include all the rules of the unwritten common law which are relevant to the question of criminal responsibility’\textsuperscript{106} The reality is that the Griffith Codes are designed around broad statements of common law principles with the common law rules invisible to the lay reader. A true Benthamite code would include both the principles and the rules in the body of the code. Thus, the next step for a comprehensive code design is the explicit classification of the relevant fault element for a particular offence.\textsuperscript{107}

In this context, Kadish has singled out Macaulay’s treatment of \textit{mens rea} questions, regretting that ‘so enlightened and clear-headed an approach to the definition of crimes had so little effect on later statutory and judicial law-making in the criminal

\textsuperscript{103} Macaulay’s code design is plainly identified with the first exception under s 300 of provocation where a general statement is made whereby culpable homicide is not murder if the offender whilst deprived of the power of self-control by a grave and sudden provocation causes the death of any other person by mistake or accident. This statement is followed by three provisos including not inciting the provocation or responding to lawful self-defence, an explication that whether the provocation was grave and sudden enough is a question of fact, and six illustrations.

\textsuperscript{104} Department of Justice and Attorney-General, \textit{Supreme and District Court Benchbook (Queensland: The Department, 2008)}.

\textsuperscript{105} M. Shanahan, S Ryan, A Rafter, J Costanzo, and A Hoare, \textit{Carter’s Criminal Law of Queensland} (LexisNexis Butterworths, 19\textsuperscript{th} ed, 2013).

\textsuperscript{106} Griffith, above n 47, iii.

\textsuperscript{107} The judgment of Brennan J in \textit{He Kaw Teh v The Queen} (1985) 157 CLR 523, which deconstructs the concept of \textit{mens rea}, was the precursor, along with US Model Penal Code, of the element analysis in the \textit{Model Criminal Code} and, subsequently, Chapter 2 of the \textit{Criminal Code (Cth)}. 
law’. 108 As Wright has observed, ‘[t]he Macaulay and Stephen codes are very different, the former aspiring to break decisively from the common law, the latter seeking accommodation with it’. 109 One reason for such an accommodation in England was ‘after the demise of Brougham’s commissioners [1845], codifiers proceeded with much more caution’. 110 Another reason was ‘[t]hat judicial opposition frustrated attempts to restart the project after the early 1850s and Charles Greaves’s 1861 consolidation 111 merely updated Peel’s earlier reforms’. 112

In dealing with mens rea, Macaulay’s formula for negligence – an act ‘so rash or negligent as to indicate a want of due regard for human life’ 113 – was supplemented with ‘a higher standard of culpability, awareness of the danger’ 114 which explicitly used knowledge as the fault element such as selling food ‘knowing the same to be noxious’. 115 Wright has noted that Macaulay did not define principles of liability in a General Part ‘but there is consistent attention to fault requirements and terms, emphasis on subjective standards, with occasional use of lesser standards of rashness (the Macaulayan term for recklessness) and negligence’. 116

The IPC adopted utilitarian legal theory. Wright has identified the IPC as coming ‘closest to a working realisation of Bentham’s conception of criminal law codification’, 117 and Smith has suggested that ‘[w]ithout any direct effort on his part,
Bentham achieved his most tangible codifying success in the form of the Indian Penal Code’. For present purposes, Wright's summary of the design of the IPC is pertinent.

The law was presented systematically and each offence was defined precisely and clearly to maximise certainty, with accompanying elements of liability and exceptions explicitly spelt out. It was to be applied as uniformly as possible with illustrations that aimed to anticipate the entire range of possibilities in order to minimise judicial discretion.

Given that Macaulay, like Bentham, was anticipating modern element analysis, there is merit in Wright’s observation that many of the qualities of his Code ‘remain as progressive law reform aims in the 21st century’. Therefore, as Macaulay was able to construct a utilitarian code underpinned by clarity and analysis back in 1837 that has stood the test of time (the IPC remains the law in India), how much more possible is it to produce a Benthamite code in the 21st century given the advances in criminal law theory?

3.3.2. Macdonald and the Canadian Criminal Code

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, picking up Stephen’s Code and passing it into law across Canada in the wake of the

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118 Smith, above n 97, 164.
119 Wright, above n 112, 53.
120 Wright, above n 40, 187.
121 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.
North-West Rebellion of 1885. 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’.

There was a variety of reasons for Macdonald’s position ranging from the US Civil War where decentralised State rights over criminal law was ‘perceived as a contributing factor’, to security concerns given ‘American aggression during the War of 1812 followed by politically motivated raids by American residents’ in 1838 and 1866. In light of potential threats 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.

In addition, there were considerable differences between the jurisdictions across British North America prior to Confederation, with Lower Canada having a strong French tradition.

Brown has observed that the diffuse nature of criminal law jurisdiction in Canada prior to Confederation ‘resembled the centralised civilian jurisdictions of France and Germany rather than the common law parent of England’. Kasirer has argued that a political view was formed that Canada would better unite as a nation through a uniform criminal law.

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122 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.

123 Wright, above n 46, 50.

124 Ibid.

125 Ibid.


127 See, for example, the *Civil Code of Lower Canada* (1866).

This moved John A. Macdonald to seek and secure a broad federal power over the criminal law at Confederation in 1867 on the theory that Canada’s nationhood was to be assured, in part, through a national criminal law uniformly applicable to all Canadians.¹²⁹

Having secured federal jurisdiction for criminal law in 1867,¹³⁰ Macdonald adopted the expedient course of turning ‘to Greaves’s English Criminal Law Consolidation Acts, 1861, suitably amended, as the basis for the Dominion’s criminal law’.¹³¹ Unlike in England, codification was widely discussed and met with little professional criticism from legal circles,¹³² so when by the 1880s there was widespread ‘criticism of the state of Canadian criminal law … the 1885 crisis mobilised the political will for codification, making it a legislative priority’.¹³³ Thus, for example, James Gowan, appointed a judge in 1843, was by 1873 ‘established as Ottawa’s premier criminal law draftsman, [who] would work on and off for the succeeding twenty years towards codifying Canadian criminal law’.¹³⁴ Another judge, George Burbidge,¹³⁵ was ‘largely responsible for drafting, cutting and pasting together the Canadian Criminal Code, 1892’.¹³⁶

The obvious place to turn for an ‘off the shelf’ code was Stephen’s Code of 1880. John Thompson, the Justice Minister, introduced the codification bill in March 1892 and it passed into law as the Criminal Code Act (1892) on 1 July 1893, with

¹²⁹ Kasirer, above n 121, 847.
¹³⁰ Section 91(27) of the Constitution Act 1867 (Canada) established the sole jurisdiction of the Federal Parliament over criminal law in Canada.
¹³¹ Wright, above n 46, 51.
¹³² Brown, above n 128, 70.
¹³³ Wright, above n 46, 51.
¹³⁴ Kasirer, above n 121, 879. In 1885, Gowan was appointed a Senator on the advice of John A. Macdonald.
¹³⁵ Burbidge conducted the prosecution of Louis Riel who was tried for treason following the North-West Rebellion of 1885, and was appointed the first justice of the Exchequer Court in 1887. Burbidge’s Digest of the Canadian Criminal Law (1890) influenced the 1892 Code. See Dictionary of Canadian Biography Online.
¹³⁶ Kasirer, above n 121, 843.
parliamentary discussion centred on public order offences. As Wright has observed ‘[c]onceptually the bill fully embraced Stephen’s approach to codification and closely resembles the 1880 bill in organisation’,

137 with 40 per cent taken from Stephen and 60 per cent taken primarily from the 1886 Canadian Revised Statutes.138 In keeping with Canada’s nation-securing objectives, ‘prominent and comprehensive provisions relating to political offences and national security measures’139 were introduced into the 1892 Code. Thus, in Canada, codification ‘went far beyond more effective crime control reform’.140 More particularly for the purposes of this thesis, ‘codification did not detract from the authority of the bar and bench, rather, it facilitated professional power’.141

In sum, Canada, unlike Australia, with the chaotic US example on its doorstep, realised the dangers of decentralising the criminal law, and within a federal model pragmatically in 1892 adopted the narrow, common law infused Stephen Code design of 1880 (209 sections) with little dissent. As will be discussed further in the next section, Queensland effectively achieved the same outcome by adopting Stephen’s Code and the common law (75 explicit references to the common law), but for reasons more associated with Griffith’s unique position than reasons of nation-building, however much Griffith’s admirers might believe he created a unique code.

The historical assessment of the 1892 Code, with its mosaic of Stephen’s 1880 Code Bill, Burbidge’s Digest of the Canadian Criminal Law (1890), and existing Canadian statute law, has not been favourable. Significantly, in light of Cockburn’s criticism of

137 Wright, above n 46, 53, noting in footnote 46 that ‘the first six titles were the same’.
138 Brown, above n 128, 34-35.
139 Wright, above n 46, 54.
140 Ibid, 55.
141 Ibid.
Stephen’s 1880 Code Bill, many previously enacted Canadian federal statutes were preserved and listed in a schedule to the 1892 Code. Writing in 1958, Mackay described Canada’s 1892 Code as almost immediately requiring the legislature ‘to go to work with scissors and paste’ on an annual basis until it ‘began to resemble a patchwork quilt’. A Royal Commission to Revise the Criminal Code was appointed in 1949 which duly reported in 1954. After the vicissitudes of the political process, the new draft Code became effective in 1955. Mackay’s analysis is that ‘not very much’ was achieved largely because the Commission was appointed to revise the existing Code and not create a new one. Mackay’s view was that a ‘thorough house-cleaning’ was required with particular attention to the ‘definitions of the substantive law’. More importantly, this house-cleaning required ‘a close and critical scrutiny of the validity of some of the basic premises upon which the Code is founded’. A similar view of the General Part of the Criminal Code 1892 was taken by the now defunct Law Reform Commission of Canada in 1982, in describing the General Part as lacking ‘completeness, generality and orderly arrangement’.

First, our current General Part does not achieve completeness. It leaves many matters of general relevance to the Special Part … It leaves others to the common law … Finally, by virtue of subsection 7(3) it must be supplemented by the common law. Second, the present General Part lacks sufficient generality to obviate repetitiveness in the Special Part. It has for example no general provision relating to mens rea, while at the same time mens rea words like

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142 Cockburn, above n 51.
145 Ibid.
146 Ibid, 207.
147 Ibid.
148 Ibid.
149 Ibid.
‘fraudulently’, ‘intentionally’, ‘knowingly’ and wilfully’ occur in no less than two hundred
and fifty sections in the Special Part … Third, the General Part lacks orderly arrangement.
Rules belonging to the General Part of criminal law are found in three different places – in the
General Part of the Code, in the Special Part of the Code and in the common law.¹⁵¹

No reform of the General Part has occurred. Stuart, writing in 2008, has described
developments in these terms: ‘In the past thirty years the Criminal Code of Canada
has trebled in size with the constant addition of new and often overlapping crimes,
stiffer penalties and overly complex procedural changes … The legislative process is
patchwork and reactive.’¹⁵² As the Griffith Code is similarly based on the Stephen
Code Bill of 1880 and the common law, Mackay’s and the Law Reform Commission
of Canada’s analysis of the Canadian Code (1892) is equally applicable to the
Queensland Code of 1899.

### 3.3.3. Griffith and the Queensland Criminal Code

*It must seem strange to the ordinary mind that in the present stage of civilisation a great branch of the
law, by which everyone is bound, and which is understood to be definitely known and settled, should
not be reduced to writing in such a form that any intelligent person able to read can ascertain what it
is.*¹⁵³

Griffith failed his own test, as stated above, as evidenced by the existence of the
Queensland Benchbook and *Carter’s Criminal Law of Queensland.*¹⁵⁴ The reference
to the reduction to a form that any intelligent person can understand the code is a

¹⁵¹ Ibid, 4-5.
1892 and Entrenched Charter Standards since 1982’ (Paper presented at The International Society for
the Reform of Criminal Law Codifying the Criminal Law: Modern Initiatives, Dublin, 11-15 July,
2008) 5.
¹⁵³ Griffith, above 47, iv.
¹⁵⁴ See above n 104 and n 105.
Benthamite standard. Given that Griffith essentially reproduced the common law, it is little wonder that the common law leaks through the Griffith Code like a colander, with the necessity of a Benchbook for judges to interpret the Code through decided cases outside of the Code itself. Griffith ended his letter to the Attorney-General with the hope that ‘the enactment of a Code of Criminal Law is both desirable and feasible’. This thesis supports such an aspiration against Bentham’s standard, but argues that Griffith’s Code is merely a statute encompassing the common law dressed up as a Code.

A far more favourable assessment of Griffith’s Code has been given by Wright who has lauded Griffith’s Code as marking a ‘departure from the Stephen Code … and ranks with the Macaulay and Wright [Jamaica Code, 1877] efforts as … arguably the best, 19th century utilitarian codifications of English criminal law’. Griffith’s Code is utilitarian in the sense that the underlying fault element is negligence, but on Wright’s own calculation the overwhelming influences on Griffith's design are Stephen and the common law. Wright assesses Griffith’s particular contribution as ‘his concise statement of the principles of criminal responsibility and treatment of defences in his General Part which avoided reliance on unwieldy examples and illustrations’, even going so far as to state Griffith’s general provisions have ‘stood the test of time’. Wright describes s 23 of the General Part as providing ‘a concise

156 See also s 8 *Criminal Code* (Tas) which provides that the common law relating to defences remains in force unless specifically altered by the Code.
157 Griffith, above 47, xiv.
158 Wright, above n 46, 39.
160 Wright, above n 46, 59.
161 Ibid, 58.
162 Ibid, 64.
and elegant statement of criminal responsibility’ citing Griffith’s own appreciation of this section: ‘… no part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction.’

Such an appraisal does not survive the devastating criticism of s 23 by Dixon CJ in *Vallance v The Queen* discussed in 4.4.1.2 below, that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences. As to standing the test of time, Gummow and Heydon JJ with *Woolmington v DPP* in mind have pointed out in *DPP (NT) v WJI*, ‘[a] particular theory of the framers of State Codes may have been displaced by later common law decisions’.

Furthermore, it is not apparent how Griffith’s eschewal of illustrations and his favoured abstract approach ‘was more consistent with a Benthamite conception of codification than even Macaulay and Wright’. As discussed earlier, Bentham favoured including reasons which Macaulay rejected on pragmatic grounds preferring illustrations instead. Whilst Bentham applied deductive reasoning to his code design by starting with the general and ending with the specific, his principal aim was clarity. In any event, Wright concedes that a conceptual gulf between inductive and deductive processes was ‘inconsequential in practical effect because, again, the

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163 Ibid, 59.
164 Griffith, above 47, x.
166 [1935] AC 462 (HL).
168 Wright, above n 46, 60.
169 See above n 91 and n 92.
foundation and main substance of his [Griffith] code was applicable legislation and English common law’.\(^\text{170}\)

It is here contended that Bentham would have marked Macaulay’s Code closer to his ideal than Griffith’s Code. Support for this argument can be found in Bentham’s approval of Livingston’s draft Penal Code for Louisiana in 1826, where the ‘definition of crimes sometimes entailed a unique blending of command and explanation’.\(^\text{171}\) Kadish points out that ‘Livingston further attempted to make the Code more fully understood through an early general statement of the motives and basic principles of the legislature in enacting the code’.\(^\text{172}\)

As with the critical comments of the General Part of the Canadian Criminal Code 1892, which began to emerge some 60 years after the Code was promulgated and was discussed in the section above, negative observations relating the General Part in Griffith’s Code started to build following Dixon CJ’s criticisms in *Vallance v The Queen*.\(^\text{173}\) Thus, for example, in *Mamote-Kulang v The Queen*,\(^\text{174}\) which was decided just two years after the publication of the US *Model Penal Code* in 1962 and three years after *Vallance*, Windeyer J discussed s 23 of the *Criminal Code* (Qld). His Honour, having noted that the general provisions of Chapter V of the Queensland Code concern criminal responsibility and are couched in an exculpatory form, went on to observe: ‘Instead of stating, *as in a more modern approach might perhaps be*
expected (emphasis added), the elements of will, intent or knowledge which the doer of an act must have for him to be held guilty of a crime, their absence is stated as a matter of defence or excuse.¹⁷⁵

Bearing in mind Windeyer J’s comments, it is useful to compare and contrast the respective treatments of voluntariness in the Griffith Code and the Criminal Code (Cth). The Griffith Code under s 23(1)(a) absolves a person from criminal responsibility if the act or omission occurs independently of the will.

Section 23 Intention & Motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for (a) an act or omission that occurs independently of the exercise of a person’s will.

The Criminal Code (Cth) with its binary structure of physical (such as conduct) and fault elements, specifies in sub-section (1) that voluntariness applies to a physical element, and states in sub-section (6) that self-induced intoxication is irrelevant to a determination of whether conduct is voluntary.

4.2 Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:
   (a) a spasm, convulsion or other unwilled bodily movement;

¹⁷⁵ Mamote-Kulang v The Queen (1964) 111 CLR 62, 76. The ‘more modern approach’ is adopted in Chapter 2 of the Criminal Code (Cth).
(b) an act performed during sleep or unconsciousness;
(c) an act performed during impaired consciousness depriving the person of the will
to act.

(4) An omission to perform an act is only voluntary if the act omitted is one the person is
capable of performing.

(5) If the conduct constituting the offence consists only a state of affairs, the state of affairs is
only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether
conduct is voluntary.

(7) Intoxication is self-induced unless it came about:
(a) involuntarily; or
(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable
mistake, duress or force.

At one level, it could be argued that everything contained in s 4.2 above can be
implied into s 23(1)(a) of the Criminal Code (Qld), given the interpretations the
judiciary have given to other sections of the Griffith Code such as s 28 which deals
with intoxication. However, this is to overlook the purpose of a criminal code which
is to fully state the relevant law, and avoid the necessity for judicial inventiveness
through the express statement of such provisions by the legislature. For example,
automatism, which is covered in s 4.2(3)(c) above, was unknown when Griffith
drafted his Code and has to be implied into s 23(1)(a). This has required the courts, in
cases such as The Queen v Kusu,176 to have stated that where intoxication leads to a
state of automatism, there can be no reliance on s 23(1)(a) which requires an act or
omission to be accompanied by an exercise of the will.

Mention of intoxication leads to a further example. The effect of s 28(3) of the Criminal Code (Qld) is to introduce the distinction between offences of specific and basic intent as per DPP v Majewski. When Griffith drafted his Code no concession was made in practice to an intoxicated accused until the watershed case of DPP v Beard. Taken together and just fifteen years apart, Beard and Woolmington mark the ascendancy of subjective tests, whereas the Griffith Code is based on the objective test of whether an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome. The insertion of s 28(3) above underlines the dangers of grafting on new sections without amending the central provisions of a Code.

Despite romantic notions to the contrary, the influences on Griffith of Zardinelli’s Italian Code and Field’s New York Code of 1881 were negligible. The plain fact

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177 An offence of basic intent is one where the defendant intends to commit the proscribed conduct such as to strike the victim in a case of common assault. For an offence of specific intent some further intention is required such as not only intending to strike the victim but also intending to cause the victim serious harm in a case of causing serious harm.

178 [1977] AC 443 (House of Lords). For similar sections see s 28(3) Criminal Code (WA); s 17(2) Criminal Code (Tas); s 31 Criminal Code 2002 (ACT); s 8.2 Criminal Code (Cth); s 43AS Criminal Code (NT); s 428C Crimes Act 1900 (NSW).

179 [1920] AC 479.

180 [1920] AC 479.


182 A. Cadoppi, ‘The Zanardelli Code and Codification in the Countries of the Common Law’ (2000) 7 James Cook University Law Review 116 (K.A. Cullinane trans). Schloenhardt, above n 155, 28, citing Rt Hon Sir Harry Gibbs, ‘Queensland Criminal Code: From Italy to Zanzibar’ (2003) 77 Australian Law Journal 232, 235-236, states that s 23(1) does ‘correspond directly with the old Italian Code’. However, Article 45 of the Zanardelli Code reads as follows: ‘No-one can be punished for an offence if he has not willed the act which constitutes it, except where the law imposes a liability on him otherwise, as a consequence of his act or omission.’ Clearly, s 23 is only partially based on Article 45, namely, 23(1)(a), which deals with voluntariness and led to judicial differences on the meaning of ‘an act’, whereas it is the meaning of the defence of accident in s 23(1)(b) which has caused further and arguably greater difficulties in interpreting ‘an event which occurs by accident’ as distinct from ‘an act or omission that occurs independently of the exercise of the person’s will’.

183 Kadish, above n 25, 1137, dismisses Field’s Code as ‘a tame treatment of the existing law’.

184 Wright, above n 46, 59, has given an enlightening insight into the influences bearing on the Griffith Code. ‘A simple quantitative measure of outside influences, based on a count of Griffith’s explicit references, stands at over 100 to Stephen’s Draft English Code, 1880, 75 references to the common law, 15 references to the 1889 Italian Criminal Code, and 9 references to the 1881 New York State Code.’
is that Griffith took Stephen’s cautious narrow English Draft Code of 1880 and made sure he met Cockburn’s criticism relating to the absence of defences, but in so doing Griffith merely restated the common law. However, Cockburn’s criticism of Stephen’s Code that ‘a great deal remains to be done to make the present code a complete and perfect exposition, or a definitive settlement of the criminal law,’ could equally well apply to Griffith’s Code. The key difference was that Griffith bestrode Queensland like a legal and political Leviathan. Once Griffith’s Code was on the Queensland statute books, Western Australia followed suit in 1902 (revised in 1913) and Tasmania in 1924.

To underscore the point about defences, all Griffith attempted was short statements of the common law. For example, s 22(2) deals with the excuse of honest claim of right.

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185 For a telling example, see Heydon J in Patel v The Queen [2012] HCA 29 [138] – [151] where his Honour points out that s 288 of the Criminal Code (Qld) was modelled on clause 158 of Stephen’s Criminal Code Bill 1880 which in turn was derived from Article 217 of Stephen’s A Digest of the Criminal Law (Crimes and Punishments) first published in 1877 in which Stephen was stating his understanding of the common law. Another recent example of the High Court examining Stephen’s work in aid of interpretation can be found in the judgment of Bell J in PGA v The Queen [2012] HCA 21 [218] – [220] in relation to the offence of rape, relevantly defined by Griffith in s 353 of his Draft Criminal Code (1897) as the ‘carnal knowledge of a woman, not his wife’, which Griffith considered to be a statement of the common law. Stephen J gave the leading judgment in R v Clarence (1888) 22 QBD 23 in which his Honour referred to clause 29 of his ‘A Digest of the Criminal Law (Crimes and Punishments) (4th ed, 1887). Furthermore, in the joint judgment of Gleeson CJ, Gummow, Heydon and Crennan JJ in Darkan v The Queen (2006) 227 CLR 373, 385-386 [33] – [36], the meaning of ‘probable consequence’ in s 8 of the Criminal Code (Qld) is discussed in relation to ss 71 and 72 of Stephen’s Draft Code of 1879.

186 Cockburn, above n 42, 14.

187 See for example s 24(1) Mistake of fact, which Dixon J said stated ‘the common law with complete accuracy’ in Thomas v The King (1937) 59 CLR 279, 306. Sitting behind the sparse three lines of the section is a body of common law contained in numerous cases invisible to the lay reader which is often contradictory. For example, see Chapter 2, n 156 for the cases of R v Gould and Barnes [1960] Qd R 283, Pacino v R (1998) 105 A Crim R 309, and Larsen v G.J. Coles and Co Ltd (1984) 13 A Crim R 109.

188 Cockburn, above n 42, 1-2.

189 O’Regan has referred to Griffith ‘as an activist Premier’ capable of drafting ‘his own reforming legislation and steering it through parliament with a minimum of controversy’: R. O’Regan, ‘Law Reform and Politics’ (1996) 14 Australian Bar Review 1, 1.
(2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.

In *R v Fuge*, Wood CJ at CL identified a total of nine common law principles relating to an honest claim of right all of which are implicitly imported into s 22(2) of the *Criminal Code* (Qld), but of which the lay reader is totally unaware.

Griffith’s Code is not really a Code at all, but a narrow restatement of the common law that is heavily based on Stephen’s Code Bill of 1880. The longevity of the Griffith Code is testimony to the flexibility of the common law which pervades it, the ingenuity of judges in interpreting it, and the inertia of the legislature in failing to reform it. In sum, the Griffith Code is a pale imitation of a true Benthamite code.

### 3.4. UNITED STATES MODEL PENAL CODE AND AUSTRALIAN MODEL CRIMINAL CODE IN THE 20TH CENTURY

*The beginning of wisdom in all the mens rea cases to which our attention was called is ... that mens rea means a number of quite different things in relation to different crimes.*

By the mid 20th century and the production of the US *Model Penal Code* over the ten year period 1952 to 1962, ‘the codification controversy of the 19th century was over [as] the legislatures had long since asserted their dominance as lawmakers’. Kadish has argued that the driving force behind the US *Model Penal Code* was not an arrogant judiciary or the aspiration that any citizen could understand his or her rights

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191 A fuller treatment is provided in Chapter 4.
192 *DPP v Morgan* [1976] AC 182, 213 (Lord Hailsham) (HL).
193 Kadish, above n 25, 1138.
and obligations, but that statutes in the United States were ‘disorganised and often accidental in their coverage, a medley of enactment and of common law’. Kadish’s view is disputed by Dubber who has contended that ‘[t]he original Code set out to wrest control of penal lawmaking away from the judiciary’. Given the innate conservatism of the legal profession, McClellan lends support to Dubber’s view when discussing the likely opposition to a new federal code in the United States: ‘It will … be suggested that a new code will cause great confusion and uncertainty and deprive the practicing bar of its accumulated wisdom under the existing law’.

In any event, Kadish has suggested that the most notable feature of the Model Penal Code enterprise was ‘its affinity with the fundamental reformist zeal of the early Benthamite codification movement’. Herbert Wechsler, the architect of the Model Penal Code, identified the drafting task as a ‘legislative commission, charged with construction of an ideal penal code’. The purpose was ‘to determine the contents of the penal law, the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it confers, by a contemporary reasoned judgment’.

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194 Ibid.
198 Kadish, above n 25, 1138.
199 Wechsler, above n 195, 525.
In terms of a theory of criminal liability, the major achievement of the US Model Penal Code was to formulate ‘a set of definitional tools with which the entire code of specific crimes could be fashioned’. Mens rea questions were defined within the four mental states of purpose (intention), knowledge, recklessness and negligence. The appropriate mental state was specified against three objective or physical elements identified as the nature of the conduct, the attendant circumstances, and the result of the conduct. Chapter 2 of the Criminal Code (Cth) draws heavily on the US Model Penal Code’s analytical precision, but ‘unlike the US Model Penal Code, the elements of the offence are sharply distinguished from the defences’.

As Leader-Elliott has pointed out, ‘Bentham was familiar with the characterisation problem’ writing that ‘the description of an act is performed by the enumeration of particulars which are called circumstances’. For example, Bentham discusses the need for an intelligible law against theft to be ‘translated into a law that forbids the taking under certain circumstances; which circumstances when specified will constitute so many limitations or exceptions to the general prohibition against taking’. Further examples can be found in another work of Bentham’s where he identifies ‘the consequences of an act are events’, and ‘the intention or will may regard either of two objects: 1. The act itself: or, 2. Its consequences’.

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201 Kadish, above n 25, 1143.
203 Leader-Elliott, above n 19, 410.
204 Ibid, 420.
206 Ibid, 119.
207 J. Bentham, The Principles of Morals and Legislation (Prometheus Books, New York, 1988) 77. Significantly, the principal section dealing with criminal responsibility in the Criminal Code (Qld), namely, s 23(1), distinguishes between (a) an act or omission that occurs independently of the exercise of the person’s will and (b) an event that the person does not foresee as a possible consequence. Section 23 of the Criminal Code (WA) makes the same distinction between an act or omission for voluntariness and an event that occurs by accident.
208 Ibid, 82.
Elliott convincingly argues that ‘Bentham’s account presages modern element analysis’.  

More broadly, Bentham, in keeping with both his comprehensive plan for a code and the need for the public to understand the full range of offences to which they may be liable, focused on the need for definitional detail.

To render it [a law] explicit enough to be understood by those who are to obey or execute it, it must be taken to pieces as it were and made up again according to a fuller pattern. The short name given to the act [for example, murder] must be laid aside and a definition substituted in its stead.  

In a footnote discussing the circumstances which make an act of taking theft, Bentham contended that, in his *History of Pleas of the Crown* (1713), Hale confessed that he did not know what those circumstances were.

This however was no hindrance to hanging men for theft. It is one thing to conceive an idea, it is another thing to express it: it is one thing to form a particular idea on a particular occasion, it is another thing to abstract from it a general idea for all occasions.  

The two extracts above are effectively Bentham’s answer to critics of comprehensive codes that the English language is too vague and indeterminate to permit the fulfilment of Bentham’s test of ‘no blank spaces’. Bentham’s position was that the severe consequences of possible criminal conviction demand maximum legislative clarification rather than the vagaries of the common law as interpreted by individual
judges. Chapter 2 of the *Criminal Code* (Cth), by distinguishing between conduct, results and circumstances, is a modern testimonial to Bentham’s perspicacity in identifying the characterisation problem nearly two hundred years before the US *Model Penal Code*.\(^{212}\)

Nevertheless, whilst Bentham can lay claim to being the intellectual father of codification he never obtained a codification commission and ‘nor did he ever produce a completed code, penal or otherwise’.\(^{213}\) Bentham’s major contribution was to create a distinct methodology of codification ‘proceeding systematically from basic principle to practical corollary to the construction of an internally harmonious and philosophically grounded system’.\(^{214}\) Bentham’s detailed plans for civil and penal codes addressed the same general questions that face modern codifiers. As outlined in Part II The Central Themes of the Thesis in Chapter 1, the main issues that confront those embarking on codification have been usefully collected separately by Dubber\(^{215}\) and Ferguson.\(^{216}\) The list below collates and combines the issues identified by both authors.

- What is a criminal code as distinct from a series of criminal statutes? Should it contain the substantive criminal law, criminal process and evidence?

- What is the purpose of a criminal code as regards either restating the current law or attempting law reform at the same time? How much reform is practical?

\(^{212}\) Bentham also ridiculed Blackstone’s division of every law into four parts: a declaratory, a directory, a remedial, and a vindicatory. See above n 205, 2, footnote a.

\(^{213}\) Kadish, above n 25, 1099.

\(^{214}\) Ibid.

\(^{215}\) Dubber, above n 196, 74-75.

• Should the code be structured into a General Part and a Special Part? If so, what should the General Part contain?

• What is the audience of a criminal code as regards the adoption of technical as opposed to plain language?

• Should a criminal code be exclusive or should the common law continue to develop alongside the criminal code?

• How should a criminal code be kept up-to-date?

Bentham’s answers to these questions can be readily deduced from his writings. Bentham’s plan for a criminal code is more achievable today than during the 19th century. Thus, for example, Bentham would accept a code structured into a General Part and a Special Part as being compatible with a comprehensive code design; the audience would be the general public; the code would be exclusive and establish the full control of the legislature; and the code would be regularly updated in keeping with its overall structure. On the first question noted above, the very point being made here is that for the Griffith Codes there is nothing substantive to distinguish them from the common law States of New South Wales, Victoria and South Australia. Given much of the necessary law reform for offences has already been undertaken in Chapter 2 of the Criminal Code (Cth), the next step in Australia should be to follow Canada and adopt a single Criminal Code.217

217 Criminal Code 1892 (Canada).
Absent from the above list is any reference to an underlying philosophy that infuses the entire criminal code. For Bentham, that philosophy was utilitarianism which seeks to maximise the overall ‘good’ of the society (‘the greatest happiness principle’).

The business of government is to promote the happiness of society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency is pernicious, will be the demand it creates for punishment. What happiness consists of we have already seen: enjoyment of pleasures, security from pains.218

Public policy is the modern form of utilitarianism or the overall ‘good’ of society. In discussing the legal principle that ignorance of the law is no excuse, Oliver Wendell Holmes justified the principle on the basis that ‘public policy sacrifices the individual to the general good’.219 Translating the notion of the public good into the Criminal Code (Cth), the underlying fault element is recklessness.220 Essentially, the basic structure of the Criminal Code (Cth) is that the conduct (act) must be intentional coupled with recklessness as the threshold for liability for the result of conduct or a circumstance in which conduct happens. Leader-Elliott has rightly described recklessness as the ‘ubiquitous fault element’221 which requires an awareness of a substantial risk which is unjustifiable to take.222 However, as mentioned in Chapter 2, the Commonwealth legislature can equally apply strict or absolute liability to a

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218 Bentham, above n 207, 70.
220 For the definition of recklessness, see s 5.4 Criminal Code (Cth).
222 This is not the common law position in Australia where recklessness is treated as subjective. Recklessness is unknown to the Griffith Codes where the baseline fault element is the objective test of negligence.
specific offence where there is no fault element. As Leader-Elliott has observed in the context of drug trafficking, the Commonwealth legislature ‘has taken the provisions of Chapter 2 as an effective set of instructions for subverting common law principles’.

To illustrate the point in relation to the flexibility and legislative control following the adoption of Chapter 2 of the Criminal Code (Cth), set out below is part of the newly inserted s 161A Violent act causing death under the Criminal Code (NT). This new section has a fault element of intention as regards engaging in conduct involving a violent act (ie, for example, the defendant intended to throw the punch), but for the result of that conduct (the defendant causes the death) strict liability applies.

**161A Violent act causing death**

(1) A person (the defendant) is guilty of the crime of a violent act causing death if:

(a) the defendant engages in conduct involving a violent act to another person (the other person); and

(b) that conduct causes the death of:

(i) the other person; or

(ii) any other person.

Maximum penalty: Imprisonment for 16 years.

(2) Strict liability applies to subsection (1)(b).

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223 Leader-Elliott, above n 19, 400.
224 Ibid, 401.
225 Criminal Code Amendment (Violent Act Causing Death) Act 2012 (NT).
(5) In this section:

*conduct involving a violent act* means conduct involving the direct application of force of a violent nature to a person, whether or not an offensive weapon is used in the application of the force.

*Examples of the application of force of a violent nature*

*A blow, hit, kick, punch or strike.*

It can be seen from s 161A(2) above, that there is no fault element for the result of the conduct. Therefore, if the Crown decided it was unable to prove beyond reasonable doubt the objective fault element of negligence for manslaughter under s 43AL, then the proposed s 161A above would allow the Crown to proceed with a charge for which there is no fault element for the result of conduct.

As mentioned above, the residual fault element of recklessness in the *Criminal Code* (Cth) straddles the subjective requirement of awareness of a substantial risk and the objective requirement of the taking of the risk being unjustifiable. Chapter 5 of the thesis proposes an objective test for recklessness as the underlying fault element of criminal responsibility, based on the natural and probable consequences test adopted in *DPP v Smith* in the guise of *Caldwell*228 recklessness. The purpose behind such support of objectivity in determining criminal responsibility is grounded on the idea that the ‘object of the law is to prevent human life being endangered or taken … to

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226 *Nydam v The Queen* [1977] VR 430. The test in *Nydam* is followed in s 43AL Negligence of the *Criminal Code* (NT): ‘A person is negligent in relation to a physical element of an offence if the person’s 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.’


compel men [and women] to abstain from dangerous conduct … at their peril to know
the teachings of common experience’. 229 The philosophy is unashamedly utilitarian.

Bentham’s blueprint for code design can be called in aid at two levels: first, the
concept of an underlying fault element per se is consistent with his science of
legislation; and, second, of the principle of utility guiding the hand of legislation in
shifting the emphasis away from subjective to objective tests of criminal
responsibility. In any event, whichever underlying fault element is selected, the
legislature has the capacity to select the combination of physical and fault elements
under the nomenclature of Chapter 2 of the Criminal Code (Cth).

There is a double irony here: Chapter 2 was born of the US Model Penal Code and the
MCCOC’s Model Criminal Code, where the focus was on personal and property
offences which in Australia are the province of the States who in turn have
‘spurned’230 Chapter 2. Conversely, Commonwealth offences focus inter alia on drug
offences, corruption, terrorism et al, broadly following Federal heads of power under
s 51 of the Federal Constitution, such that ‘Chapter 2 will find its primary application
in offences where the general principles of common law may have very little
purchase’.231 Consequently, Bentham’s comprehensive code design remains viable
and desirable as the model design for a code. Chapter 2 provides the springboard into
a single criminal code for the whole of Australia following the Canadian example.
The deficiencies of Chapter 2, particularly Part 2.3 Circumstances in which there is no
criminal responsibility, will be taken up in subsequent Chapters of this thesis.

230 Ibid.
231 Ibid.
Additionally, Bentham’s code design combined the science of legislation with a utilitarian philosophy. Dubber has criticised the US *Model Penal Code* for having a central weakness based on ‘the drafters’ failure to ground it in a theory of penal justice and of penal codification’. \(^{232}\) Dubber has identified the US *Model Penal Code* as implementing a model of preventing ‘crime through deterrence, and if deterrence fails, through treatment and correction’. \(^{233}\) The reasons why the original US *Model Penal Code* is said to be redundant include ‘the expansion of the victim’s significance … the shift from penal codes to punishment guidelines … the retention and spread of strict liability offences … and the continued splintering of the penal law outside the penal code’. \(^{234}\) Essentially, Dubber argues that the original US *Model Penal Code* cannot cope with the war on crime which has ‘transformed penal law from a policy means into a weapon’. \(^{235}\) This leads Dubber to propound the need for a new *Model Penal Code* based ‘on principles that connect the penal law to the power of a democratic state over its constituents, grounding penal theory in political theory’. \(^{236}\) Bentham would certainly endorse such a statement.

Dubber’s attack on the US *Model Penal Code* could equally well apply to all Australian Codes. However, the Griffith Codes do not even possess the merit of internal consistency exhibited in the US *Model Penal Code*. Dubber’s Benthamite insistence that a penal code should be ‘measured in terms of legitimacy first, and crime prevention second’ \(^{237}\) is founded on his belief that ‘[t]he task of a new model

\(^{232}\) Dubber, above n 196, 98.
\(^{233}\) Ibid, 53.
\(^{234}\) Ibid, 56-57.
\(^{235}\) Ibid, 54.
\(^{236}\) Ibid, 99.
\(^{237}\) Ibid, 98.
code is to reassert the presumption of innocence’. Legitimacy and the presumption of innocence do not necessarily go hand in hand. Even within Lord Sankey’s famous ‘golden thread’ speech, there was a significant qualification relating to the presumption being subject to any statutory exception as to the onus of proof placed on the prosecution, and also some common law exceptions such as the defence of insanity.

Indeed, Dubber’s argument that the spread of strict liability offences has led in part to the redundancy of the US Model Penal Code completely overlooks Bentham’s call for the dominance of the legislature over the judiciary. The real point is that the very design of the US Model Penal Code and the Model Criminal Code in Australia arms the legislature with the capacity to determine whether a particular offence has a fault element, and, if so, where the offence will sit on the ladder of fault liability.

Putting aside the absence of a binary system of physical and fault elements in the Griffith Codes, Bentham’s model code design is also relevant today to the legitimacy of the code. Ad hoc incorporations of responses to the crime du jour whilst having the legitimacy of Parliament, do not meet the wider criterion of fitting within a code that is regularly reviewed and updated. The citizen now faces under the Griffith Codes a roulette wheel of criminal responsibility based on historical accident, legislative inertia, and political reactions or promises. Furthermore, there is an absence of plain language in the Griffith Codes for the citizen to establish the nature of the criminal liability that he or she faces. For example, s 328(4)A of the Criminal Code (Qld) covers the offence of dangerous operation of a vehicle where a death is caused. There

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238 Ibid, 55.
239 Woolmington v DPP [1935] AC 462, 481 (HL).
is no indication to the reader that s 328A(4) is a strict liability offence. By contrast, the Criminal Code (Cth) clearly identifies for each element of an offence whether strict or absolute liability applies.

As to interpretation, the Texas Penal Code has an unusual provision that suspends the rule that a criminal statute be strictly construed, rather the provisions ‘shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code’. Ferguson makes the astute observation that codifiers should not expect their code to be interpreted according to their intentions, ‘but rather should assume that it will be ruthlessly exploited to the best advantage of the accused’. Bentham, having advocated that the legislator be ‘his own and sole interpreter’, would endorse the legislature clearly deciding where criminal responsibility is to be set, be it strict liability, or placing the onus of proof on the defence, or selecting the combination of physical and fault elements for a particular offence.

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240 Similarly, Western Australia addressed the issue of fatal ‘one punch’ assaults by introducing s 281 Unlawful assault causing death into the Criminal Code (WA) in 2008. Section 281 reads as follows: ‘(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years. (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.’ Effectively, the section creates a partial mens rea offence, in the sense that a fault element is required for the assault, but nothing in the language of the section directly indicates the lack of a fault element for the resulting death to the lay reader.
241 Texas Penal Code, s 1.05(a).
242 Ferguson, above n 216, 161.
3.5. CONCLUSION

In the evident conviction that a criminal code is unsatisfactory, England continues to resort to the alternative of enacting ad hoc legislation superimposed on the common law.244 – Mackay.

In summary, in this Chapter the lens of the legal history of codification has been used to examine the viewpoint that the more detailed a code, the more vulnerable it is to statutory gridlock.245 In rebuttal, the outstanding Benthamite code of the 19th century was Macaulay’s Indian Penal Code because it successfully incorporated illustrations, and the treatment of mens rea questions anticipated modern element analysis. The arrival in the 20th century of the US Model Penal Code paved the way for Australia’s Model Criminal Code now operational as the Criminal Code (Cth). Thus, not only does the Criminal Code (Cth) represent the only Australian Code that resembles a true code, but also this most recent of Australian Codes can be usefully developed further on Benthamite lines. The result will not be incoherence or inconsistency, but legislative dominance through amplitude of the views of the legislator.246

Mackay’s statement above relates to England, but with the exception of the Criminal Code (Cth), is equally applicable to all Australian Code jurisdictions. To all intents and purposes the Griffith Codes are restatements of the common law. As the basic premises of the Griffith Codes remain unchanged, they are open to the same criticism made by Mackay and the Law Reform Commission of Canada of the Canadian Code (1892) discussed in 3.3.2 above.

244 Mackay, above n 144, 206.
245 Leader-Elliott, above n 19, 452..
246 Hart (ed), above n 205, 239.
Gray and Blokland have suggested for a criminal code that ‘[i]f the law is set out simply, then it will fail to cover the complexities of human behaviour … [i]f it is set out exhaustively … it would be an effective reproduction of the common law itself’. 247 The first part of the above statement can be supported, which is fully applicable to the Griffith Codes. However, the second part is contested at several levels. First, the whole architecture of the Criminal Code (Cth) allows the legislature to subvert or replace the common law, which has already occurred. 248 Secondly, the implication is that exhaustive statements are unwieldy and impractical. Bentham would argue (as does this thesis) to the contrary, in that clarity and not confusion is the result when the legislature specifies the rules it wishes to incorporate backed by examples or illustrations.

The essential point is that from Bentham’s familiarity with the characterisation problem, through Macaulay’s treatment of mens rea questions, to modern element analysis in the US Model Penal Code, criminal law theory is now well placed to deliver Bentham’s vision of a comprehensive criminal code. The Criminal Code (Cth) provides the framework for this vision to come to fruition in Australia. The only pity is that in the 1890s Australia did not possess someone of John A. Macdonald’s vision to press for federal jurisdiction over criminal law.

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248 Leader-Elliott, above n 19, 400.
CHAPTER 4

WHEN IS A CODE A CODE?

4.1. OVERVIEW OF CHAPTER

This Chapter of the thesis will develop the first two of its three central themes of the thesis outlined in Chapter 1, commencing with the very nature of a code. In what sense, in Australia, is a criminal code clearly distinguishable from a Crimes Act? The proposition is developed that Criminal Codes in Australia are misnamed because they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. This was the test set by Griffith himself. Contemporary 19th century critics of criminal codes, such as J.A. Dixon, echoing the views of Savigny, recognised the magnitude of the task when dismissing would-be codifiers who ‘saw no difficulty at all in replacing by a Code, made to order by any set of juridical journeymen that the moment might provide, the whole existing law and law sources of a nation’. As will be argued in this thesis, such criticism loses much of its potency with the development of criminal law theory in the 20th century.

The contention that Criminal Codes in Australia are misnamed applies to all the Griffith Codes (Queensland, Western Australia, Tasmania and the Northern Territory) and, to a lesser extent, to the more recently minted Criminal Code (Cth). The reason for such failure is that all of the Codes are too sparsely written, and per force of

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1 The central themes of the thesis are discussed in 1.2 above.
2 In his famous letter to the Attorney-General of Queensland, Griffith wrote of ‘the honour to transmit herewith a Draft of a Code dealing with the whole subject of the Criminal Law of Queensland’: Sir Samuel Griffith, Explanatory Letter to the Queensland Attorney-General, 29 October 1897, iii (emphasis added).
inadequate definitional detail or statement of the appropriate tests to be applied, judges are required to have recourse to the common law or to ‘fill in the blanks’ left by the respective Code. Consequently, it is here argued that a code needs to be structured with the objective of keeping statutory interpretation of a code within the four corners of the code. Bland injunctions that recourse to the common law is only permissible when the meaning is uncertain or where a prior technical meaning existed are wholly inadequate.

It is acknowledged that provision of greater detail opens up the possibility of creating a minefield of statutory interpretation. However, one of the justifications for a code is that it has undergone Parliamentary scrutiny. The greater the intended ‘partnership’ between the legislature and the judiciary, with the legislature content to identify the legal principles but to leave the interpretation (or rules) to the courts, the greater the departure from the acknowledged purpose of a code. In what ways could it then be said that a code differs from a Crimes Act? Undoubtedly, Part 2.2 of Chapter 2 of the Criminal Code (Cth) is a far more comprehensive statement of the elements of an offence than the principal sections of the Griffith Codes in Queensland and Western Australia (section 23), Tasmania (section 13) and the Northern Territory (section 31). A considerable level of detail is evident in Part 2.2 in the elements of offences but far less so with defences in Part 2.3 of the Criminal Code (Cth).

This Chapter then addresses the second theme of the thesis, which concerns the actual content of a code. In effect, an answer is attempted to Austin’s concrete question\(^4\) of ‘whether, having regard to the circumstances of a given community [here Australia],

\(^4\) The abstract question is whether a code is preferable to the common law and statute.
it is expedient to attempt the reduction of the law to a code’. This Chapter, building on the discussion of voluntariness, honest claim of right, and violent act causing death in Chapter 3, sets out further examples, covering the defences of honest claim of right and duress, that are intended to reinforce the argument for the appropriate level of detail that is required to meet the conventional definition of a true code without sacrificing clarity. In the case of honest claim of right, the full extent of the common law is set out. This provides the opportunity to dissect the choices the legislature has available, such as whether to endorse the common law use of the excuse to defeat a charge of armed robbery. Irrespective of the choices selected, the argument is made that the legislature is obliged to make them and spell them out to the lay reader in the case of a criminal code.

These examples should be viewed as templates in a variety of contexts supporting the proposition that clarity not confusion can result from a more detailed approach. The focus is directed at incorporating the relevant tests that the legislature accepts as appropriate. This has two effects. First, it reduces reliance on secondary material such as second reading speeches. Secondly, it firmly tilts the ‘partnership’ to the legislature (as a true code should) leaving the judiciary to explain the tests to the jury rather than to select which tests are appropriate. In this way at least consistency within a code rather than uniformity across codes can be promoted.

5 J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law (abridged by R. Campbell, London: Murray, 1880) 331.
4.2. THE MEANING OF A CODE

On a map of the law executed upon such a plan there are no *terrae incognitae*, no blank spaces: nothing is at least omitted, nothing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at the moment’s warning can traverse in all imaginable directions.6

This thesis accepts Bentham’s definition of a code in the above quotation. The then Federal Minister for Justice in the Second Reading Speech introducing the legislation that became the *Criminal Code Act 1995* (Cth) said that ‘codification of the criminal law has its roots in the work of the 18th century jurist Jeremy Bentham’.7 In particular focus is placed on the words ‘no blank spaces’ which reflected Bentham’s dislike of judge-made law because it was unwritten, uncertain and retrospective.8 It is here contended that the Griffith Codes9 fail Bentham’s test for a code (*no terrae incognitae*) and that even Chapter 2 of the *Criminal Code* (Cth) does not pass muster.

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’.10 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

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8 Bentham likened the common law to the way a man makes law for his dog by breaking a habit through a beating immediately after the event since ‘the dog only learns after the punishment that what it has done is wrong’. See A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2001) 19.
9 This thesis takes the Griffith Codes to be the *Criminal Code* (Qld), the *Criminal Code* (WA), the *Criminal Code* (Tas) and the *Criminal Code* (NT). While the Northern Territory has imported Chapter 2 of the *Criminal Code* (Cth) as Part II A effective from 20 December 2006 this presently applies only to a very narrow range of offences against the person listed in Schedule 1.
ascertained by an intelligent person" whilst 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.

4.2.1. Arguments For and Against Codification

The arguments for and against codification have been usefully collected by Farmer. The objections to codification are (1) that ‘the common law is uncodifiable’; (2) that such a code would ‘sacrifice the flexibility of the common law, trapping its reasoning within rigid conceptual confines’; (3) that judge-made law is better or less out of touch than law made by the legislator; and (4) that the common law’s greatest strength is its adaptability. This hostility to a code has been described as ‘codiphobia’ defined as a morbid fear and steadfast resistance to the ideas of codification emanating from the European continent.

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12 Griffith, above n 2, 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.
13 L. Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioner, 1833-45’ 18(2) Law and History Review (2000) 397, 398. Farmer here summarises the debate over the pros and cons of codification as follows: ‘The code, in short, offers system, the common law adaptability – whatever the supposed merits of each.’
14 Farmer, ibid, states that ‘the term was coined by Andrew Amos, Professor of Law at University College, London, and a former Law Commissioner, to describe the failure of the English legislator to grasp the nettle of codification’ citing A. Amos, Ruins of Time, exemplified in Sir Matthew Hale’s Pleas of the Crown (Stevens and Norton, 1859), xvii.
15 P. Goodrich, Reading the Law: A Critical Introduction to Legal Method and Technique (Basil Blackwell, 1986) 24. Farmer argues that because codification was scarcely thought to merit study by those imbued under the English common law, the conceptual tools to understand ‘codification and legislation as part of the common law tradition, are simply not available’: above n 13.
Mr Justice John Hedigan of the High Court of Ireland has addressed Farmer’s four objections in favouring codification. The first objection to codification, that the common law is uncodifiable, is to some extent countered by the 19th century experience of common law jurisdictions that have adopted criminal codes such as Canada, New Zealand, and Australia, and the 20th century experience in the United States. As regards Australia, it is significant in the context of the common law’s ‘steadfast resistance’ to continental codes that Griffith claimed he derived ‘very great assistance’ from Zanardelli’s Italian Penal Code of 1888. O’Regan has pointed out that the Griffith provisions are ‘in materially the same terms’ in Papua New Guinea.

The second objection that codification sacrifices the flexibility of the common law overlooks the need in any code for a degree of judicial interpretation in applying the code to situations that were not foreseen by the drafters of the code, at least until the legislature can decide whether it accepts the judicial interpretation of the case, or an amendment to the code is required. For example, in some US States like California,
codification is treated as a mere restatement of the common law with judges free to liberally interpret the Code until overridden by the legislature. Nevertheless, Goode has suggested that a ‘Code should provide better guidance for judges confronting a new situation’. Supreme and District Court Benchbooks already assist judges in delivering model directions to juries in standard cases (often based on appellate court decisions). These Benchbooks, it is contended, could usefully be expanded to cover almost every conceivable scenario if the code itself contained more detail and illustrations as per Macaulay’s Indian Penal Code (IPC) discussed in Chapter 3.

The third objection that judge-made law is superior to that of the legislator rather depends on the uniform quality of judges and the collective scrutiny of the legislation, notwithstanding ‘beauty in things exists merely in the mind that contemplates them’. In this context, Goode has memorably described Thomas J’s attack on the general principles outlined in the Model Criminal Code as ‘mere unreasoned abuse’. In any event, the Criminal Code (Cth) and Part 2 in particular, could scarcely have gone through greater public scrutiny starting with the Gibbs Committee, then the long drawn out Model Criminal Code Officers’ Committee (MCCOC) process and finally the emergence of the legislation itself.

26 Li v Yellow Cab Co (1975) 13 Cal. 3d 804. Section 4 of the Californian Civil Code (1872) states: ‘The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.’


28 See for example Department of Justice and Attorney-General, Supreme and District Court Benchbook (Queensland: The Department of Justice and Attorney-General 2008).


30 See Goode, above n 18, 159.

31 In 1991 the Standing Committee of Attorneys-General established the Model Criminal Code Officers’ Committee (MCCOC) ‘to prepare a uniform criminal code for all Australian jurisdictions … [and the] MCCOC has since gone on to produce a further seven reports on various areas of Commonwealth criminal law: S. Odgers, Principles of Federal Criminal Law (Lawbook Co, 2nd ed, 2010) 2 [0.0.140].
The fourth objection regarding the adaptability of the common law could equally be applied to the benefit of code interpretation. Judicial experience in adapting the common law to the circumstances of the case, in the tradition of Blackstone, is also relevant to code interpretation. Such adaptation has become necessary given legislative inertia and the Griffith Codes merely restating the common law, discussed in Chapters 2 and 3. Goode has pointed out: ‘And it can be said at once that codification does not mean that every case must be specifically dealt with. The interpretative role of the judiciary will remain a vital element in the process.’

This thesis goes further and contends that judicial interpretation can be minimised under a Benthamite code design. Farmer argues that the negative perception of codification as an interloper to the common law has resulted in ‘the existence of a long native tradition [in England] of codification [being] lost to view’.

The arguments in favour of codification are (1) that a code enjoys democratic legitimacy; (2) the law of the legislator is better than judge-made law as it provides ‘a theory of adjudication binding judges to the code’; (3) codification offers accessibility whereas the common law is accessible only to those trained in the

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32 Goode, above n 27, 12.
34 The Law Commission of England and Wales observed that ‘since the criminal law is arguably the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature’. Law Commission of England and Wales, *A Criminal Code for England and Wales Vol.2*, Report No 177 (1989) [2.2]. Underlying codification is the democratic concept of *res nullius* that the law belongs to no one in particular: Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law*, Department of Justice, Dublin, Ireland (2004) [1.28].
35 Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law*, Department of Justice, Dublin, Ireland (2004) [1.28]. The architect of the American Law Institute’s *Model Penal Code* has argued that a code underlines the point that ‘when so much is at stake for the community and the individual, care has to be taken to make law as rational and as just as law can be’: Herbert Wechsler, ‘The Challenge of a Model Penal Code’ (1986) *Criminal Law Review* 285, 289-290.
artificial reasoning of the law; and (4) that the code offers system in the sense that it is both a restraint and a guide to judges. In sum, one academic commentator has concluded that the central virtues of codification are ‘readability, accessibility, simplicity and clarity … if the code is effectively to articulate and announce the criminal law’s rules of conduct’. 

Taking up the last two virtues of simplicity and clarity, can it be fairly said that a code which contains far greater detail still retains clarity and avoids becoming submerged in a mire of statutory interpretation? First, comparisons between common law jurisdictions and code jurisdictions in Australia are muddied because lawyers in both jurisdictions commonly refer to multiple pieces of legislation. For example, whether the matter comes under the *Crimes Act 1900* (NSW) or the *Criminal Code* (Qld), lawyers need to refer to the relevant sentencing legislation when it comes to punishment. Statutory interpretation is becoming ever more important and is clouded by the piecemeal nature of criminal legislation. A comprehensive catalogue of offences and defences goes some way to aiding both the transparency and understanding of the criminal law.

Secondly, as discussed in Chapter 2, it is recognised that the limitations and ambiguity of language will constrain the goal of keeping statutory interpretation within the four

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36 Although, as Odgers, above n 31 [0.0.180], recognises in discussing Chapter 2 of the *Criminal Code* (Cth) ‘[f]or the most part, the meaning of the provisions is relatively clear, at least for someone with legal training’.
37 Expert Group, above n 35.
39 See Griffith, above n 2, iv. See also above n 27, 10, where Goode gives a list of common law offences in force in South Australia in the general area of offences of a public nature. ‘This, mind you, is just a list of the offences – discovering their content and coverage is yet another step.’
40 For example in *Campbell v R* [2008] NSWCCA 214 (16 September 2008) the appeal turned on the meaning of the word ‘imports’, and in *R v Toe* [2010] SASC 39 the appeal rested on the physical element of ‘importing’. *Campbell* was construed in the context of s 307.11 and *Toe* under s 307.2 of the *Criminal Code* (Cth).
corners of a code. Also, the changing nature of social values, the creativity of advocates and the ingenuity of criminals all ensure that a code cannot be a closed system. Nevertheless, if a code starts from the proposition of ‘covering the field’ with the intention of distilling the relevant law through the specific selection or rejection of available legal options and tests, the room for judicial manoeuvre within the code is reduced. Then, all the well known rules of statutory interpretation such as a provision being read in context or a construction that promotes the purpose underlying the code shall be preferred, come to the aid of keeping statutory interpretation within the four corners of a code. This thesis is not a search for a perfect and complete code, but an attempt to demonstrate that codes can be far truer to their intended design if a Benthamite model is followed.

4.3. THE CONCEPT OF CODIFICATION IN AN AUSTRALIAN CONTEXT

So how has the concept of codification translated in the Australian context? Gani has differentiated between (a) codification as per the Griffith Codes or the Model Criminal Code which she defines as a ‘relatively “complete statement of the law” on a branch of the law’ and (b) the codifying of an ‘area of law within the context of a larger statute’ such as covering the field on a discrete subject as exemplified by the law of self-defence within the Crimes Act 1900 (NSW).

41 K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd (1985) 157 CLR 309, 315 (Mason J).
42 See, for example, Acts Interpretation Act 1901 (Cth) s 15AA.
44 D. Pearce and R. Geddes, Statutory Interpretation in Australia (Butterworths, 5th ed, 2001) [8.7] and [1.20].
45 Gani, above n 43, 267.
46 Ibid.
It is doubtful if any criminal code in Australia can be described as approaching a complete statement of the criminal law, and Gani herself points out that the MCCOC failed to spell out their concept of codification in any of their reports. Gani observes that the MCCOC’s ‘treatment of the codification chapter of the *Model Criminal Code* [Chapter 1] is extraordinarily brief (effectively, one page) and does not directly engage with conceptual issues or comparative perspectives’. ⁴⁷

Instead, the MCCOC was content tacitly to endorse via supporting footnotes the views of two writers: MCCOC member Matthew Goode ⁴⁸ and English academic Andrew Ashworth. ⁴⁹ Goode’s definition of a criminal code is enlightening and provides a useful test against which to measure the success of any criminal code.

[A Criminal Code is a] pre-emptive, systematic, and comprehensive enactment of the whole field of law. It is pre-emptive in that it displaces all other law and its subject areas save only that which the Code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies. ⁵⁰

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⁴⁷ Ibid, 268. The precursor to the MCCOC, the Gibbs Committee, adopted a conservative approach to criminal law reform: ‘It should be noted that codification does not necessarily involve radical reform; the Review Committee would not propose to depart widely from existing principles, but would rather propose generally to restate existing principles whilst at the same time to fill gaps, remove obscurities and correct anomalies’: Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and Other Matters* (AGPS, 1990) 14 (emphasis added).

⁴⁸ Goode, above n 27.


By ‘comprehensive’ Goode ‘does not mean that a Criminal Code can or should be absolutely comprehensive [but] should take in all major indictable and summary offences’. Goode’s concern was to point out that a line had to be drawn somewhere, which he saw as a policy decision, and his discussion centred on whether juvenile offences, proceeds of crime legislation or pollution offences et al should be part of a criminal code. Such a pragmatic, broad brush policy delineation is necessary, along with the incremental approach to switching codes as exampled by the Northern Territory and discussed in Chapter 3. In summary, the real issue is the nature of ‘comprehensive’ in relation to all major indictable offences and of course the available defences.

Goode’s justification of codification of the criminal law in Australia is grounded on ‘four very basic principles of social justice’ which he identified as easy to find, easy to understand, cheap to buy, and democratically made and amended. This echoes Ashworth’s expectation of a criminal code as ‘an authoritative statement of the major offences [which under a code] would be more accessible and more comprehensible, and there would be greater consistency in terminology and greater certainty in the scope of offences’.

As Gani has noted, the language used by Goode and Ashworth above ‘is highly reminiscent of that used by Sir Samuel Griffith in his 1897 Explanatory Letter to

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51 Ibid.
52 A criminal code could still be considered ‘comprehensive’ if it only covered indictable offences and the available defences rather than criminal procedure. However, a ‘comprehensive’ General Part could then be used to define offences in other pieces of legislation as per the Commonwealth regime. See, for example, the Customs Act 1901 (Cth) discussed in Chapter 3.
53 Goode, above n 27, 8.
54 Ashworth, above n 49, 420.
55 Gani, above n 43, 269.
the Attorney-General of Queensland\textsuperscript{56} which leads Gani to conclude that ‘the principles underlying the Model Criminal Code are very similar to those underlying the Griffith Codes of the 19\textsuperscript{th} century’.\textsuperscript{57} But principles of social justice are a far cry from the codification of general principles of criminal law. The Model Criminal Code is a clear improvement on the Griffith Codes which, as discussed in Chapter 3, are caught in a 19\textsuperscript{th} century time warp, both because the provisions in the Griffith Codes are insufficiently comprehensive to abrogate the common law, and because criminal law theory has been substantially developed in the 20\textsuperscript{th} century.

4.4. INTERPRETATION OF CRIMINAL CODES

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.\textsuperscript{58} Kirby J has addressed this issue in several judgments\textsuperscript{59} but the most succinct version is to be found in Charlie v R.\textsuperscript{60}

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.\textsuperscript{61} It is not uncommon for codes, including in the area of criminal law, to introduce fundamental

\textsuperscript{56} Griffith, above n 2, iv.
\textsuperscript{57} Gani, above n 43, 269.
\textsuperscript{58} Pearce and Geddes, above n 44, [8.8].
\textsuperscript{59} See for example R v Barlow (1997) 188 CLR 1 and Murray v The Queen (2002) 211 CLR 193.
\textsuperscript{60} (1999) 199 CLR 387, 394 [14].
\textsuperscript{61} Boughey v The Queen (1986) 161 CLR 10, 30 (Brennan J).
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.\textsuperscript{63} The first loyalty, as it has been often put, is to the code.\textsuperscript{64} 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.\textsuperscript{65} But before deciding that there is ambiguity, the code in question must be read as a whole.\textsuperscript{66} The operation of a contested provision of a code, or any other legislation, cannot be elucidated by confining attention to that provision. It must be presumed that the objective of the legislature was to give an integrated operation to all of the provisions of the code taken as a whole, and an effective operation to provisions of apparently general application, except to the extent that they are expressly confined or necessarily excluded.

The 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 well be applied to the \textit{Australian Constitution} which is the very epicentre of Australian law. The \textit{Australian Constitution} is a very sparsely written document and the High Court has wrestled with its interpretation since Federation. Criminal Codes in Australia suffer from the same defect, 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’.

\textsuperscript{62} \textit{R v Martyr} [1962] Qd R 398, 413 (Philp J).
\textsuperscript{63} \textit{Brennan v The King} (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).
\textsuperscript{64} \textit{R v Jervis} [1993] 1 Qd R 643, 647 (McPherson ACJ); \textit{R v Barlow} (1997) 188 CLR 1, 32 (Kirby J).
\textsuperscript{65} \textit{Zecevic v Director of Public Prosecutions (Vic)} (1987) 162 CLR 645, 665 (Wilson, Dawson and Toohey JJ).
\textsuperscript{66} cf \textit{R v Jervis} [1993] 1 Qd R 643, 652 (McPherson ACJ).
4.4.1. Questions of Policy and Technical Meaning

4.4.1.1 Policy

This in turn raises two related questions, one of which goes to policy and the other to technical meaning. First, to what extent is the use of such sparse language a deliberate policy decision by the legislature to engage in ‘power-sharing’ with the judiciary notwithstanding a code is supposed to be a comprehensive enactment? Secondly, to what extent is the General Part of the code encompassing the principles of criminal responsibility either irrelevant or inadequate for the purpose of construing the application of substantive offences?

It may be objected that the first question above is misdirected, in that the more important question is that ambiguity can arise from language being either too sparse or too dense. However, this is to overlook the fact that the original Griffith Code, the Criminal Code (Qld), has been fundamentally unaltered for over a century, and that legislative inertia as opposed to regular updating of the Griffith Codes is the reality, as discussed in Chapter 2. For example, when the opportunity presented itself in 2011 to amend the original s 304 of the Criminal Code (Qld), which deals with provocation, the legislature was content to leave the original section intact as s 304(1) despite the fact that the sparse three lines contain tests and cases invisible to the lay reader. The decision by the legislature not to clarify and spell out the common law developments in the law of provocation since 1899, which have been imported into s 304 by the Supreme Court of Queensland, is indicative of an implicit ‘power-sharing’ by the legislature with the judiciary.

67 Criminal Code and Other Legislation Amendment Act 2011 (Qld).
Given that one of the reasons for having a code is to confine judicial lawmaking, it is as Gani suggests ‘ironic that the development of the rules governing the interpretation of criminal and other Codes in Australia has fallen and continues to fall largely within the province of the judiciary’. 69 So can any guidance be had from Chapter 1 of the Criminal Code (Cth) regarding a clear statement as to the construction of the Code? Leader-Elliott drily observes that ‘Chapter 1 of the Code is stark in its brevity, a solitary provision declaring that the only offences against laws of the Commonwealth are those created by Commonwealth statute’70 while Gani notes that the ‘MCCOC shied away from the issue’. 71

There may have been good reason for adopting such a small target approach given the hostile reception of the original interpretation section of the Draft Criminal Code put forward by the Law Commission of England and Wales. 72 Essentially, the argument against the inclusion of a construction clause was that ‘it was felt that provisions on interpretation were unnecessary insofar as they restate general principles of construction’ 73 or in the alternative ‘it was unwise to attempt to draft a comprehensive set of provisions [because] they would unbalance the Code and produce their own difficulties of interpretation’. 74 One wonders if this attack was a ‘fifth column’ of common law diehards seeking to minimise the reach of code provisions.

In any event, for present purposes, it is illuminating to juxtapose Leader-Elliott’s comment that Chapter 2 of the Criminal Code (Cth) ‘is based on article 2 of the

69 Gani, above n 43, 273.
71 Gani, above n 43, 273.
73 Ibid [3.15].
74 Ibid.
American Penal Code\textsuperscript{75} and the equivalent general part of the English Draft Criminal Code\textsuperscript{76} with Gani’s observation that the drafting team of the Draft Criminal Code accepted arguments that the provision \[on interpretation\] was ‘unnecessary [and] potentially dangerous’\textsuperscript{77} because it ‘directs attention to the previous law and seems to invite a search for ambiguity’\textsuperscript{78} [such that] the construction and illustration provisions were omitted from the Draft Code Bill.\textsuperscript{79} All that can be gleaned from the singular failure of the MCCOC to address the important issue of construction is that ‘it appears that the principles enunciated by the High Court, and particularly Kirby J, will apply to the interpretation of Criminal Codes in Australia’.\textsuperscript{80}

Reference was made in Chapter 3 to the Texas Penal Code which has an unusual provision that suspends the rule that a criminal statute be strictly construed, but rather the provisions ‘shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code’.\textsuperscript{81} Such a provision is rooted in the purposive approach to statutory interpretation, yet overlooks the well known expression that ‘the devil is in the detail’. Statutes normally contain a definitional section with other specific definitions listed for individual parts of the statute. An extension of this practice can only be helpful to lay understanding of the meaning of a particular section if key words are routinely explained. For example, as discussed earlier, the word ‘accident’ was not defined in s 23(1)(b) of the Criminal Code (Qld). In 2011,\textsuperscript{82} the word ‘accident’ was finally omitted from s 23(1)(b) and replaced by the ‘reasonably foreseeable consequence’ test, which the judiciary had been using for

\textsuperscript{75} See above n 21.
\textsuperscript{77} Law Commission of England and Wales, above n 72, [3.21].
\textsuperscript{78} Ibid.
\textsuperscript{79} Gani, above n 43, 274 citing Law Commission of England and Wales, n 72, [3.24].
\textsuperscript{80} Ibid, 275.
\textsuperscript{81} Texas Penal Code, s 1.05(a).
\textsuperscript{82} Criminal Code and Other Legislation Amendment Act 2011 (Qld).
many years to interpret ‘accident’. Such a test bears no resemblance to the normal usage of the word ‘accident’.

If the law is supposed to be ‘knowable’ then it needs to be spelt out. Effectively, there is a spectrum of criminal law design available to the legislator. At one end of the spectrum is the common law, and at the other is a comprehensive Benthamite code. The logic of the pure common law model is that there is no need for statute and everything can be left to the common law. As was discussed in Chapter 3, historically the reality was a legislative preference for statute and statute consolidation. Starting in the 19th century in England and ‘exported’ to the British Empire, a momentum built up of legislators replacing the common law by statute. Thus, as mentioned earlier, in 1897 Griffith was able to observe that the criminal law of Queensland was scattered throughout nearly 250 statutes outside of the applicable common law.83

Ironically, the situation today is little different in Queensland (or any other jurisdiction in Australia). Whether one is describing the criminal law landscape in the Griffith Code jurisdictions (Queensland, Western Australia, Tasmania and the Northern Territory) or the so called common law jurisdictions of New South Wales, Victoria and South Australia which are statute based,84 the principal piece of criminal law legislation is based on the common law and is supplemented by a myriad of other statutes. This criminal law landscape is open to improvement in two ways. First, judicial discretion can be reduced by the inclusion of more detail in the individual sections of the relevant statute. This point is developed in a later section of this Chapter which discusses the excuse of honest claim of right, and requires legislators to accept or reject the common law set precedents and case law that underpin the

83 Griffith, above n 2, iv.
84 See Crimes Act 1900 (NSW), Crimes Act 1958 (Vic) and Criminal Law Consolidation Act 1935 (SA).
‘hidden’ law to the lay reader. Secondly, once a comprehensive General Part covering the physical and fault elements is in existence, then other criminal law legislation can be aligned to mirror the General Part and the specification by the legislature of the particular elements for each offence. Such alignment is already occurring with the *Criminal Code* (Cth) and other criminal legislation within the Commonwealth regime.\(^{85}\)

Nevertheless, despite a comprehensive General Part, this thesis answers the first question above by concluding that the paucity of language in Chapter 1 of the *Criminal Code* (Cth) demonstrates a clear policy decision by the legislature to engage in ‘power-sharing’ with the judiciary, with the MCCOC content to leave windows into the Code through which the common law freely passes. As will be demonstrated in later sections of this Chapter, the common law is implicitly incorporated into all the Criminal Codes of Australia both by reference and by design. Such a ‘power-sharing’ arrangement may well suit the legislature because it has to face the electors, whereas judges do not and enjoy tenure until retirement. It is perhaps understandable that the legislature may prefer to deliberately leave questions of code interpretation to the judiciary, rather than make explicit choices itself.

4.4.1.2 Technical Meaning

Turning now to the second question, one must ask: how successful is a General Part in construing the application of substantive offences? A useful starting point can be found in Dixon CJ’s well known criticism of s 13(1) of the *Criminal Code* (Tas) in

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\(^{85}\) See *Customs Act 1901* (Cth), above n 52.
Leader-Elliott has suggested that Dixon CJ’s analysis of the Tasmanian incarnation of s 23 of the Griffith Queensland Code and His Honour’s attack on s 13(1), the central provision of criminal responsibility in the Criminal Code (Tas), ‘was to have a devastating effect on attempts to articulate a coherent theory of criminal liability in jurisdictions which adopted the Griffith Code’.  

Vallance was charged with unlawful wounding. The question the High Court had to determine was the relationship between the offence of unlawful wounding and s 13(1) Criminal Code (Tas) below:

No person shall be criminally responsible for an act unless it is voluntary and intentional; nor…for an event which occurs by chance.

Dixon CJ fired his first salvo at Sir Samuel Griffith by declaring that ‘an examination of the Code, in an attempt to answer what might have been supposed one of the simplest problems of the criminal law [the place of intention on a charge of unlawful wounding], leaves no doubt that little help can be found in any natural process of legal reasoning’. Dixon CJ continued in similar vein by deriding the introductory part of the Code for containing ‘wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do’. By this Dixon CJ meant that such abstractions of doctrine were not to be interpreted as general deductions.

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86 (1961) 108 CLR 56.
87 Leader-Elliott, above n 70, 29.
88 Vallance v The Queen (1961) 108 CLR 56, 58.
89 Ibid.
from specific instances that followed but came ‘ab extra and speak upon the footing that they will restrain the operation of what follows’.  

The problem, as Dixon CJ explained, was that the plan of the Tasmanian Code was to provide for specific offences whilst at the same time treating their complete definition as finally determined by Chapter IV (criminal responsibility). This plan could not be uniformly undertaken because ‘common sense rather suggests that guilt will depend on definitions that in point of fact will fall outside the philosophy of s 13 [and] to turn over the sections of the Code is enough to show how large a number of crimes there are to the elements of which s 13(1) can have little or nothing to say’. Dixon CJ then applied s 13(1), which he took to be saying all the acts of the defendant that formed the elements of the offence had to be voluntary and intentional, to the offence of unlawful wounding and concluded that the wounding must be voluntary and intentional (not reckless).

This then led to Dixon CJ’s second salvo at the architect of the Criminal Code (Qld), namely, ‘that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially’.

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90 Ibid.
91 Ibid 60.
92 Ibid 61. Two good examples of provisions being worked out judicially can be seen in the interaction between s 31 Criminal Code (NT) and, first, the now repealed s 162(1)(a) which dealt with murder, and, secondly, the now amended s 192 which covers sexual assault. In the first example, in Charlie v The Queen [1999] HCA 23 [69] Callinan J held that the express reference to intent in s 162(1)(a) meant that s 31 of the Criminal Code (NT) had no role to play as all the mental elements were set out in s 162(1)(a). In the second example, in Director of Public Prosecutions (NT) v WJI [2004] HCA 47 [8] Gleeson CJ held that in relating ss 192(3) and 31(1) of the Criminal Code (NT), having regard to the definition of ‘act’ (‘deed ... not limited to bodily movement’), a broad interpretation of ‘act’ necessarily followed such that the relevant act is having sexual intercourse with another person without the consent of the other person, as opposed to the DPP’s contention that the ‘act’ was sexual intercourse itself.
Leader-Elliott has suggested that Dixon CJ’s argument was essentially that ‘s 13(1) was an unnecessary irrelevance’. 93 This seems a little broad but certainly accurate for the type of offences that Dixon CJ identified such as fraud, personation, sexual offences, receiving et al, which require a mental element to be identified from within the section dealing with the offence or the Special Part, rather than from s 13 and the General Part. More telling is Leader-Elliott’s observation that Dixon CJ’s judgment went to the central defect of the Griffith Codes, namely, ‘their near complete failure to anticipate the effects which the general provisions of the Code were supposed to have on the analysis and application of the substantive offences’. 94 Thus, the plan upon which the Code was conceived fell apart because the central criminal responsibility sections were either an optional extra or hopelessly intermingled with the substantive offence rather than governing the particular offence provision.

Leader-Elliott has argued that the counterweight to Dixon CJ’s criticisms can be found in the ‘seminal judgment delivered by Brennan J in He Kaw Tey’ 95 [which] looks forward to Chapter 2 of the Model Criminal Code [and] provided the template for the provisions which set out the elements of criminal liability’. 96 He goes on to liken Part 2.2 of the Criminal Code (Cth) which is based on the Model Criminal Code ‘to rules of statutory interpretation [which] possess a quasi-constitutional status because they articulate principles of common law which are generally taken to embody fundamental principles of criminal justice’. 97

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93 Leader-Elliott, above n 70, 30.
94 Ibid.
95 (1985) 157 CLR 523.
96 Leader-Elliott, above n 70, 29.
97 Ibid, 31.
In a more recent article, Leader-Elliott has stated that ‘[i]t is implicit in the Code that the general principles and the definitions of concepts in Chapter 2 take priority over the localised “context and subject matter” of particular offences’\(^98\) by virtue of 2.2 (‘Application’) which states that Chapter 2 applies to all offences against this Code. Leader-Elliott unfavourably compares Griffith’s Queensland Criminal Code where he describes the general principles as having been vitiated as a result of ‘their subordination to the local particularities of the substantive offences’.\(^99\) Thus, the position being put by Leader-Elliott is that Part 2.2 overcomes the problems with the Griffith Codes identified by Dixon CJ in *Vallance*, and by implication is both a substantial improvement on the Griffith Codes and meets Bentham’s criterion of ‘no blank spaces’ at least for offences (as opposed to defences in Part 2.3).

4.4.2. Structure and Interpretation of the Criminal Code (Cth)

The most important component of Chapter 2 of the *Criminal Code* (Cth) is Part 2.2 which covers the elements of an offence. The formula\(^100\) adopted is that an offence consists of physical and fault elements (although an offence may provide for no fault element in the case of strict or absolute liability).\(^101\) Physical elements can be conduct,

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\(^{99}\) Ibid.

\(^{100}\) See *Regina v JS* [2007] NSWCCA 38 (10 September 2004) [145] (Spigelman CJ): ‘Fundamental aspects of the law have been altered by the *Criminal Code* in substantial and indeed critical matters, by the replacement of a body of nuanced case law, which never purported to be comprehensive, with the comparative rigidity of a set of interconnecting verbal formulae which do purport to be comprehensive and which involve the application of a series of cascading provisions, including definitional provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage.’

\(^{101}\) Ibid [152]. ‘No provision of the Code states that a physical element which is a question of law for the judge cannot have attached to it a fault element which the jury must decide. The Code makes no direct distinction between questions of law and questions of fact. It does, however, make express provision for decoupling a specific physical element, relevantly a question of law, from any fault element. This can be done by either providing that no fault element applies to that physical element (under s 3.1(2)) or by specifying that strict or absolute liability applies to the offence (under s 6.1 or s 6.2).’
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. For example, the definition of negligence in section 5.5 is based closely on Nydam v The Queen and is entirely objective.  

In R v Saengsai-Or, Bell J explained the operation of Chapter 2 in relation to an offence as follows:

An offence consists of physical and fault elements. Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element. An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (provision is made for the law creating an offence to specify that there is no fault element for one or more of the physical elements of the offence). In the absence of specification of the fault element (or specification that there is no fault element) for a physical element the Criminal Code makes provision for default fault elements: s 5.6.

Intention is the default fault element for a physical element that consists only of conduct: s 5.6(1). Recklessness is the default fault element for a physical element that consists of a circumstance or a result: s 5.6(2).

At first sight, it might not seem that the above analysis of the operation of Chapter 2 outlines a simplification of the law, or how it could be understood by the lay person. However, on closer inspection, Chapter 2 is a clear statement of a binary structure of physical and fault elements that avoids Dixon CJ’s criticism of the Griffith Codes.

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102 [1977] VR 430. The test for negligence is totally objective, negligence requiring such a great falling short of the standard of care that a reasonable person would exercise, and such a high risk that the physical element exists, that the conduct merits criminal punishment. It may be objected that the ‘reasonable person’ test requires judicial determination. However, there is nothing to prevent the legislature defining such a test and regularly updating such a definition in line with changing community standards of a ‘reasonable person’, rather than leaving determination of the ‘reasonable person’ standard to the unelected judiciary.

discussed earlier. Importantly, it requires legislative selection of each element rather than leaving the interpretation to the judiciary, because in the Griffith Codes the General Part is not tied directly to the Special Part.

Essentially, the basic structure of the *Criminal Code* (Cth) is that the conduct (act) must be intentional and the person engaging in the conduct must be reckless (the threshold for liability) either as to the result of conduct or as to the circumstance in which conduct happens. Leader-Elliott has rightly described recklessness as the ‘ubiquitous fault element’\(^\text{104}\) which requires an awareness of a substantial risk the taking of which is unjustifiable. The subjective requirement of ‘awareness’ for recklessness is the sole distinction between recklessness and negligence in the *Criminal Code* (Cth). Notwithstanding the fact that Part 2.2 treats the distinction between recklessness and negligence as fundamental (only recklessness contains a subjective component), it was demonstrated in *Simpson v The Queen* that there is a thin line between recklessness and negligence - between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.\(^\text{105}\) It requires but a small step to envisage that the ‘fall back’ fault element of recklessness in the *Criminal Code* (Cth) may not be up to the task it has been allocated, as Leader-Elliott has acknowledged.\(^\text{106}\)

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\(^{104}\) Leader-Elliott, above n 70, 39.

\(^{105}\) (1998) 103 *A Crim R* 19. In *Simpson*, the High Court was construing s 157(1)(c) *Criminal Code* (Tas) which deals with murder and in particular whether the offender knew or ought to have known whether the unlawful act was likely to cause death in the circumstances. The High Court held that if a fact or circumstance is so well known that no reasonable person in the community would dispute it (here stabbing the deceased in the general area of the upper body), a jury may safely infer that the offender (appellant) knew it unless denial by him raises a reasonable doubt about his knowledge.

\(^{106}\) Leader-Elliott, above n 70, 39-40. Leader-Elliott makes the point that in England following *Caldwell v Commissioner of Police* [1982] AC 341 ‘the distinction between recklessness and negligence notoriously collapsed’ going on to suggest that the difficulties of maintaining the distinction across a range of offences ‘are considerable’ as are ‘the temptations to dilute the requirement of actual awareness’.
In *R v Saengsai-Or*, the appellant appealed against his conviction under s 233B(1)(b) of the *Customs Act 1901* (Cth) for importing into Australia a trafficable quantity of heroin concealed in two bottles of brandy. Bell J considered that the physical element of the offence created by s 233B(1)(b) was one of conduct: the act of importing into Australia any prohibited import to which the section applies. Her Honour found that ‘in respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the *Criminal Code* apply. Intention is the fault element’. The jury members at first instance had been directed that if they were satisfied of the appellant’s awareness of a substantial risk that the brandy bottles contained narcotics and that in the circumstances it was unjustifiable to take that risk then the element of intention would be proved. As the jury had thus been directed on recklessness, Bell J held that this was a misdirection.

Goode has observed that Bell J misread the *Code*, pointing out that the importation of heroin is a circumstance and therefore the fault element is recklessness.

Bell J was faced with a problem of legal analysis with which she was not familiar and which she found difficult to comprehend. She solved the problem by extensive reference to the pre-existing common law. … The problem with Bell J’s reasoning is very apparent to Code lawyers.

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108 Ibid [75].
110 *Brennan v The King* (1936) 55 CLR 253, 263. See above n 63.
More recently, the High Court in *The Queen v Wei Tang*\(^\text{112}\) was required to consider an appeal by the Crown against the quashing of convictions under s 270.3(1)(a) of the *Criminal Code* (Cth) which dealt with possession of a slave or the exercise over a slave of any of the other powers attaching to the right of ownership. The Court of Appeal of the Supreme Court of Victoria quashed Ms Tang’s convictions, holding that the jury should have been instructed that the prosecution had to prove that Ms Tang had the knowledge or belief that the powers being exercised were obtained through ownership, as well as proving the intention of Ms Tang to exercise those powers. The prosecution appealed to the High Court.

The High Court allowed the appeal holding that the prosecution had made out the required elements of the offences and did not need to prove what Ms Tang knew or believed about her rights of ownership. The prosecution did not need to prove that she knew or believed that the women were slaves. The critical powers she exercised were the power to make each woman an object of purchase, the capacity to use the women in a substantially unrestricted manner for the duration of their contracts, the power to control and restrict their movements, and the power to use their services without commensurate compensation.\(^\text{113}\)

Gleeson CJ took issue with the reasoning of the Court of Appeal in the following terms:

> Chapter 2 of the Code does not provide support for the Court of Appeal's reasoning … the physical element of the offence was conduct, which is defined to include both an act and a state of affairs … Both possessing a slave and using a slave are conduct, and the prosecution


\(^{113}\) *The Queen v Wei Tang* [2008] HCA 39 (28 August 2008).
had to establish the existence of the conduct and one of the fault elements specified in s 5.1(1).

The prosecution case was conducted on the basis that the relevant fault element was intention… Eames JA said that all of sub-ss (1), (2) and (3) of s 5.2 were relevant. This is not easy to understand: sub-s (1) applies where the physical element is conduct; sub-s (2) applies where the physical element is a circumstance; sub-s (3) applies where the physical element is a result. Section 4.1 says a physical element may be conduct or a result of conduct or a circumstance in which conduct or a result of conduct occurs.

The physical element was conduct (which includes a state of affairs); the fault element was intention. It was, therefore, s 5.2(1) that was relevant. A person has intention with respect to conduct if he or she means to engage in that conduct. Knowledge or belief is often relevant to intention. If, for example, it is the existence of a state of affairs that gives an act its criminal character, then proof of knowledge of that state of affairs ordinarily will be the best method of proving that an accused meant to engage in the proscribed conduct.  

Goode has criticised the majority for concluding there was no fault element attaching to the slavery circumstance, by ignoring the whole point of default elements.

They [default fault elements] are to be used when Parliament does not specify a fault element. Parliament did specify for the offence under consideration [possession of a slave], making the defaults irrelevant. It is a distinct question of interpretation of the offence itself as to the extent to which the added word ‘intentionally’ qualifies all or some of the physical elements of the offence.

Two conclusions can be drawn from *R v Saengsai-Or* and *The Queen v Wei Tang*. The first is that, as would be expected, in the early stages of the Federal Code’s history, judges face challenges in the interpretation of Chapter 2 of the *Criminal Code* (Cth) as it applies to a specific offence (here, respectively, drug importation and possession of a slave). Secondly, Dixon CJ’s dicta in *Vallance* that specific solutions to Code

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115 Gleeson CJ, Gummow, Heydon, Hayne, Crennan and Kiefel JJ.
116 Goode, above n 111, 328.
provisions have to be worked out judicially, whilst still valid, carry less weight for the
*Criminal Code* (Cth) as Chapter 2, the General Part, informs the Special Part. Leader-
Elliott considers that Chapter 2 had ‘emerged unscathed, indeed reinforced, as a
consequence of judicial scrutiny by the High Court in *The Queen v Tang* …
remarkable for the strict literalism of its interpretation of Part 2.2’. 117

In *R v JS*, 118 Spigelman CJ gave an extended analysis of the statutory interpretation of
Chapter 2 of the *Criminal Code* (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 section 39 to be interpreted within the context of the relevant
*Criminal Code* (Cth) provisions ‘which require a particular analysis, in accordance
with the requirements of that Code’. 119 For example, His Honour pointed out that
‘[b]y reason of the express reference to knowledge in s 39 of the *Crimes Act 1914*
(Cth), the relevant fault element for present purposes is “knowledge” which is defined
in s 5.3’ [*Criminal Code* (Cth)]. 120 In this respect, the *Criminal Code* (Cth) with its
specific matching of physical and fault elements seeks to avoid the criticisms that
Dixon CJ in *Vallance* leveled at the Griffith Code in general and section 13 of the
*Criminal Code* (Tas) in particular. An important aspect of the case was that
Spigelman CJ rejected the appellant’s submission that there were categories of fault
elements that arose by implication despite being unspecified in the provisions of the
*Code*.

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117 Leader-Elliott, above n 98, 205.
118 *Regina v JS* [2007] NSWCCA 38.
119 Ibid [8]. Spigelman CJ stated that the relevant provisions of the *Criminal Code* (Cth) were s 3.1
(‘Elements’); s 3.2 (‘Establishing guilt in respect of offences’); s 4.1 which deals with matters capable
of constituting a physical element (here, s 4.1(1)(c) – a circumstance in which conduct occurs); and
In its submissions to this Court the Appellant sought to draw a distinction between different kinds of elements of an offence. It invoked a distinction between ‘substantive’ and ‘definitional’ characteristics of a physical element of an offence, suggested by the author of a text on the Code.\textsuperscript{121} It also invoked a similar distinction, drawn by the author of another text, between ‘facts’ and ‘statutory references or designations’.\textsuperscript{122}

I do not think it is open, when construing a Code, to decide that there are elements of an offence that are merely ‘definitional’ or ‘referential’ in such manner as to permit the words used in the formulation of the offence to be set aside. The very breadth of the definition of ‘physical element’, encompassing as it does anything capable of answering the description of a ‘circumstance’, indicates that all of the words of a statutory offence to which the \textit{Criminal Code} applies must be given force and effect.\textsuperscript{123}

Thus, there is support for the claim that judicial interpretation of Part 2.2 should be conducted with ‘strict literalism’, of which Dixon CJ would doubtless have approved.

For example, in \textit{Campbell v R}, Spigelman CJ held that a new statutory context of a Code\textsuperscript{124} covering a wide range of drug offences suggested ‘that a precise, rather than expansive, sense of the word “imports”\textsuperscript{125} has been adopted’.\textsuperscript{126} However, the more

\textsuperscript{121} S. Odgers, \textit{Principles of Federal Criminal Law} (Lawbook Co, 1st ed, 2007) 22 [4.1.390]. Odgers responded to this criticism in the 2nd edition of his text, above n 31, 30 - 31 [4.1.390]: ‘However, important limits remain concerning the extent to which purely lexical matters (that is, the choice of particular words in a definition and their precise location in a statute) will be a component of a physical element.’


\textsuperscript{123} \textit{Regina v JS} [2007] NSWCCA 38 [126] – [127].

\textsuperscript{124} Spigelman CJ notes that ‘the Commonwealth’s long standing legislative regime with respect to imports was engrafted upon the proposed national model for drug offences’: \textit{Regina v JS} [2007] NSWCCA 38 [114]. His Honour continues by quoting from the Explanatory Memorandum for the Bill which explains that the import and export offences in Division 307 are based on the \textit{Customs Act 1901} (Cth) whereas the other offences are based on Chapter 6 of the \textit{Model Criminal Code} which was developed in 1998 by the MCCOC. [115.]

\textsuperscript{125} Section 300.2 of the \textit{Criminal Code} (Cth) now contains a definition of the word ‘import’ in order to overcome the decision in \textit{Campbell v R}.

\textsuperscript{126} [2008] NSWCCA 214 [126]. In \textit{Campbell} the jury was handed a document identifying six elements of which they had to be satisfied beyond reasonable doubt in order to convict the appellant. The most important element was number 5: that Mrs Campbell knew that there were tablets with pseudoephedrine in them inside container DLCU 2141810 or Mrs Campbell was aware of a substantial risk that there were tablets with pseudoephedrine in them inside container DLCU 2141810 and, in the circumstances known to her, it was unjustifiable for her to take that risk by importing the container.
important question is whether the approach to the *Criminal Code* (Cth) interpretation ‘on the basis it comprehensively states each of the elements of a criminal offence’\(^{127}\) is sound. Spigelman CJ states that such an approach follows of necessity because ‘[t]hat is the central purpose of adopting a Code’.\(^{128}\) However, his Honour goes on to point out that there is a built-in assumption to this approach, namely, that:

> [I]t is apparent on the face of the offence, as interpreted in the light of the Criminal Code, precisely what are the physical elements of an offence and to precisely which of those physical elements a fault element, if any, attaches and what that fault element is.\(^{129}\)

In *Crowther v Sala*,\(^{130}\) a case where the relevant fault element was disputed, the applicant appealed her conviction under s 474.17(1) of the *Criminal Code* (Cth) which deals with using a carriage service (here a telephone line) to menace, harass or cause offence. There was no dispute as to the relevant content of the applicant’s two telephone calls made 10 minutes apart, which was to the effect that unless she got an answer to her question she would get a shotgun and was going to use it on everyone in the complainant’s office. The Magistrate rejected the applicant’s contention that she was only using Australian colloquialisms in finding that, objectively, a reasonable person would find her words menacing. On appeal, the District Court judge agreed in applying an objective test.

The Queensland Court of Appeal divided 2:1 on a further appeal by the applicant. Williams JA dissented finding that the only fault element necessary for the offence was the intention to use the telephone and utter the words. He considered that, because s 474.17(1)(b) contained the phrase ‘that reasonable persons would regard as

\(^{127}\) *Regina v JS* [2007] NSWCCA 38 [129] (Spigelman CJ).

\(^{128}\) Ibid.

\(^{129}\) Ibid.

\(^{130}\) [2007] QCA 133.
being, in all the circumstances, menacing’, the subjective intent of the person uttering
the words was not relevant.\textsuperscript{131} His Honour concluded that ‘a fault element has been
excluded by necessary implication with respect to the element of the offence that
reasonable persons would in the circumstances regard the conduct in question as
menacing’.\textsuperscript{132}

The judgment for the majority was given by Philip McMurdo J who found that there
was no implied exclusion of the fault element in s 474.17(1)(b) and what must be
proved is ‘that objectively viewed the conduct was menacing and that the defendant
either intended that it be so or was reckless as to that fact’.\textsuperscript{133} His Honour reached that
conclusion by virtue of s 5.6(2) which provides that, if the law creating the offence
does not specify a fault element for a physical element that consists of a circumstance
or a result, then the corresponding fault element is recklessness.\textsuperscript{134} As the Magistrate
had made no finding as to what the applicant had thought about her conduct at the
time, the appeal was allowed.

Interestingly, Leader-Elliott has viewed the decision in \textit{Crowther v Sala} as something
of a double edged sword. On the one hand, Leader-Elliott applauded the decision as ‘a
salutary instance of strict construction of the requirements of Chapter 2’\textsuperscript{135} whilst also
finding that the decision represented ‘a danger signal, requiring legislative
intervention’.\textsuperscript{136} Leader-Elliott’s preferred amendment would be ‘to the effect that
falling short of an ordinary person or reasonable person standard constitutes a

\begin{footnotes}
\item[132] Ibid [27].
\item[133] Ibid [47].
\item[134] Goode, above n 111, 324-325, agrees with McMurdo J’s reasoning and criticises the dissenting
judgment of Williams JA for ignoring the entire purpose of the Code scheme of default fault elements.
\item[135] Leader-Elliott, above n 98, 230.
\item[136] Ibid.
\end{footnotes}
Division 5 fault element’. 137 This fault element would operate in a similar manner to the existing fault element of negligence and thereby avoid the automatic application of s 5.6 (‘Offences that do not specify fault elements’) ‘when breach of the standard is characterised as a circumstantial element of an offence’. 138

This is a novel suggestion and entirely consistent with the architecture of Chapter 2 with its interconnecting formulae. 139 However, as the case law on the Criminal Code (Cth) grows, it can be confidently anticipated that judges will increasingly be able to rely on precedent in deciding which physical and fault elements apply to specified offences under the circumstances of the particular case. Such an outcome is unsurprising given both the formulaic nature of Part 2.2 and the breadth of Commonwealth offences. 140 So perhaps the Criminal Code (Cth) has indeed emerged ‘unscathed’ or ‘reinforced’, whilst also undergoing a period of judicial clarification natural for a Code which was first minted in 1995 and which marks a major break with the architecture of the Griffith Codes.

It may be objected that any period of judicial clarification is inconsistent with Bentham’s model for a code of ‘no blank spaces’. Yet, as stated at the commencement of this Chapter, this thesis is not a search for a complete code, but an attempt to demonstrate that codes can be far truer to their intended design if a Benthamite model

137 Ibid, 232.
138 Ibid.
with comprehensive detail is followed. The purpose is to reduce the scope of judicial discretion. It would be unrealistic to expect the legislature to adopt a code that would be interpreted by the judiciary in exactly the manner intended or to anticipate every conceivable factual scenario. The legislature retains the power to amend the code in the face of either inconsistent judicial interpretation, or the need to address a drafting error, or to update the code to account for required developments in the reach of the criminal law. Properly understood, given the judiciary administers the law, it is inevitable that there will be a period of adjustment and clarification when a new criminal code is introduced which in no way undermines a Benthamite model.

Bentham’s test of ‘no blank spaces’ in a criminal code may be met for the elements of an offence in Part 2.2 of the Criminal Code (Cth), but can the same be said for defences and excuses? It is therefore now appropriate to turn to Part 2.3 which covers circumstances in which there is no criminal responsibility. However, at this juncture, it should be acknowledged that Part 2.2 represents the best springboard into a Benthamite code in Australia. Correct application of Part 2.2 to specific Commonwealth offences is more a question of judicial familiarity than any limitations in this General Part. Conversely, judicial familiarity with the Griffith Codes has reached a stage that, notwithstanding the obvious fundamental defects, the judiciary is completely wedded to the Griffith Codes.
4.5. CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

To be found guilty of a criminal offence (other than one of strict or absolute liability), fault must be proved against the defendant. In some circumstances, it will also be necessary for the Crown to negative defences, such as self-defence, beyond reasonable doubt, or for all defences or excuses prima facie open on the evidence to fail. Such a binary structure of criminal responsibility combines proven fault liability with the elimination of any defence or excuse, and ‘is common to all modern codes derived from the common law’.\(^\text{141}\) For example, Part II of the *Criminal Code* (NT) is entitled Criminal Responsibility and is divided into four Divisions: General Matters, Authorisation, Justification and Excuse.

In the terminology of the *Criminal Code* (Cth), the offences are to be found in Part 2.2 and the defences in Part 2.3 which is entitled *Circumstances in which there is no criminal responsibility* and sets out the defences that are generally available. Part 2.3 covers the field of available defences some of which, like self-defence (s 10.4), do not follow the common law. With the usual exception of mental impairment (s 7.3(3)), section 13.3(3) provides that ‘a defendant who wishes to rely on any exception, exemption, excuse qualification or justification provided by the law creating the offence bears the evidential burden [of demonstrating a reasonable possibility that the exception, etc applies] in relation to that matter’.

The available defences listed in Part 2.3 are lack of capacity for criminal responsibility; mental impairment; intoxication; mistake or ignorance; intervening

\(^{141}\) Leader-Elliott, above n 70, 32.
conduct or event; duress; sudden or extraordinary emergency; and self-defence. Significantly, while s 115.1(d) of the Criminal Code (Cth) covers murder of an Australian citizen or a resident of Australia outside Australia, following the recommendations of the MCCOC in the context of developing a uniform criminal code for Australian jurisdictions, there is no provision for either of the partial defences to murder of provocation and diminished responsibility in Part 2.3. These two partial defences do exist in both the Criminal Code (Qld) and the Criminal Code (NT), and will be addressed for provocation in the context of objective tests in Chapter 5, and for diminished responsibility in the context of the need for a definition of the word ‘substantial’ in Chapter 10.

4.5.1. Claim of Right

Of the available defences in Part 2.3, Division 9 covers Circumstances involving mistake or ignorance, and s 9.5 deals with Claim of Right. This section has been singled out as the excuse of honest claim of right encompasses a considerable body of common law hidden to the lay reader by the words of the statute.142 The MCCOC stated that claim of right ‘normally negatives a fault element, usually, but not necessarily, one of dishonesty, and the Code should reflect that state of the law’.143 Section 9.5 of the Criminal Code (Cth), which is set out below, is an example of inadequate drafting, and will be used to support the contention that brief sections that hide or imply a considerable body of case law are not only unsatisfactory and fail

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142 This is even more apparent in the equivalent section, s 22(2), of the Criminal Code (Qld) and the Criminal Code (WA): ‘But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.’ The above three lines do not make the law simple and accessible if a raft of common law principles have to be imported in order to interpret the meaning of an honest claim of right.

Bentham’s ‘no blank spaces’ test, but also can be considerably improved in line with the objective of a criminal code to state fully the relevant law.

Section 9.5. Claim of right

(1) A person is not criminally responsible for an offence that has a physical element relating to property if –
   (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right;\textsuperscript{144} and
   (b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that the person mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

The authorities have been usefully collected together in \textit{R v Fuge}\textsuperscript{145} by Wood CJ at Common Law as to the principles relating to an honest claim of right, albeit in a common law rather than a criminal code jurisdiction, although the Australian Criminal Codes do no more than reflect the common law as regards claim of right. The list of legal principles covered in the authorities below runs from (a) to (i) and encompasses over 20 cases.\textsuperscript{146}

\textsuperscript{144} The concept of a ‘proprietary’ or ‘possessory’ right is a common law concept under which lies a substantial body of case law.

\textsuperscript{145} \textit{R v Fuge} (2001) 123 A Crim R 310.

\textsuperscript{146} Ibid [24].
A review of the authorities shows that:

a) the claim of right must be one that involves a belief as to the right to property or money in the hands of another;\(^{147}\)

b) the claim must be genuinely, i.e. honestly held, it not being to the point whether it was well founded in fact or law or not;\(^{148}\)

c) while the belief does not have to be reasonable,\(^ {149}\) a colourable pretence is insufficient;\(^ {150}\)

d) the belief must be one of a legal entitlement to the property and not simply a moral entitlement;\(^ {151}\)

e) the existence of such a claim when genuinely held, may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms; the relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it;\(^ {152}\)

f) the claim of right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value, of which \(\text{Langham}^{153}\) and \(\text{Lopatta}^{154}\) provide examples; although that may be qualified when, for example, the property is taken ostensibly under a claim of right to hold them by way of safekeeping, or as security for a loan, yet the actual intention was to sell them;\(^ {155}\)

147 \(R \text{ v Langham} (1984) 36\) \(\text{SASR}\) 48.
148 \(R \text{ v Nundah} (1916) 16\) \(\text{SR (NSW)}\) 482; \(R \text{ v Bernhard} (1938) 2\) \(\text{QB}\) 264; \(R \text{ v Lopatta} (1983) 35\) \(\text{SASR}\) 101, 107; \(Walden \text{ v Hensler} (1987) 163\) \(\text{CLR}\) 561; and \(R \text{ v Langham} (1984) 36\) \(\text{SASR}\) 48, 52-53.
149 \(R \text{ v Nundah} (1916) 16\) \(\text{SR (NSW)}\) 482, 485-490; \(R \text{ v Langham} (1984) 36\) \(\text{SASR}\) 48, 49; and \(R \text{ v Kastratovic} (1985) 19\) \(\text{A Crim R}\) 28.
150 \(R \text{ v Dillon} (1878) 1\) \(\text{SCR NS (NSW)}\) 159 and \(R \text{ v Wade} (1869) 11\) \(\text{Cox CC}\) 549.
151 \(R \text{ v Bernhard} (1938) 2\) \(\text{QB}\) 264 and \(Harris \text{ v Harrison} (1963)\) \(\text{Crim LR}\) 497.
152 \(R \text{ v Love} (1989) 17\) \(\text{NSWLR}\) 608, 615-616; \(R \text{ v Salvo} (1980)\) \(\text{VR}\) 401; \(R \text{ v Langham} (1984) 36\) \(\text{SASR}\) 48, 58; \(R \text{ v Kastratovic} (1985) 19\) \(\text{A Crim R}\) 28; \(R \text{ v Barker} (1983) 153\) \(\text{CLR}\) 338; \(R \text{ v Williams} (1986) 21\) \(\text{A Crim R}\) 460; and see also \(R \text{ v Boden} (1844) 1\) \(\text{C & K}\) 395.
153 \(R \text{ v Langham} (1984) 36\) \(\text{SASR}\) 48.
154 \(R \text{ v Lopatta} (1983) 35\) \(\text{SASR}\) 101.
155 \(R \text{ v Lenard} (1992) 58\) \(\text{A Crim R}\) 123.
g) the claim of right must, however, extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the bona fide claim attaches;\textsuperscript{156}

h) In the case of an offender charged as an accessory, what is relevant is the existence of a bona fide claim in the principal offender or offenders, since there can be no accessory liability unless there has in fact been a foundational offence,\textsuperscript{157} and unless the person charged as an accessory, knowing of the essential facts which made what was done a crime, intentionally aided, abetted, counselled or procured those acts;\textsuperscript{158}

i) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.\textsuperscript{159}

The above extensive list\textsuperscript{160} is adequate testimony to the breadth of the excuse of honest claim of right. Very little of the common law contained in this list is apparent to the lay reader. A comprehensive code section on claim of right would explicitly set out the above list if the legislature accepted such a reach for claim of right. The proposed section below constructs a comprehensive section for honest claim of right, which specifically imports variations of the common law rules.\textsuperscript{161} Essentially, these common law rules have been modified to narrow the defence. For example, the word ‘property’ is not defined in the existing s 9.5 of the \textit{Criminal Code} (Cth). It is here argued that the meaning of ‘property’ should be defined to narrow the scope of the

\textsuperscript{156} Astor v Hayes (1988) 38 A Crim R 219, 222.
\textsuperscript{160} Testimony to judicial acceptance of the accuracy of this list of common law authorities on claim of right is given by the list being quoted in its entirety by Gray J in \textit{R v Bedford} (2007) 98 SASR 514 [37].
\textsuperscript{161} For fuller discussion, see A Hemming, ‘The time has come to tighten the reach of Honest Claim of Right in Australian Criminal Codes’ (2008-2009) 11 \textit{Newcastle Law Review} 167.
defence and to explicitly amend existing common law authority as per the proposed redrafted section 9.5(3) below. Another proposed amendment to section 9.5 (s 9.5(2) below) reflects the powerful dissent of Wells J in *R v Lopatta* who was concerned at the reach of honest claim of right at common law.

The critical comparison is whether the present truncated s 9.5 of the *Criminal Code* (Cth) is preferable to a comprehensive s 9.5, that attempts to either explicitly state the common law listed in *R v Fuge* or explicitly amend the common law. The contention is that a criminal code, as opposed to a criminal statute, mandates that the legislature specify what relevant definitions, tests, and exceptions are being adopted as the law. Objectively, for a criminal code, a passable drafting effort to state fully the law selected by the legislature, is preferable to leaving the law in the ether of the common law divorced from the code and invisible to the lay reader.

*Criminal Code* (Cth)

### 9.5 Honest claim of right

(1) Nothing in this section is to be taken to mean placing a premium on ignorance of the general criminal law by subverting the capacity of the criminal law to serve the public interest.

(2) The honest claim of right must be of a kind that is, given favourable circumstances, recognised by Australia’s system of law and an honest claim which in no circumstances would be recognised by Australia’s system of law is excluded from this section.

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162 *Walden v Hensler* (1987) 163 CLR 561. In the absence of any definition of property in s 9.5, the broad definition of property taken by the majority of the High Court in *Walden v Hensler* would per force be ‘imported’ into s 9.5 rather than the proposed definition of property which reflects the earlier authority of *Pearce v Paskov* (1968) WAR 66.


(3) For the purposes of the definition of property in this section, property means an honest
claim to some right in the property the subject of the charge that is personal to him or her. The
honest claim of right must extend to the whole of the property taken, and does not include
property taken in compensation as opposed to a right in relation to identified property.

(4) Acts injurious to the public in general\textsuperscript{165} and which involve an interference by the
Commonwealth with proprietary and possessory rights of the individual in the interest of the
Commonwealth and for the protection or benefit to the community as a whole, do not
constitute an honest claim of right.

(5) Nothing in s 211 of the Native Title Act is to be read as overriding any Commonwealth,
State or Territory law that totally protects any species of plant, animal, mammal or reptile.

(6) Consistent with s 130.5 of this Code, honesty is defined as meaning (a) honest according to
the standards of ordinary people;\textsuperscript{166} and (b) known by the defendant to be honest according to
the standards of ordinary people.

(7) A person is not criminally responsible for an offence that has a physical element relating to
property if –

\begin{itemize}
  \item[(a)] at the time of the conduct constituting the offence, the person is under an honest but
  mistaken belief about a proprietary or possessory right; and
  \item[(b)] the existence of that right would negate a fault element for any physical element of the
  offence.
\end{itemize}

(8) A person is criminally responsible for the offence of robbery committed in pursuit of an
honest claim of right.

(9) A person is criminally responsible for any other offence arising necessarily out of the
exercise of the honest proprietary or possessory right that the person mistakenly believes to
exist, such as any offence involving personal violence, damaging or destroying property, or
breaking and entering.

(10) The burden of establishing a defence of honest claim of right is a legal burden and lies on
the defence.

\textsuperscript{165} ‘Acts injurious to the public in general’ would include the taking of undersized crayfish, as in
\textit{Pearce v Paskov} (1968) WAR 66.

\textsuperscript{166} ‘Standards of ordinary people’ are not defined in s 130.5 of the \textit{Criminal Code} (Cth), which deals
with dishonesty. However, as with the standard of the ‘reasonable person’, discussed above at n 102,
there is nothing to prevent the legislature defining such ‘standards of ordinary people’ and regularly
updating such a definition in line with changing community standards.
The thrust of the argument for the revision of section 9.5 is that the excuse of honest claim of right, which finds expression in all the Criminal Codes in Australia, relies on the common law to interpret the reach of the excuse because all of the relevant sections are comparatively short. Such common law interpretation, inter alia, includes that the mistaken belief does not have to be reasonable provided it is genuinely held; that the fact the claim is wrongheaded does not matter; and that the claim may be unfounded in law or in fact. The contention in the thesis that a code section should be comprehensive is applied to honest claim of right. The proposed section extends the existing section 9.5 to explicitly expose (and to vary) the invisible hand of the common law, which has reached into to all corners of the Criminal Codes in Australia.

This revised section 9.5 restricts honest claim of right solely to property personal to the person claiming such a right, and no other offence necessarily arising out of an honest claim of right is covered by the section. The offence of robbery is specifically covered given the common law history of honest claim of right being available for robbery. Such inclusion also meets the judicial comment on the availability of the defence for robbery as being ‘an astonishing proposition’. The test for ‘honesty’ (the inverse of dishonesty in s 130.5 of the Criminal Code 1995) in a claim of right is no longer totally subjective, and the onus of proof in raising the defence now lies on the claimant. Under this proposed section, it is no longer sufficient for the defendant

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167 Criminal Code (Cth) s 9.5; Criminal Code (NT) s 30(2) and s 43AZ; Criminal Code 2002 (ACT) s 38; Criminal Code (Qld) s 22; Criminal Code (WA) s 22; and Criminal Code (Tas) ss 42, 44, 45, 226(1) and 267(3).
170 R v Bernhard [1938] 2 KB 264.
to merely discharge the evidential burden by adducing evidence that suggests a reasonable possibility that the matter exists or does not exist.

The acid test is whether the existing section 9.5 is to be preferred to the proposed section 9.5, as judged by clarity and accessibility. In other words, given the generally accepted criteria for a code, is the law better served by a section that relies on copious common law invisible to the lay reader and requiring legal training to interpret the nuances of the section? Or, should a code attempt to spell out all of the law (and the tests the legislature prescribes) so that a lay reader has a fair indication of the ‘hidden’ law and the potential reach of criminal responsibility? The latter is preferred, whilst recognising that a lawyer experienced in drafting legislation would be able to express better the actual text, which in turn would then undergo parliamentary scrutiny.

4.5.2. Duress

A further example from the list of defences in Part 2.3 of the Criminal Code (Cth), namely, s 10.2 Duress, which is to be found in Division 10 Circumstances involving external factors, will be annotated to illustrate the cases and interpretation that sit behind the section akin to invisible ink rather than a tabula rasa. There are strong similarities between the defence of duress and the defence of sudden or extraordinary emergency (necessity) in s 10.3. For example, both defences require that the person ‘reasonably believes’ his or her actions were a reasonable response in the circumstances.
10.2 Duress

(1) A person is not responsible for an offence [all Commonwealth offences including murder] if he or she carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she reasonably believes [this is not the reasonable person or ordinary person test but rather what the defendant might reasonably believe in all the circumstances] that:

(a) a threat [no limitation on the kind of threat that triggers the defence] has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective [objective test of necessity]; and

(c) the conduct is a reasonable response to the threat [objective test of proportionality of response].

The same approach can be taken to any one of the defences in Part 2.3 of the Criminal Code (Cth) to reinforce the theme of this thesis that a copious body of case law sits behind such short sections in Australian Codes. Indeed, the interpretation of a section

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172 Odgers, above n 31, 123 [10.2.150] citing Oblach v The Queen (2005) 65 NSWLR 75 [56]-[57] (Spigelman CJ) where the authority of Mason J in Viro v The Queen (1978) 141 CLR 88 was considered to be ‘helpful’.

173 The implication from the lack of qualification of ‘a threat’ is that the threatener need neither be physically present when the offence is carried out (R v Hurley and Murray [1967] VR 526), nor that the threat must be imminent (R v Hudson and Taylor [1971] 2 QB 202), nor that the threat is too remote from the criminal conduct (R v Hudson and Taylor [1971] 2 QB 202) and nor that the threat be directed at the accused but can be indirect such as aimed at a third person (R v Hurley and Murray [1967] VR 526).

174 Bronitt and McSherry, above n 11, 359 [6.105] suggest that ‘it would seem that an honest and reasonable, but mistaken belief may form the basis for a defence of duress’ citing R v Graham [1982] 1 WLR 294, 300 (Lord Lane CJ).

175 ‘In all jurisdictions, there is a legal duty on the accused to escape from the person making threats should a reasonable opportunity to do so present itself’: Bronitt and McSherry, above n 11, 360 [6.120], citing inter alia R v Abusafiah (1991) 24 NSWLR 531.

176 In Oblach v The Queen (2005) 65 NSWLR 75 [55] Spigelman CJ said the following of the defence of duress in s 10.2 Criminal Code (Cth): ‘Paragraphs 10.2(2)(b) and (c) each adopt the word “reasonable” to apply an objective test to the elements of necessity and proportionality of response.’ Odgers, above n 31, 126 [10.2.210], has suggested that ‘[s]ince this provision reflects the common law, it is likely that it will be “construed against the background of the strong policy considerations in this area of the law”: Morris v The Queen [2006] WASCA 142 [154] (McClure J). Such policy considerations reflect the presumption that under ordinary circumstances criminal intimidation is reported to the police (R v Brown (1986) 43 SASR 33, 40 (King CJ)).
may be further muddied if a well known common law test has been slightly altered as in section 10.4(2) which deals with the subjective (conduct is necessary) and objective (reasonable response) tests for self-defence. Section 10.4(2) dilutes the objective test by the use of the words ‘the conduct is a reasonable response in the circumstances as he or she [‘reasonably’ has been omitted] perceives them’ (emphasis added). The difficulties in combining objective and subjective tests for self-defence are discussed in the next Chapter.

It might be better and more accurate to include a statement in a purported criminal code that expressly recognises the importation of the common law such as the one to be found in s 9(1) of the Evidence Act 1995 (NSW).

\[
\text{This Act does not affect the operation of a principle or rule of the common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.}
\]

The recognition of common law principles in s 9(1) above, can be contrasted with those parts of the Evidence Act 1995 (NSW) that ‘codify’ the law, such as Chapter 3 which deals with the admissibility of evidence.

Leader-Elliott asks the question: what happened to the common law of criminal responsibility in Chapter 2 of the Criminal Code (Cth)? His reply is that ‘traces remain, secreted in the statutory interstices of Chapter 2 … there will be occasions when judicial recourse to common law principles will be unavoidable for want of

\[177\text{ Compare s 29(2)(b) Criminal Code (NT) which follows the common law objective test of requiring the conduct to be a reasonable response in the circumstances as the person reasonably perceives them, with the Model Criminal Code importation in s 43BD(2)(b) of the Criminal Code (NT) in the new Part IIAB which allows the perception to be subjective by omitting the word ‘reasonably’.} \]
guidance in the *Code*. However, in point of fact the palimpsest of the common law is plainly showing through the parchment of Part 2.3 of Chapter 2 of the *Criminal Code* (Cth). Rather, Part 2.3 resembles a cipher that requires a common law decoding book to make sense of its provisions, a primer for the common man not the learned lawyer.

4.5.3. Summary

In summary, this section of the Chapter has cast an eye over the defences of claim of right and duress in the *Criminal Code* (Cth) and the Griffith Codes, and found the golden thread of the common law runs through and links both these defences. More generally, unlike Part 2.2 of the *Criminal Code* (Cth) which is a comprehensive statement of the elements of an offence, Part 2.3 *Circumstances in which there is no criminal responsibility* draws far more heavily on the common law, both explicitly and implicitly.

4.6. CONCLUSION

The Criminal Codes in Australia are misnamed because they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. In particular, they fail Bentham’s test of ‘no blank spaces’ in a criminal code. In fairness, it has to be said that the *Criminal Code* (Cth), based as it is on the *Model Criminal Code*, achieves far greater success against this measure than any other Criminal Code in

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178 Leader-Elliott, above n 98, 215.
179 A palimpsest is a manuscript page from a scroll or book that has been scraped off and used again. Windeyer J in *Vallance v The Queen* (1961) 108 CLR 56, 76, famously commented that ‘we cannot interpret its general provisions [*Criminal Code* (Tas)] concerning such basic principles [of criminal responsibility] as if they were written on a *tabula rasa*. Rather is ch.iv of the Code written on a palimpsest, with all the old writing still discernible behind’.
Australia that falls under the rubric of the Griffith Codes. For example, in Chapter 3, as part of the discussion of the *Model Criminal Code*, it was noted that the flexibility and legislative control following the adoption of Chapter 2 of the *Criminal Code* (Cth), as Part IIAA, could be demonstrated by the newly inserted s 161A *Violent act causing death* in the *Criminal Code* (NT). Another example of the ‘new style’ will be given in Chapter 6, Part V, with s 244 Bushfires, which is designated as a Schedule 1 offence under the *Criminal Code* (NT). Section 244 demonstrates how the physical and fault elements in Chapter 2 (or ‘set of interconnecting verbal formulae’) translate into an offence ‘intended to be capable of only one meaning’.

The Griffith Codes suffer the fatal flaw recognised by Dixon CJ in *Vallance* that the central criminal responsibility section often has little or nothing to say as to the elements of offences, which was problematic because the central provision of the Tasmanian Code (s 13) came *ab extra* restraining the operation of what followed even though common sense dictated resolution outside of s 13 itself.

 Whilst Part 2.2 of the *Criminal Code* (Cth) is a comprehensive statement of the elements of an offence, two conclusions can be drawn from recent cases interpreting Chapter 2 such as *R v Saengsai-Or* and *The Queen v Wei Tang*. The first is that, as would be expected, in the early stages of the Federal Code’s history, judges face challenges in the interpretation of Chapter 2 of the *Criminal Code* (Cth) as it applies to a specific offence (here, respectively, drug importation and possession of a slave). Secondly, Dixon CJ’s dicta in *Vallance* that specific solutions to Code provisions

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have to be worked out judicially, whilst still valid, carry less weight for the Criminal
Code (Cth) as Chapter 2, the General Part, informs the Special Part.

However, the weight behind the above two conclusions is tempered when the focus
turns to Part 2.3 *Circumstances in which there is no criminal responsibility* where the
imprint of the common law is still discernible behind the Code sections like a
palimpsest, to paraphrase Windeyer J in another evocative image from *Vallance*. If,
contrary to the main contention of this thesis, Bentham’s test of ‘no blank spaces’ in a
criminal code is considered to be unattainable, then it would be more appropriate and
fitting to explicitly recognise the operation of the common law except to the extent the
code provides otherwise, rather than to trumpet (see 2.1 Purpose) that Chapter 2 of the
Criminal Code (Cth) contains all the general principles of criminal responsibility that
apply to any offence.

This Chapter has provided a suggested template as to how defences in Part 2.3 could
be more explicitly expressed which would either give greater credence to section 2.1
Purpose, or underpin the recognition of the common law unless specifically excluded
in the Code. These templates will be more closely examined in subsequent Chapters.
The law has always been more concerned with substance rather than form, and a code
does not necessarily qualify as a code simply by calling a body of statute law a code.

In the next Chapter, the third theme of the thesis, which deals with the need for an
underlying fault element of a criminal code, will be developed. In the Griffith Codes
the *sub silentio* underlying fault element, which reflects the degree of
blameworthiness required for a range of specified offences, is negligence. Under the
Criminal Code (Cth), the underlying or residual fault element is recklessness. The selection of an underlying fault element is important both from a consistency perspective and to reflect the penal philosophy of the code. The decision to vary the underlying fault element for a specified offence, whether it be to require intention or knowledge on the one hand, or, to dispense with a fault element and make an offence one of strict liability on the other hand, is clearly one that should be made by the legislature in a criminal code context.
CHAPTER 5

THE UNDERLYING FAULT ELEMENT FOR A CRIMINAL CODE

5.1. OVERVIEW OF CHAPTER

This Chapter seeks to develop the third theme of the thesis, namely, the need for and selection of an underlying fault element in the General Part of a criminal code, which in turn reflects the penal philosophy of the code. Bentham was concerned that a body of criminal laws was liable to fall into either weakness or tyranny: ‘Weakness from want of qualifications, tyranny from want of clearness, the one or the other as it may happen.’ \footnote{H.L.A. Hart (ed), Jeremy Bentham, \textit{Of Laws in General} (Athlone Press, 1970) 232.} Public policy is the modern form of utilitarianism or the overall ‘good’ of society, where the interest of the individual is secondary to the general good of society. In that sense, the underlying fault element of a criminal code, which sets the baseline of criminal responsibility between the State and its citizens, is important, in conjunction with a suite of options for the physical and fault elements from which the legislature can select for any given offence. Given the consequences, the citizen should be able to readily ascertain the elements of any offence contained in the code.

Even in countries like England, which does not have a criminal code, the judiciary has perceived a need to establish a baseline fault element for serious offences. However, as Simester, Spencer, Sullivan and Virgo have observed, the British Parliament has been legislating on a different basis.
Even as the House of Lords endorsed subjective recklessness as the minimum form of culpability for serious criminal liability, Parliament was creating new, serious offences where the culpability requirement is satisfied by proof of negligence. It has even created very serious offences with strict liability imposed as to crucial elements.\(^2\)

The situation in Australian jurisdictions, with a collection of criminal statutes, delegated legislation and case law, is little different to that in England. For example, Australian jurisdictions have made serious offences, such as unlawful assault causing death and driving a motor vehicle causing death, offences of partial *mens rea*. These offences reflect the legislature’s attention to the *crime du jour*, rather than the need for a regularly updated criminal code that, within a consistent structure, represents a clear statement to the lay reader of the nature of criminal responsibility. An explicit underlying fault element is essential to such consistency.

In a criminal code, the residual or ‘fall back’ fault element only operates where the legislature does not specify a fault element. Bentham stressed the need for the legislature to determine the requisite fault elements for each offence,\(^3\) and the decision to vary the underlying fault element for a specified offence is quintessentially one for the legislature in a criminal code. The architecture of the code should readily enable the legislature to select from a suite of physical and fault elements, or to dispense with a fault element in the case of a strict liability offence.


\(^3\) Hart (ed), above n 1, 232-233.
The clearest choice for the legislature for the underlying fault element of a criminal code is between a subjective or objective test of criminal responsibility. Colvin has described a subjective test of criminal responsibility as meaning that

liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as justification for the imposition of punishment.\(^4\)

Colvin identified the alternative objective approach as

measuring the conduct of an accused against that of some ‘ordinary’ or ‘reasonable’ person, placed in a similar situation [which] is ‘objective’ because it does not depend on any finding that the accused’s state of mind was blameworthy in itself.\(^5\)

This Chapter contends for a greater role for objective tests on public safety grounds, and building on the measure of objectivity contained in reckless murder at common law and constructive murder in all Australian States, seeks to redress the balance in favour of objective tests. The argument is made for an objective test of recklessness as the underlying fault element, based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith*,\(^6\) which is similar to objective *Caldwell*\(^7\) recklessness where the defendant does not foresee the relevant risk but a reasonable person would have done so. At the end of the Chapter, the case is also advanced for the adoption of purely objective tests for provocation and self-defence,


\(^5\) Ibid.

\(^6\) [1961] AC 290.

\(^7\) *R v Caldwell* [1982] AC 341.
because the current tests for both defences are confusing as they combine subjective and objective tests.

5.2. FAULT ELEMENTS OF THE GRIFFITH CODE

‘There are so many legal barnacles encrusted upon section 23 of the Queensland Criminal Code that it is difficult to see what lies beneath it.’

Australia has a very disparate mosaic of criminal laws which can be broadly grouped into either code States and Territories or common law States. This lack of coherence is a significant negative feature of Australian criminal law. Given that the Griffith Code forms the backbone of all the State based codes, the search for an underlying fault element for a code should start with section 23 of the Criminal Code (Qld), the principal section dealing with criminal responsibility.

As discussed under the section on Legislative Inertia in Chapter 2, the sub silentio underlying fault element in the Criminal Code (Qld) is negligence, given the Griffith Code does not recognise recklessness or knowledge as a fault element. By contrast, the Criminal Code (Cth), which is based on the Model Criminal Code, explicitly adopts recklessness as the underlying and default fault element for a physical element that consists of a circumstance or a result in the absence of a legislative intention to

8 Comments by D.G. Sturgess, Criminal Code (NT) Seminar Transcript, October 1983, Darwin, 16.
9 As further discussed in Chapter 6, while it is true to say that all the Griffith Codes predate the Model Criminal Code, of the four Griffith Codes, only the Northern Territory has switched to Chapter 2 of the Criminal Code (Cth). The Australian Capital Territory has also adopted Chapter 2 of the Criminal Code (Cth) in 2002, but the previous criminal law in the ACT was based on the Crimes Act 1900 (NSW) and not the Griffith Codes.
10 Fairall, n 130, in 2.2.3.2 Legislative Inertia.
11 Kaporonovski v The Queen (1973) 133 CLR 209, 231 (Gibbs J): ‘It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.’
the contrary.\textsuperscript{12} The absence of both knowledge and recklessness as fault elements in the Griffith Code leaves a major gap in \textit{mens rea} divisions, with only intention at the top of the fault liability staircase jumping down to negligence at the bottom, one step above strict liability.

An immediate objection may be raised: why does the choice of the underlying fault element matter? Is not the choice of recklessness or negligence as an underlying fault element just a convenient drafting convention? Further, while negligence is a pretty slippery notion,\textsuperscript{13} at least the test is objective and realistic, as opposed to the more dubious idealism of subjective recklessness at common law and the dual subjective (awareness of risk) and objective (unjustifiable to take the risk) test of recklessness under the \textit{Criminal Code} (Cth).

The responses to the above objections lie partly in the earlier discussion\textsuperscript{14} of \textit{Woolmington v DPP}\textsuperscript{15} and \textit{Vallance v The Queen},\textsuperscript{16} but the major rebuttal goes to the incoherent structure of the Griffith Code which requires considerable judicial interpretation in order to give meaning to the various offence sections. Negligence emerges as the underlying fault element through judicial interpretation of s 23(1)(b) rather than as a result of the explicit drafting of the Code’s architect. The definition of criminal negligence is imported from the common law as a matter of necessity and is

\begin{footnotesize}
\begin{enumerate}
\item Section 5.6(2) of the \textit{Criminal Code} (Cth) specifies that: ‘If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.’ Section 5.6(1) of the \textit{Criminal Code} (Cth) specifies that: ‘If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.’
\item ‘Negligence’ can encompass the tort of negligence, a fault element in tort, and a fault element in criminal law that at its extreme can meld into recklessness.
\item \textit{Woolmington} was discussed in 2.2.3.1 on \textit{Internal Consistency Versus Ambiguities of Language}, starting at n 83. Vallance was discussed in 4.4.1.2 on \textit{Technical Meaning}, starting at n 86.
\item [1935] AC 462 (HL).
\item (1961) 108 CLR 56.
\end{enumerate}
\end{footnotesize}
also judicially applied to the duty-imposing provisions of the Griffith Code in the absence of any indication to the contrary in the Code. When Sir Samuel Griffith stated in relation to Chapter V, which deals with criminal responsibility, that ‘[n]o part of the Draft Code has occasioned me more anxiety’,\(^\text{17}\) he was right to be anxious as s 23(1)(b) does not contain any definition of accident or indication as to how or when it is to be applied to offences.\(^\text{18}\)

It seems reasonable to contend that such failures of omission mark a major limitation in a criminal code. Whatever the drafting limitations that can be levelled at the *Criminal Code* (Cth), as discussed in 4.4.2 above, the absence of detailed definitions of physical and fault elements in Part 2.2 and how they are to be applied to offences are not among such limitations. The four fault elements of intention, knowledge, recklessness or negligence reflect Lord Hailsham’s observation ‘that *mens rea* means a number of quite different things in relation to different crimes’.\(^\text{19}\) Griffith CJ’s comment that ‘it is never necessary to have recourse to the old doctrine of *mens rea*’\(^\text{20}\) in the *Criminal Code* (Qld), raises the issue as to how the relevant fault element for a particular offence is to be determined given the negative manner in which s 23(1) is

\(^{17}\) Sir Samuel Griffith, *Explanatory Letter to the Queensland Attorney-General*, 29 October 1897, x.

\(^{18}\) Rt Hon Sir Harry Gibbs, ‘Queensland Criminal Code: From Italy to Zanzibar’ (2003) 77 *Australian Law Journal* 232, 235-236, has suggested that s 23(1) corresponds directly with the old Zanardelli Code in Italy. However, Article 45 of the Zanardelli Code reads as follows: ‘No-one can be punished for an offence if he has not willed the act which constitutes it, except where the law imposes a liability on him otherwise, as a consequence of his act or omission.’ Clearly, s 23 is only partially based on Article 45, namely, 23(1)(a), which deals with voluntariness and led to judicial differences on the meaning of ‘an act’, whereas it is the meaning of the defence of accident in s 23(1)(b) which has caused further and arguably greater difficulties in interpreting ‘an event which occurs by accident’ as distinct from ‘an act or omission that occurs independently of the exercise of the person’s will’.

\(^{19}\) *DPP v Morgan* [1976] AC 182 (HL), 213.

\(^{20}\) *Widgee Shire Council v Bonney* (1907) 4 CLR 997, 981.
expressed. This is the difficulty identified by Dixon CJ in *Vallance*\(^{21}\) and opens a Pandora’s box of judicial interpretation.\(^{22}\)

Windeyer J’s comments in *Mamote-Kulang v The Queen*\(^{23}\) relating to a more modern approach, and the negative way the absence of the elements of will, intent or knowledge is stated as a matter of defence or excuse in the Griffith Code, need to be kept in mind.\(^{24}\)

5.3. THE ARTIFICIALITY OF SUBJECTIVE TESTS FOR FAULT ELEMENTS

Despite the above differences between Australian jurisdictions it can be fairly stated from a perusal of the criminal laws of Australia that subjective tests, whether they be the mental states of intention, knowledge or recklessness, constitute the required standard for the fault element of serious offences.\(^{25}\) However, how is the subjective question of what was in the accused’s mind at the relevant time to be determined? As Kirby ACJ observed in *Winner* ‘it is inescapable that the forensic process by which intent is judged (when it is denied) will address the objective facts from which an inference of intention may be derived’.\(^{26}\) In *Stanton v Queen*,\(^{27}\) which involved an appeal against a conviction for wilful murder under the now repealed s 278 of the

\(^{21}\) (1961) 108 CLR 56.

\(^{22}\) See 2.2.3.1 above for a full discussion of intention, the highest expression of *mens rea*, in the context of the offence of murder in s 302(1)(a) of the *Criminal Code* (Qld), and Dixon J’s statement in *R v Mullen* (1938) 59 CLR 124, 136, that Woolmington v Director of Public Prosecutions applied to the *Criminal Code* (Qld), despite Griffith’s belief that the rule of law was otherwise.

\(^{23}\) (1964) 111 CLR 62, 76. The ‘more modern approach’ is adopted in Chapter 2 of the *Criminal Code* (Cth).

\(^{24}\) For example, for the *Criminal Code* (Cth), see above n 12 which sets out the default fault elements.

\(^{25}\) For example, for the *Criminal Code* (Cth), see above n 12 which sets out the default fault elements.

\(^{26}\) *Winner v The Queen* (1995) 79 A Crim R 528, 542.

\(^{27}\) (2003) 77 ALJR 1151.
In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill, rather than merely to cause grievous bodily harm. Furthermore, although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to commend it. The appellant's best hope was that the jury might regard the case as one of manslaughter, based upon a view that he was menacing his wife with a loaded shotgun, but did not actually intend to shoot her.  

The above passage encapsulates all that is amiss with subjective tests and the artificiality involved in determining the appellant’s actual state of mind when he shot his estranged wife at close range. The High Court was required to turn to objective circumstances to infer the appellant’s intent. The argument being made here is that a greater degree of objectivity in the standard used to determine criminal liability will obviate the tortured reasoning of courts inserting objective circumstances into the narrow subjective test of intention. In addition, such objectivity also can be justified on public safety grounds. For example, in *Stanton v The Queen*, the appellant, who was in dispute with his wife in the Family Court, claimed he went to his wife’s house armed with a shotgun to ‘make her see some sense and negotiate’. Such behaviour is, at best, reckless, and it is the fault element of objective recklessness (where the defendant does not foresee the relevant risk but an ordinary person would have

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foreseen it) that underpins this Chapter’s argument in favour of a greater role for objective tests for serious offences.

By contrast with objective recklessness, a recent example of appellate judges taking an exceptionally narrow view of intention for wilful murder in Western Australia occurred in 2004 in *Turner v The Queen*. The appellant had followed his estranged wife from Victoria to Western Australia. Upon locating his wife in Kalgoorlie, the appellant attacked her with a large pocket knife and inflicted a total of 65 wounds, a number of which were potentially fatal, and was only stopped from stabbing his wife when struck on the head by a milk crate wielded by the deceased’s brother. Wheeler J (with whom Murray and Templeman JJ agreed) whilst finding it ‘very difficult to accept the conclusion that a person who stabs another repeatedly in the chest with considerable force, can have intended anything other than the death which inevitably resulted’, nevertheless could not exclude the possibility that the appellant’s anger, intoxication and hypoglycaemia might have left the jury ‘in some doubt as to the appellant’s intention to cause death rather than some other outcome’.

The decision in *Turner v The Queen* illustrates the argument being made here that respect for the criminal law would be better served if ‘abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do’ were avoided. The adoption of an objective test of what the ordinary reasonable person would have contemplated as the natural and probable result of stabbing the victim 65

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30 The now repealed s 278 of the *Criminal Code* (WA) stated: ‘Except as in hereafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.’
32 *Turner v The Queen* [2004] WASCA 127 [22].
33 Ibid [23].
34 *Vallance v The Queen* (1961) 108 CLR 56, 58 (Dixon CJ).
times, if applied in Turner, would have obviated minute judicial dissection as to the appellant’s intention.

The rationale for adopting an objective test position is also a response to academic support for the notion of fair labelling in criminal law,^35^ because, when subjective fault elements predominate, ‘fair labelling’ is skewed towards the offender rather than the victim or society. Chalmers and Leverick point out that ‘more important to victims than the name of the offence is whether the offender is convicted at all and the magnitude of the sentence passed’.^36^ Instead of the fair labelling focus on splitting offences into sub-divisions based on the level of moral culpability under subjective tests, the adoption of objective tests would apply the reasonable person standard and leave the level of culpability for that genus of offence to the sentencing stage, based on the circumstances of the case.

Ashworth defines the concern for fair labelling as ‘to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law’.^37^ This translates into the sub-division of offences to reflect the nature and magnitude of the offending. Thus, for example, supporters of the partial defence to murder of provocation argue that fair labelling requires a distinction to be made between a cold-blooded killing (murder) and a hot-blooded killing (manslaughter) on the grounds that the latter is less culpable. This presupposes the acceptance of such a ‘widely felt’ distinction.

^36^ Ibid 238.
Significantly, in the context of the contention in this thesis that the law should be precisely stated, Simester, Spencer, Sullivan and Virgo discuss fair labelling in terms of clarity and communication.

[T]he ex ante guidance the law is meant to provide requires it to be clearly stated … The law needs precision in order to identify exactly what offence the wrongdoer has committed … the law should communicate the crime to the public, so that it too may understand the nature of his transgression.\(^{38}\)

However, clarity of language is distinct from the notion of fair labelling. Indeed, arguably, the proliferation of sub-divisions of offences adds to the complexity of the criminal law in terms of the potential number of charges and alternative verdicts available. More fundamentally, clearer language meets the ‘ex ante guidance’ to the public irrespective of whether subjective or objective tests of criminal responsibility are utilised. The difficulty with the application of fair labelling is that it relies on the objective standard of ‘widely felt distinctions between kinds of offences and degrees of wrongdoing’ whilst the offender, at least for serious offences, is tried on his or her subjective state of mind at the time the offence was committed. The adoption of objective tests of criminal responsibility would be more consistent with an objective standard of distinctions between types of offences.

Another argument in support of fair labelling made by Clarkson is that broad offences like manslaughter give too much discretion at the sentencing stage.\(^{39}\) By contrast, a

\(^{38}\) Simester, Spencer, Sullivan and Virgo, above n 2, 31-32.

broader definition of murder includes the fault element of recklessness, thereby bringing the law of homicide ‘more in line with public opinion’. Horder acknowledges the duality of labelling in noting that ‘if the offence in question gives too anaemic a conception of what it might be, it is fair neither to the defendant, nor the victim’. Significantly, it was the widely reported reaction of the victim’s families in Ramage and Weatherston that led directly to the abolition of the partial defence to murder of provocation in Victoria and New Zealand, thereby widening murder and narrowing manslaughter in those jurisdictions. More recently, in Singh v R, the family and public outrage at the six year sentence handed down to an Indian man who cut his wife’s throat at least eight times with a box cutter and successfully pleaded manslaughter on the grounds of provocation, sparked a New South Wales Parliamentary inquiry on 14 June 2012 (a week after the verdict was announced) as to whether the partial defence should be repealed.

40 Law Commission of England and Wales, A New Homicide Act for England and Wales, Consultation Paper No 177 (2005) 2.13. A public opinion survey of 56 participants was carried out for the Commission by B. Mitchell which is contained in Appendix A. The survey was about mandatory sentencing in criminal homicides in the context of the Commission recommending that a new offence of first degree murder be created. For present purposes, the conclusion contained in A.16 (1) is significant: ‘The survey appears to confirm the findings of previous studies that members of the public share the law’s view that there are important variations in the seriousness of homicides — that any unlawful homicide is a serious matter, but some are worse than others – and that these variations should be reflected in the law.’ One example given of a serious homicide was ‘where the offender demonstrated a “total disregard for human life” ’ (A.8), which encompasses recklessness where the consequence was probable, as in the example given of a Russian-roulette killer.


44 The cases of Ramage and Weatherston are classic examples of ad hoc political responses to the crime du jour.


46 Select Committee of the Legislative Council of the Parliament of New South Wales, Inquiry into the partial defence of provocation, 14 June 2012. The Committee’s report was tabled on 23 April 2013. The Committee essentially recommended the retention of the partial defence of gross provocation and the narrowing of the partial defence, whilst also recommending a reference to the NSW Law Reform Commission to undertake a comprehensive review of the law of homicide and homicide defences in NSW: ibid, xii-xiii.
Murder and manslaughter need not be collapsed into one offence. Rather, recklessness, in addition to intention, should be legislatively specified as an alternative fault element for murder. Partial defences to murder should be repealed, or greater objectivity be incorporated into prescribed defences to homicide. Such a narrowing of the range of partial defences challenges the view that ‘[i]f the rationale for adding rungs to the homicide ladder is primarily fair labelling, then it is important that defendants are categorised according to the appropriate level of fault’. The contrary argument being made here is that there should be fewer rungs (for example, no difference in blameworthiness between an intention to cause an injury likely to endanger life and an intention to cause a permanent injury to health) and narrower defences. This has the virtue of consistency even if comes at the cost of flexibility.

For jurisdictions where recklessness is not a separate mental element for murder, such as Queensland and Western Australia, there are three possible approaches. First, intention includes recklessness; secondly, intention means purpose and awareness that consequences are virtually certain to occur; and, thirdly, the meaning of intention is limited to purpose. This was the form of the analysis adopted by the Law Reform Commission of Western Australia, which recommended the third approach. None of the above three approaches is satisfactory, and instead what is required is the specific importation of recklessness as a separate, substantive head of malice at common

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47 For the contrary view, that murder and manslaughter should be merged into a single offence of criminal homicide (unlawful killing), see L. Blom-Cooper and T. Morris, *With Malice Aforethought: A Study of Crime and Punishment for Homicide* (Hart, 2004) 175, who argue fault is merely a factor to reflect sentence.
49 Cf s 279(1)(b) of the *Criminal Code* (WA).
50 Tadros, above n 48.
An example can be found in s 115.1(d) of the *Criminal Code* (Cth) where the fault element for murder is either intention or recklessness as in ‘intends to cause, or is reckless as to causing, the death’.

### 5.4. OVERLAP BETWEEN SUBJECTIVE AND OBJECTIVE TESTS

Where a subjective test is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. However, this is ‘somewhat artificial as an accused, in many cases, will deny that he or she possessed the necessary state of mind necessary to commit the offence’.

Barwick CJ in *Pemble v R* pointed out that the jury will normally have to infer the accused’s state of mind from what the accused has actually done and the surrounding circumstances.

The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind… that conclusion [as to the accused's

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52 I. G. Campbell, ‘Recklessness in Intentional Murder Under the Australian Codes’ (1986) 10 *Criminal Law Journal* 3, 12 -13. Campbell defined recklessness number 1 as a separate, substantive head of malice at common law; recklessness number 2 as being no distinction in law between intention and recklessness; and recklessness number 3 where recklessness exists purely as a matter of evidence. This Chapter proposes the importation of recklessness number 1.


54 (1971) 124 CLR 107.
state of mind] could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.\textsuperscript{55}

The above passage is illustrative of the difficulties faced by both judges and juries when the judge is explaining the law and the elements of the particular offence (or defence) to the jury. Barwick CJ points out that the jury, in coming to a verdict founded on inference as to the accused’s state of mind, naturally take into consideration the reasonable person’s foresight. This overlap between subjective (the accused’s actual state of mind) and objective (the ordinary or reasonable person placed in a similar situation) tests can be traced back to different meanings given to the distinction between subjective and objective in the criminal law. A reference in a case to objective circumstances goes to the facts and the strength of the evidence which is separate from the elements of an offence or a defence. Turning to the meaning of objective within the substantive law as opposed to evidence, two different meanings of objective are employed. The first meaning relates to the ordinary or reasonable person standard, while the second meaning refers to foresight of probable consequences which frames the law around objective circumstances and objective grounds for making inferences about the accused’s subjective state of mind.

The nature of the overlap between the subjective test of intention and inference from the evidence was considered in \textit{R v Glebow},\textsuperscript{56} where the appellant appealed his conviction for murder under s 302(1)(a) of the \textit{Criminal Code} (Qld). The leading judgment was given by Jerrard JA who found that ‘[t]he directions on proof of intent given by the learned trial judge were both common sense ones, and were supported by


\textsuperscript{56} [2002] QCA 442.
authority’. Jerrard JA noted that the trial judge had directed the jury that ‘where, (as was commonly the case), there was no direct evidence of the existence of the necessary intention, it may be inferred from facts which had been proved beyond reasonable doubt’. Furthermore, the Court of Appeal took no objection to the prosecution reminding the jury that ‘intention was something which could be inferred from the degree of violence that was used’, and other matters relevant to the question of intention included whether any remorse was shown, whether any assistance was given to the victim, and the continued aggressive conduct of the accused. Thus, while the jury had to be satisfied the necessary intent did exist such that the appellant meant at least to cause grievous bodily harm to the victim, the critical objective circumstance was that the appellant had repeatedly kicked the inert victim in the head.

Another Queensland case on point is *R v Reid* which concerned the transmission of the HIV virus. Keane JA, while noting ‘that the complainant became infected with the HIV virus was a natural consequence of the appellant’s deception’, went on to identify the key issue as ‘whether the jury, acting reasonably, could have rejected, as a rational inference, the possibility of the absence of intent to infect the complainant with the HIV virus’. As in *R v Glebow*, critical objective circumstances were determinative in rejecting the appellant’s ground of appeal that he was either ‘completely irresponsible’ or ‘stupid in the extreme’ rather than being motivated by a

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57 *R v Glebow* [2002] QCA 442 [20], citing Connolly J in *R v Willmot (No 2)* [1985] 2 Qd R 413 as authority that the ordinary and natural meaning of the word ‘intends’ is, to have in mind, which involves the directing of the mind, having a purpose or design.
58 Ibid [12].
60 Ibid.
63 Ibid 389 [49].
64 [2002] QCA 442.
subjective desire to infect the complainant. Keane JA singled out, first, ‘the complainant’s evidence of the appellant’s taunting after the complainant had been diagnosed as HIV positive’, and secondly, ‘that the appellant knew that post-exposure prophylaxis might have prevented the complainant becoming infected’.

Cases involving guns allegedly going off by accident provide fertile ground to highlight the implicit intermingling of subjective and objective tests, of which the watershed case of Woolmington v DPP is perhaps the best known example. The trial judge directed the jury that the onus was on Woolmington to show that the shooting was accidental, and 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.

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:

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

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65 R v Reid (2006) 162 A Crim R 377, 389 [44]. In England, a similar offence would be prosecuted under s 20 of the Offences Against the Person Act 1861, which only requires proof of recklessness.
66 Ibid 390 [53].
67 Ibid 391 [54].
69 Foster, above 2.2.3.2, n 146.
down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.\textsuperscript{70}

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. Therefore, post \textit{Woolmington v DPP}, under the accident defence of s 23(1)(b) of the \textit{Criminal Code} (Qld), how should a judge instruct a jury when the accused is claiming he feared the victim was about to commit suicide and in lunging for the rifle it discharged killing the victim? This was the fact scenario in \textit{Stevens v The Queen}\textsuperscript{71} where the High Court split 3:2 on whether a substantial miscarriage of justice occurred as a result of the trial judge’s failure to give directions on accident under s 23(1)(b) of the \textit{Criminal Code} (Qld).

In \textit{Stevens}, Gleeson CJ and Heydon J, who were in the minority, would have dismissed the appeal against conviction for murder. The main point of difference with the view of the majority was the trial judge’s decision not to direct the jury on accident under s 23(1)(b) of the \textit{Criminal Code} (Qld), because his Honour considered it was subsumed in his directions on intent for murder and neither party wanted to raise manslaughter. In addition, a direction under s 23(1)(b) would have opened up the alternative verdict of manslaughter by virtue of the qualification in sub-section (1) relating to negligent acts.

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

\textsuperscript{70} \textit{Woolmington v DPP} [1935] AC 462, 481.
\textsuperscript{71} (2005) 227 CLR 319.
(a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that occurs by accident.

Gleeson CJ and Heydon J were of the view that the jury would only need to consider the question of accident under s 23(1)(b) if an act of the appellant had caused the death of the deceased, namely, the act of grabbing the gun (as opposed to the Crown case that the deceased had no reason to commit suicide and the appellant intentionally fired the fatal shot which if accepted by the jury ruled out ‘accident’), it being ‘strongly arguable that it is foreseeable that death will result if another person attempts to seize the gun’. This led to consideration of the test of criminal responsibility under s 23.

In *R v Van Den Bemd* this Court accepted the statement of the Queensland Court of Appeal that “[t]he test of criminal responsibility under s 23 is not whether the death is an ‘immediate and direct’ consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it”. The same proposition was more recently accepted in *Murray v The Queen*.

Hence, following *Van Den Bemd* and *Murray*, if, as the majority held, a direction under s 23 was necessary, then the test for accident was objective (as opposed to the subjective test for intention to kill given the Crown’s case that there was no mishap) in that an ordinary person could not reasonably have foreseen it. However, Gleeson CJ and Heydon J, who disagreed that a direction under s 23 was necessary, cited

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72 *Stevens v The Queen* (2005) 227 CLR 319, 326 [17].
73 Ibid.
74 (1994) 179 CLR 137.
75 *R v Van Den Bemd* [1995] 1 Qd R 401, 405.
76 (2002) 211 CLR 193, 208 [43].
77 In Queensland, under s 302(1)(a) *Criminal Code* (Qld) a person is liable for murder where they unlawfully kill another with intent to kill or with intent to cause grievous bodily harm. The *Criminal Code* (Qld) does not define the word ‘intention’. In *Bruce Henry Willmot* (1985) 18 A Crim R 42, 46, Connolly J was of the view that there is ‘no ambiguity about the expression [‘intent’] as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language’.
Murray v The Queen as framing the question for decision whether s 23 was engaged as whether ‘there [was] an issue for the jury about whether there was an unwilled act, or an event occurring by accident, that was an issue separate from the issue about the intention with which the appellant acted’. Gleeson CJ and Heydon J answered that question in the negative, because the threshold issue was causation and the trial judge’s directions were clear that an acquittal should be returned if the Crown failed to negative the appellant’s account.

The majority, who held that the evidence did raise a defence of accident which was for the prosecution to negative, delivered three separate judgments. McHugh J while recognising the case was fought on murder being the sole possible guilty verdict, considered that manslaughter should have been left to the jury. McHugh J then continued with the following observation.

With great respect to the majority judges in the Court of Appeal, much of their reasoning was based on the express or implied premise that the evidence had to establish a possible inference of accident before that issue could be left to the jury. Barca denies that proposition. Juries cannot take into account fantastic or far-fetched possibilities. But they ‘themselves set the standard of what is reasonable in the circumstances’.

In the above passage, McHugh J was leading up to the conclusion that ‘the jury might reasonably conclude that the Crown had not proved to the requisite standard that the

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79 Stevens v The Queen (2005) 227 CLR 319, 327 [18].
80 Ibid 331 [29].
81 Ibid 331 [30].
82 Barca v The Queen 1975 133 CLR 82, 105 (Gibbs, Stephen and Mason JJ), citing Peacock v The King (1911) 13 CLR 619, 661 as authority for the proposition that ‘an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence’.
83 Green v The Queen (1971) 126 CLR 28, 33 (Barwick CJ, McTiernan and Owen JJ).
death was not caused by accident’. However, the above passage implies the trial judge is prescient. On the one hand, the trial judge is required to direct the jury to exclude the ‘far-fetched’, while, on the other hand, the trial judge is to look into the minds of the jury and predict the jury’s own standard of reasonableness in determining what might be a fantastic possibility. Furthermore, the use of the phrase ‘standard of what is reasonable’ connotes an objective standard. Thus, under the test for s 23 in the context of a murder trial, the High Court appears to move seamlessly between subjective and objective tests.

Kirby J accepted the logical force of the argument that ‘[w]ith offences of specific intent such as murder ... the excuse of accident is not available to an accused if the jury is satisfied that the element of intention has been established’.

Nevertheless, Kirby J held that because the application of s 23(1)(b) was not expressly excluded in a murder trial, in considering whether the Crown has established the necessary specific intention ‘the jury's attention must be directed (where accident is an available classification of the facts) to that category of exemption from criminal responsibility’.

So, again the subjective test for intention is merged into the objective test for accident.

Callinan J could not ‘be satisfied that the appellant has not missed a chance of an acquittal by reason of the absence of a direction of the kind that I have suggested’.

For present purposes, the relevant portion of Callinan J’s ‘model’ direction is as follows:

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84 Stevens v The Queen (2005) 227 CLR 319, 331 [30].
86 Stevens v The Queen (2005) 227 CLR 319, 346 [81].
87 Ibid 371 [162].
The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident, that is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseen by an ordinary person in his position.\footnote{Ibid 370-371 [160].}

With great respect to the three judges constituting the majority in \textit{Stevens v The Queen},\footnote{\textit{Stevens v The Queen} (2005) 227 CLR 319.} the running together of subjective and objective tests is unhelpful and confusing. The joint judgment of the minority is to be preferred: s 23 is only in play where there is ‘an issue separate from the issue about the intention with which the appellant acted’.\footnote{Ibid 327 [18] (Gleeson CJ and Heydon J) quoting \textit{Murray v The Queen} (2002) 211 CLR 193, 207-208 [41] (Gummow and Hayne JJ).} The minority’s approach in \textit{Stevens} does not muddy the waters between subjective and objective tests, albeit the minority did accept the objective test under \textit{R v Van Den Bemd}\footnote{(1994) 179 CLR 137.} when s 23 was relevant. The jurisprudence in \textit{Stevens} is important because it applies to three Australian jurisdictions: Queensland, Western Australia and Tasmania.\footnote{See s 23B(2) \textit{Criminal Code} (WA); s 13(1) \textit{Criminal Code} (Tas).} Dixon CJ’s well known criticism in \textit{Vallance v The Queen}\footnote{(1961) 108 CLR 56.} of s 13(1) of the \textit{Criminal Code} (Tas), which was derived from s 23 of the \textit{Criminal Code} (Qld), is pertinent here in ‘that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially’.\footnote{\textit{Vallance v The Queen} (1961) 108 CLR 56, 61.}
This two-step process between the subjective test for murder and the objective test for accident would appear to be inevitable given that s 23 was drafted before the House of Lords decision in *Woolmington v DPP*. When Sir Samuel Griffith designed s 23, the law was as stated in *Foster's Crown Law* (1762), which meant that the legal onus was on the defence to prove accident. In addition, the underlying fault element of the *Criminal Code* (Qld) is negligence, with its attendant objective test of the standard of the ordinary person. After *Woolmington* and coinciding with the supremacy of subjective tests, as Goode has aptly described ‘the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood’. It is therefore necessary in the next section of this Chapter to revisit the ascendancy of subjective tests post *Parker v The Queen*, and to consider whether the opprobrium meted out to the House of Lords decision in *DPP v Smith* was justified.

5.5. THE ASCENDANCY OF SUBJECTIVE TESTS IN CRIMINAL RESPONSIBILITY

The appropriate starting point for a discussion of the supremacy of subjective tests for criminal responsibility in Australia is the 1952 case of *Stapleton v The Queen*. Stapleton, who had a family history of mental disability and abnormality, was convicted of murdering a policeman at Katherine, in the Northern Territory. His appeal to the High Court concerned the adequacy of Kriewaldt J’s directions to the
jury in a case involving both intoxication and a plea of insanity. The crucial passage of Kriewaldt J’s direction to the jury was quoted by the High Court as follows:

The third view you might take is that the evidence regarding drink does not prove either one of the two things which I have just mentioned - neither incapacity to form an intent nor a decrease in the mental standard to make him irresponsible, but merely shows that his mind was so much affected by liquor that he more easily gave way to his passions. If that is the view you take, the ordinary presumption prevails that a man intends the natural consequences of his acts, and in that case, if you think the natural inference is that he intended to kill or inflict a serious injury the accused is guilty of murder.101

The High Court was critical of both of the above sentences.

The first of the two sentences not only appears to place the burden of disproving intent on the accused but makes the test incapacity to form, rather than absence of, the intent. Upon the defence of insanity it might tend to lessen the probability of the jury grasping the part which the medical evidence assigned to alcohol in the production of an insane excitement and aggression in a person of inherited mental instability or deficiency. The second sentence tends still more to put the burden of proof on the accused with respect to the intent. The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation. Cf. R. v. Steane (1947) KB 997, 1003 -1004.102

101 Stapleton v The Queen (1952) 86 CLR 358, 365 (emphasis added).
102 Ibid (Dixon CJ, Webb and Kitto JJ) (emphasis added). The reference to cf R v Steane (1947) KB 997, 1003-1004, refers to Lord Goddard CJ’s statement: ‘No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged.’ Lord Goddard joined in the unanimous decision in DPP v Smith [1961] AC 290, fourteen years after R v Steane. Interestingly, the High Court in Stapleton v The Queen held that in applying the second limb of the M’Naghten Rules the question was whether the accused knew that his act was wrong according
The stage was then set for a major disagreement with either the House of Lords or the Privy Council if the test for murder was to be explicitly framed around a presumption of intention for the natural and probable consequences of a person’s actions. This occurred nine years after *Stapleton v The Queen* with the House of Lords unanimous decision in *DPP v Smith*,\(^{103}\) where an objective test for criminal responsibility was adopted until replaced by statute.\(^{104}\)

Before turning to the facts in *DPP v Smith*,\(^{105}\) the difference between the objective and subjective presumption of intent should be restated. The objective presumption is the presumption that a person intends the natural and probable consequences of his or her actions. The subjective presumption is ‘the presumption of intent that may be drawn from proof that a person foresaw certain consequences as likely or probable’.\(^{106}\)

In *DPP v Smith*,\(^{107}\) a policeman tried to prevent the defendant from driving off with stolen goods by jumping on the bonnet of the car. The defendant not only drove away at speed but also succeeded in dislodging the police officer by zigzagging. The policeman fell into the path of an oncoming vehicle and was killed. As Stannard points out, Smith’s claim that he never intended to kill but only to shake the

to the ordinary principles of reasonable men, not whether he knew it was wrong as being contrary to law, thereby choosing not to follow *R v Windle* (1952) 2 QB 826.

\(^{103}\) [1961] AC 290.

\(^{104}\) *Criminal Justice Act 1967* (England), s 8 provides that: ‘A court or jury, in determining whether a person has committed an offence - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.’ The decision in *DPP v Smith* [1961] AC 290 was treated as wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576.


policeman off is ‘a classic ruthless risk taker reaction’. The ruthless risk taker has been described as having a ‘wicked disregard of the consequences to life’. Stannard suggests that ruthless risk takers highlight a tension in the law ‘between the need to stigmatise as murderers those who are thought to deserve that label, and on the other to preserve the integrity of murder as crime of specific intent’. Such a tension should be resolved objectively from the public policy perspective of protecting the community, rather than from the subjective complexities of labeling the ruthless risk taker as guilty of murder or manslaughter.

The trial judge in *DPP v Smith* directed the jury on the basis of whether a reasonable man would have contemplated that grievous bodily harm was likely to result to the police officer. The Court of Criminal Appeal quashed the murder conviction and substituted a manslaughter conviction in applying a subjective test.

After the Attorney-General gave his fiat that a further appeal to the House of Lords involved a point of law of exceptional public importance (Smith, like Woolmington 26 years earlier, was sentenced to death at trial), the Director of Public Prosecutions

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108 Stannard, above n 106, 277.
111 See, for example, *Winner v The Queen* (1995) 79 A Crim R 528, a case where the appellant drove a car as close as possible to a child cyclist in order to frighten him. The appellant, having consumed a large amount of alcohol, was driving in a stolen car when he veered suddenly across two lanes of traffic and struck and killed a cyclist riding near the kerb. He then drove away. The proceedings were heard by the primary judge sitting alone. The Court of Criminal Appeal held that the trial judge was entitled to infer the requisite intent for murder on the basis of the objective evidence alone, given the relevant portion of the definition of murder in s 18(1)(a) Crimes Act 1900 (NSW) is ‘where the act of the accused … causing the death charged, was done or omitted with reckless indifference to human life’.
113 Ibid 300 (Byrne J). The test put forward by Byrne J stated: ‘While that is an inference [a person intends the natural consequences of his or her acts] which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of a particular case it is not the correct inference, then it should not be drawn.’ Section 8 of the *Criminal Justice Act 1967* (England) reflects the test identified by Byrne J in the Court of Criminal Appeal. See above n 104. It should be noted that s 8 did not abolish the objective presumption but rather s 8 assumed the continued existence of the objective presumption subject to Byrne J’s qualification.
appealed to the House of Lords. Their Lordships reinstated the murder conviction in holding that the trial judge had not misdirected the jury and that an objective test of foresight was applicable (as a rule of substantive law\textsuperscript{114} and not an evidential guide).

Viscount Kilmuir L.C. gave the sole speech:

The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone\textsuperscript{115} in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.\textsuperscript{116}

Immediately following the above passage Viscount Kilmuir cited a string of authorities, the first of which was Holmes.\textsuperscript{117} Lecture II of Holmes’s book on \textit{The Common Law} deals with the criminal law and the first crime considered is murder.

\textsuperscript{114}Stannard, above n 106. The rule posited that for murder it was ‘sufficient to prove an intent to do an unlawful and voluntary act to someone coupled with the objective probability of death or grievous bodily resulting from that act’: ibid 278. This rule of substantive law was later held by the Privy Council in \textit{Frankland v R} [1987] AC 576 ‘to form no part of the common law’: ibid 278-279.

\textsuperscript{115}S. C. Desch, ‘Negligent Murder’, \textit{The Modern Law Review} (1963) 26(6) 660, 673, argues that the decision in \textit{DPP v Smith} [1961] AC 290 ‘clearly establishes in English law a doctrine of negligent murder, subject to the proviso that the accused was “aiming an act at someone”’. Desch makes the suggestion that the act probably means an assault (670).


\textsuperscript{117}O. W. Holmes, \textit{The Common Law} (Little, Brown and Co, 1881) 54, 56.
Holmes commenced his analysis by examining Sir James Stephen’s definition of murder as ‘unlawful homicide with malice aforethought’. Holmes looked closely at Stephen’s breakdown of malice aforethought into a number of states of mind, and concludes they can be ‘reduced to a lower term … that knowledge that the act will probably cause death, that is foresight of the consequences of the act, is enough in murder’. Holmes gave the example of a newly born child who has been laid naked out of doors. The child must perish without intervention. Holmes classifies this as murder even though the guilty party would be happy for a stranger to find and save the child.

Holmes then sought to define ‘foresight of consequences’. Holmes grounded his definition in knowledge: knowledge that from the present state of things the act done will very certainly cause death. Thus, where the probability is a matter of common knowledge, the person doing the act is guilty of murder, ‘and the law will not inquire whether he did actually foresee the consequences or not’. In this way, Holmes arrived at the conclusion that the test of foresight is not subjective (the foresight of the accused) but objective (the foresight of a person of reasonable prudence). Holmes gave the example of throwing a heavy beam from a building site down into a busy street below which a person of ordinary prudence would foresee as likely to cause death or grievous bodily harm ‘and he is dealt with as if he foresaw it, whether he does so in fact or not’.

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119 Ibid 53.
120 Ibid.
121 Ibid.
122 Ibid 54.
123 Ibid.
124 Ibid 56.
In *DPP v Smith*, Viscount Kilmuir stated that the ‘unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence’. In the example above of throwing down a heavy beam, Holmes would appear not to have required the accused to have been aiming at anyone in particular. As the act was deliberate and not an accident, the likelihood of hitting someone and causing death or grievous bodily harm was sufficient to constitute murder. It may be objected that this represents a failure to distinguish between the notion of a willed act and the consequences of a willed act. This is where the degree of foresight necessary to convert a reckless act into a *de facto* intentional act, and whether the measuring rod is subjective or objective, emerges as the critical question. In the context of a deliberate assault, Lord Parker in *R v Grimwood* explained *DPP v Smith* in similar terms to Holmes’s beam example, whereby if a reasonable person would have realised (an awareness or knowledge) in the circumstances of a deliberate assault that death or grievous bodily harm was a likely result, then, if death results, this is reckless murder and not negligence.

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125 Under the *Criminal Code* (Cth), this is dealt with by requiring the willed act (throwing down a heavy beam) to be intentional, while the fault element for the result or consequences of the willed act is recklessness.
126 [1962] 3 All ER 285, 286.
128 The subjective requirement of ‘awareness’ for recklessness is the sole distinction between recklessness and negligence in the *Criminal Code* (Cth). The test for the latter is totally objective, negligence requiring such a great falling short of the standard of care that a reasonable person would exercise, and such a high risk that the physical element exists, that the conduct merits criminal punishment. Notwithstanding the fact that Part 2.2 treats the distinction between recklessness and negligence as fundamental (only recklessness contains a subjective component), it was demonstrated in *Simpson v The Queen* (1998) 103 A Crim R 19, that there is a thin line between recklessness and negligence – between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.
129 In *R v Ward* [1956] 1 QB 351, 356, Lord Goddard states: ‘[B]ut if the jury comes to the conclusion that any reasonable person, that is to say a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm, and that death is the result of that grievous bodily harm, then that amounts to murder in law.’ (Emphasis added.) Thus, there is a presumption of intent which is rebuttable only by proof of incapacity to form intent such as insanity or diminished responsibility. This rebuttable presumption was reversed by s 8 of the *Criminal Justice Act 1967* (England).
For Holmes, the selection of the standard of the prudent person, the yardstick of general experience, was based on the view that the ‘object of the law is to prevent human life being endangered or taken … to compel men to abstain from dangerous conduct … at their peril to know the teachings of common experience’. Writing in 1881, Holmes’s test for murder ‘is the degree of danger to life attending the act under the known circumstances of the case’.

Holmes would have been aware of the Indian Penal Code (IPC), discussed at 3.3.1. Yeo has pointed out that ‘Indian law recognises three types of intentional murder’ under s 300 of the IPC. In addition to an intention to kill, a person is liable for murder where the act causing death was done ‘with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused’. Yeo has suggested sub-section 300(2) ‘constitutes a hybrid fault element of intention [to cause bodily injury] coupled with recklessness [D knew that the intended injury was likely to cause death]’. Furthermore, under sub-section 300(3), a person is liable for murder if he or she intended to cause a bodily injury ‘and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death’. Yeo has argued that ‘[t]he type of injury envisaged here is injury which is so serious that death is a highly probable consequence of the injury’.

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130 Holmes, above n 117, 56-57.
131 Ibid 57.
132 S. Yeo, Fault in Homicide (Federation Press, 1997) 15.
133 Indian Penal Code, s 300(2).
134 Yeo, above n 132.
135 The words ‘bodily injury sufficient in the ordinary course of nature to cause death’ in s 300(3) mean that death is the most probable result of the injury, having regard to the ordinary course of nature: State of Andhra Pradesh v Punnayya AIR 1977 SC 45, 50 (Sarkaria J).
136 Yeo, above n 132.
As Setalvad has pointed out, there are decided advantages in codifying murder and manslaughter:

What the Indian Code seems to have done is to incorporate into the common law crime the *mens rea* needed for that particular crime, so that the guilty intention is generally to be gathered not from the common law but from the statute itself … By adopting this course, Macaulay and his colleagues have also avoided the doubt and obscurity which have not infrequently arisen in regard to the *mens rea* required for certain common law crimes like homicide.\(^\text{137}\)

The validity of Setalvad’s observation on the doubt and obscurity of the *mens rea* required for murder at common law is particularly pertinent for England in the last 40 years. The question of whether ‘certainty’ or ‘likelihood’ of causing death should constitute a touchstone for a definition of the mental state of murder caused considerable difficulty to judges in England some 100 years after Holmes published his seminal work. Cases analogous to Holmes’s heavy beam example, such as the dropping of concrete blocks from a bridge onto a car travelling below,\(^\text{138}\) the lighting of a fire through the letterbox in the front door of an occupied house,\(^\text{139}\) and throwing a three-month-old baby onto a hard surface,\(^\text{140}\) once more placed centre stage whether the probability of causing death should form part of the test for murder.\(^\text{141}\)

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137 M.C. Setalvad, *The Common Law in India* (Stevens & Sons Limited, 1960) 139-140.

138 *R v Hancock and Shankland* [1986] 1 AC 455.

139 *Hyam v DPP* [1975] AC 55.

140 *R v Woollin* [1999] AC 92.

141 Yeo, above n 132, 52, points out that ‘Australian courts have largely avoided the difficulties which their English counterparts have had over the meaning of intention as a fault element for murder’. Given the authority of *R v Crabbe* (1985) 156 CLR 464 that the test for reckless murder is a defendant’s awareness that his or her conduct will probably result in death and is sufficient to equate to intention for murder, Yeo opined that Australian jurisdictions ‘have not felt the same need to define intention’: ibid 55.
In Australia, the test for reckless murder at common law is whether the accused knew that death was a probable as opposed to possible consequence of his or her conduct. Here, a subjective presumption of intent is drawn from proof of foresight of probable consequences, as opposed to the objective presumption of a person intending the natural and probable consequences of his or her actions. However, at common law in Australia, by contrast with England, intention and recklessness are alternative fault elements for murder, and proof of recklessness does not require an additional finding of intention before a person can be convicted such that recklessness is not merely evidence from which intention can be inferred. Thus, in *Fontaine v The Queen*, Gibbs J said:

> It must now be taken to be the law that a person who does an act knowing that it is probable that death or grievous bodily harm will result is guilty of murder if death does in fact result, even though he had no intention to cause death or grievous bodily harm.

This statement was unanimously approved by the High Court in *R v Crabbe*.

A person who does an act causing death knowing that it is probable that the act will cause death or grievous bodily harm is, as Stephen's Digest states, guilty of murder although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or even by a wish that death or grievous bodily harm might not be caused. That does not mean that reckless indifference is an element of the mental state necessary to constitute the

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142 As Cato has observed: ‘The rationale for murder is a person’s reckless and callous indifference to life which renders him or her very closely compatible in moral terms with one who intends to kill or cause grievous bodily harm’: C. Cato, ‘Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results’ (1990) 2(2) Bond Law Review 182, 189.
143 Knowledge is defined in s 5.3 of the *Criminal Code* (Cth) as follows: ‘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 overlap between subjective awareness and objective ordinary course of events in the definition of knowledge, is more marked in the definition of recklessness in s 5.4 which combines the subjective awareness of a substantial risk with the objective unjustifiable to take the risk in the circumstances.
144 *R v Crabbe* (1985) 156 CLR 464. In 1983, Crabbe drove his 25-tonne Mack truck into a crowded motel at the base of Uluru. Five people were killed and sixteen seriously injured.
146 *La Fontaine v The Queen* (1976) 136 CLR 62, 75.
147 (1985) 156 CLR 464.
crime of murder. It is not the offender's indifference to the consequences of his act but his 
knowledge that those consequences will probably occur that is the relevant element.\(^{148}\)

On the above authority, it would appear that in Australia it is arguable that the test of
common law reckless murder approximates Holmes’s definition of murder. Holmes
clearly stated his test was objective because ‘the danger which in fact exists under the
known circumstances ought to be of a class which a man of reasonable prudence
could foresee’.\(^{149}\) It is open to conclude that the ‘probable consequence’ test for
common law reckless murder resembles an objective test as, notwithstanding Barwick
CJ’s remarks in *Pemble v R*,\(^{150}\) the jury does stand in the shoes of the defendant
adopting the reasonable person’s foresight. The jury in *R v Crabbe*\(^{151}\) would have
asked themselves what else could the defendant have intended when he drove his
truck into the crowded hotel but to cause grievous bodily harm? Whilst in *R v Crabbe*\(^{152}\) criminal liability was based on recklessness as to the causing of death or
grievous bodily harm, the High Court equated recklessness, where the consequence
was probable, with intention sufficient to sustain a conviction for murder rather than
manslaughter. Ironically, if Crabbe was to be tried today in the Northern Territory,
rather than under the common law that pertained in 1983, Crabbe would likely only be
convicted of manslaughter given the definition of intention under s 156 of the
*Criminal Code* (NT) and the absence of reckless murder in Northern Territory.

So how do *La Fontaine v R*\(^{153}\) and *R v Crabbe*\(^{154}\) fit into the Australian denunciation
of *DPP v Smith*?\(^{155}\) In answering this question, it necessary to turn to *Parker v The

\(^{148}\) *R v Crabbe* (1985) 156 CLR 464, 468 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ)
(emphasis added).

\(^{149}\) Holmes, above n 117, 56.

\(^{150}\) (1971) 124 CLR 107, 120-121. See above n 54 and n 55.

\(^{151}\) (1985) 156 CLR 464.

\(^{152}\) Ibid.

\(^{153}\) (1976) 136 CLR 62.
in which Dixon CJ reasserted the High Court’s attack on the natural and probable consequences test, which was first raised eleven years earlier in Stapleton v The Queen. Parker v The Queen was a provocation case and unrelated to the issue of an objective test for murder. Nevertheless, Dixon CJ at the end of his judgment took clear aim at the House of Lords decision in DPP v Smith which had been handed down just two years earlier.

In Stapleton v. The Queen we said: ‘The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous’. That was some years before the decision in Director of Public Prosecutions v. Smith, which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied Smith's Case I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion and, perhaps I may add, explanation, to make it unnecessary to go over the ground once more. I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily and therefore if I

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154 (1985) 156 CLR 464.
156 (1963) 111 CLR 610.
157 (1952) 86 CLR 358.
158 (1963) 111 CLR 610.
160 Dixon CJ was but one of many distinguished jurists to attack DPP v Smith [1961] AC 290. H.L.A. Hart in a letter to The Times, November 12, 1960, cited by Desch, above n 115, 672, was deeply critical of the decision: ‘[T]he House of Lords has shown that it is true, even if in the mid-twentieth century it is almost unbelievable, that English law recognises no distinction between the man who intends to kill and one who, without intending either to kill or seriously harm, does something to another which a reasonable man would realise would probably cause serious harm.’
161 (1952) 86 CLR 358.
162 Stapleton v The Queen (1952) 86 CLR 358, 365.
left it on one side some misunderstanding might arise. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think Smith’s Case should not be used as authority in Australia at all.

I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph. ¹⁶⁴

Dixon CJ appears to imply that without some clear statement from the High Court that DPP v Smith¹⁶⁵ would not be followed in Australia, there might be some ‘misunderstanding on the subject’, and that there would be no departure from the law of murder ‘long since laid down in this Court’. Two points can be made at this juncture. The first is that Australia, with its federal system, has multiple criminal jurisdictions, as discussed earlier. The law of murder differs across Australian jurisdictions both as to the fault element and as to the availability of partial defences. It is therefore no more possible in 1963 than it is to today, with respect to Dixon CJ, to suggest that the law of murder has been clearly laid down by the High Court.

The second point to make in relation to the extract from Dixon CJ’s judgment above in Parker v The Queen,¹⁶⁶ is that there were already differences between the law of murder in England and Australia prior to DPP v Smith.¹⁶⁷ For example, constructive murder¹⁶⁸ was and remains on the statute books of all six Australian States.¹⁶⁹ Yet,

¹⁶⁴ Parker v The Queen (1963) 111 CLR 610, 632-633 (Dixon CJ).
¹⁶⁵ (1961) AC 290.
¹⁶⁶ (1963) 111 CLR 610.
¹⁶⁸ For constructive murder, it is not necessary for the prosecution to prove the subjective fault element of intention or recklessness to kill or to cause serious harm. Rather, the fault element is imputed to the accused where the victim has been killed during the course of a crime that endangers human life or whilst resisting lawful arrest. For the physical elements, the accused must have caused the death of the victim and the death must be connected to the commission of a specified offence.
constructive murder has been extensively criticised\textsuperscript{170} as it lacked the essential fault element of ‘intentional recklessness’ by the accused.\textsuperscript{171} In 1957, four years prior to Smith, common law felony murder was repealed in England. This thesis contends that there is already a \textit{de facto} objectivity in the Australian law of murder by virtue of the test of knowledge of a probable consequence for common law reckless murder, combined with all Australian State jurisdictions retaining constructive murder as a criminal offence, under which a fault element is ‘constructed’ from the circumstances.

Given Dixon CJ’s emphatic criticism of the objective test adopted in DPP v Smith,\textsuperscript{172} there is a certain irony that fifty years after DPP v Smith was decided it is Australia that has come closer to adopting a \textit{de facto} objective test for murder rather than England. Australia has set the foresight bar for reckless murder at ‘probable’ in the common law jurisdictions, whereas England has raised the foresight bar to ‘a virtual certainty’. In Australia, in the \textit{Criminal Code} (Cth) recklessness has a dual subjective and objective component,\textsuperscript{173} while in England the jury must find intent rather than merely inferring intent.

The situation in England post the most recent decision of the House of Lords in R v Woollin,\textsuperscript{174} would appear to be that the subjective presumption only operates where the jury is satisfied beyond reasonable doubt that the accused foresaw death or grievous bodily harm as ‘a virtual certainty’. So the wheel has come back full circle to

\textsuperscript{170}Common law felony murder was repealed in England by s 1(2) Homicide Act 1957 (England), and the constructive murder provisions in the \textit{Criminal Code} 1892 (Canada) were held to be unconstitutional by the Supreme Court of Canada in Vaillancourt v The Queen [1987] 2 SCR 636.

\textsuperscript{171}For example, Law Reform Commission of Western Australia, see above n 51, 59 quoting B. Fisse, \textit{Howard’s Criminal Law}, 2005, 70-71: ‘The main objection to the felony-murder rule is that it does not require proof of a subjective blameworthy state of mind.’

\textsuperscript{172}[1961] AC 290, 327.

\textsuperscript{173}See, for example, s 5.4 \textit{Criminal Code} (Cth); s 43AK \textit{Criminal Code} (NT).

\textsuperscript{174}[1999] AC 82.
Woolmington v DPP.\(^{175}\) The case of DPP v Smith\(^ {176}\) is to be treated as an aberration and section 8 of the Criminal Justice Act 1967 read down. After a circuitous route from Hyam v DPP\(^ {177}\) to R v Woollin,\(^ {178}\) the House of Lords has settled on ‘a virtual certainty’ (or, put another way, the probability of the consequence being foreseen must be little short of overwhelming) as constituting a finding of intent rather than merely inferring intent. Dixon CJ’s critical view of DPP v Smith,\(^ {179}\) as expressed in Parker v The Queen,\(^ {180}\) is aligned with the English rejection of the natural and probable consequences test.

5.6. THE EXPANSION OF OBJECTIVE TESTS FOR CRIMINAL RESPONSIBILITY IN AUSTRALIA

Any discussion of an expansion of objective tests for criminal responsibility needs to commence with the appropriate underlying fault element of criminal responsibility in Australia. Writing in 2001 of the Criminal Codes of Queensland, Western Australia, Tasmania and the Northern Territory, Colvin identified the general threshold of criminal responsibility as negligence, stating that ‘subjective states of mind are in issue under the Codes only when they are put in issue by the definitions of particular offences, mainly property offences and certain aggravated offences against the person’.\(^ {181}\) However, this is not to suggest that most serious offences, which require proof of intention, should encompass a fault element of negligence. Rather, that the

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\(^{175}\) [1935] AC 462, 481 (Lord Sankey).

\(^{176}\) [1961] AC 290.

\(^{177}\) [1975] AC 55.

\(^{178}\) [1999] AC 82.


\(^{180}\) (1963) 111 CLR 610, 632-633 (Dixon CJ).

\(^{181}\) Colvin, above n 4, 198-199. See also Fairall, above 2.2.3.2, n 130.
higher fault element of recklessness on the staircase of criminal liability is unknown
to the above *Codes*.

However, under the *Model Criminal Code*, which has essentially been translated into
Part 2 of the *Criminal Code* (Cth), the underlying fault element is recklessness for a
physical element that consists of a circumstance or a result. Essentially, the basic
structure of the *Criminal Code* (Cth) is that the conduct (act) must be intentional
coupled with recklessness as the threshold for liability for the result of conduct or a
circumstance in which conduct happens. Leader-Elliott has rightly described
recklessness as the ‘ubiquitous fault element’\(^1\) which requires an awareness of a
substantial risk which is unjustifiable to take. The subjective requirement of
‘awareness’ is the sole distinction between recklessness and negligence,\(^2\) and there
is clearly a thin line between recklessness and negligence in terms of actual awareness
of a risk (subjective) and objective awareness because the risk was obvious, as
demonstrated in *Simpson v The Queen*\(^3\).

Selecting a general threshold of criminal responsibility is further complicated by the
use of strict liability (no fault element) for serious driving offences. For example, in
the Northern Territory, the Crown would likely prosecute a case such as *DPP v Smith*
under s 174F Driving motor vehicle causing death or serious harm which under s

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\(^1\) Leader-Elliott, ‘Elements of Liability in the Commonwealth Criminal Code’ (2002) 26 Criminal

\(^2\) See above n 128.

\(^3\) (1998) 103 A Crim R 19. In *Simpson v The Queen*, the High Court was construing s 157(1)(c)
*Criminal Code* (Tas) which deals with murder and in particular whether the offender knew or ought to
have known whether the unlawful act was likely to cause death in the circumstances. The High Court
held that if a fact or circumstance is so well known that no reasonable person in the community would
dispute it (here stabbing the deceased in the general area of the upper body), a jury may safely infer that
the offender (appellant) knew it unless denial by him raises a reasonable doubt about his knowledge.
174F(4) is an offence of strict liability\textsuperscript{185} and which carries a maximum term of imprisonment of 10 years under s 174F(1). The two physical elements of the offence are causing death or serious harm and driving dangerously, with the latter in turn having three alternative definitions: being either under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle, or driving at a speed that is dangerous to another person, or in a manner that is dangerous to another person. Thus, not only is this serious offence one of strict liability but also intoxication \textit{per se} is sufficient to trigger a physical element.

So where does a potential term of imprisonment of 10 years for a strict liability offence leave critics of objective tests who contend that for serious offences ‘there should be no penal liability without fault’?\textsuperscript{186} Colvin would apply the test that ‘whatever the seriousness of the offence, we should reject liability for failure to attain a standard that was beyond the capacities of the accused’.\textsuperscript{187} For Colvin, the ‘primary problem for the design of objective tests of criminal responsibility is that ordinary behaviour encompasses a range of conduct … if an objective test is to be used, a point within the range must be selected as the standard against which the accused is measured’.\textsuperscript{188}

It is instructive to compare Colvin’s criteria above with the widely accepted test\textsuperscript{189} for criminal negligence manslaughter in \textit{Nydam v The Queen}.\textsuperscript{190} Clearly, the twin

\textsuperscript{185} Under s 43AN \textit{Criminal Code} (NT) strict liability is defined as where there are no fault elements for any of the physical elements and the defence of mistake of fact under s 43AX is available. Section 43AX requires the person to be under a mistaken but reasonable belief about the facts and had those facts existed the conduct would not have constituted an offence.

\textsuperscript{186} Colvin, above n 4, 199.

\textsuperscript{187} Ibid.

\textsuperscript{188} Ibid 200.

\textsuperscript{189} ‘A killing that occurs through gross negligence amounts to manslaughter in all [Australian] jurisdictions.’ Bronitt and McSherry, above n 169, 537 [9.155].
objective quantum of a great falling short of a reasonable standard of care and a high risk sufficient to merit criminal punishment, are neither beyond the capacity of a normal person nor set at an unrealistically high standard of human behaviour. In fact, the strength of the objective test is here amply demonstrated, as the jury is not confused by mixed judicial messages about foresight and intention, and can objectively stand in the shoes of the accused. Arguably, given ‘a great falling short’ is open ended, the objective standard is set at the most favourable to the accused.

In any event, manslaughter carries a potential term of life imprisonment.\(^\text{191}\) This raises the question if a person can face life imprisonment under an objective test, or face a 10 year prison sentence under a strict liability offence such as driving a motor vehicle causing death, has the time come to review the ascendancy of subjective tests of criminal responsibility? The only offence more serious than manslaughter is murder. As was discussed earlier, at common law recklessness is included as a fault element for murder in addition to intention.\(^\text{192}\) Also, as previously mentioned, recklessness under the *Criminal Code* (Cth) contains a combined subjective (the person is aware of a substantial risk that the result will happen) and objective (having regard to the circumstances known to the person it is unjustifiable to take the risk) test.\(^\text{193}\) Recklessness as defined under s 5.4 in Chapter 2 of the *Criminal Code* (Cth) is a fault element for murder under s 115.1(d) of the *Criminal Code* (Cth) which reads as

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\(^{190}\) *Nydam v The Queen* [1977] VR 430. The test in *Nydam* is followed in s 43AL Negligence of the *Criminal Code* (NT): ‘A person is negligent in relation to a physical element of an offence if the person’s 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.’

\(^{191}\) See, for example, s 161 of *Criminal Code* (NT) and s 310 of *Criminal Code* (Qld). Under s 24 of the *Crimes Act 1900* (NSW) the punishment for manslaughter is up to 25 years’ imprisonment.

\(^{192}\) For example, s 18(1)(a) *Crimes Act 1900* (NSW) states ‘where the act of the accused … causing the death charged, was done or omitted with reckless indifference to human life’. See *Winner v The Queen*, above n 111.

\(^{193}\) See s 5.4 *Criminal Code* (Cth); s 43 AK *Criminal Code* (NT).
follows: ‘the person intends to cause, or is reckless as to causing, the death of, or serious harm to, that or any other person by that conduct’.

Thus, common law reckless murder with its test of doing an act causing death knowing that it is probable that the act will cause death or serious harm,\textsuperscript{194} is essentially replicated for the fault element of recklessness under s 5.4 and s 115.1(d) of the \textit{Criminal Code} (Cth). The Australian foresight bar for murder of ‘probable’, rather than the English foresight bar of ‘a virtual certainty’, arguably takes Australia close to Holmes’s objective definition of murder. Holmes concluded ‘that knowledge that the act will probably cause death, that is foresight of the consequences of the act, is enough in murder’,\textsuperscript{195} such that where the probability is a matter of common knowledge, like leaving a newly born child naked outside, the person doing the act is guilty of murder. The facts in \textit{Crabbe} are exactly on point with Holmes’s example of throwing a heavy beam from a building site down into a busy street below.

In 5.4 above, s 23(1)(b) of the \textit{Criminal Code} (Qld) was discussed in the context of \textit{Stevens v The Queen}.\textsuperscript{196} The Queensland Government has recently amended s 23(1)(b) to refer to:\textsuperscript{197}

\begin{quote}
(b) an event that – (i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence.
\end{quote}

The purpose of the amendment was to omit the term ‘accident’ and legislatively enshrine the ‘reasonably foreseeable consequence’ test. As discussed earlier, the word

\textsuperscript{194} R \textit{v Crabbe} (1985) 156 CLR 464, 468 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
\textsuperscript{195} Holmes, above n 117, 53.
\textsuperscript{196} (2005) 227 CLR 319.
\textsuperscript{197} \textit{Criminal Code and Other Legislation Amendment Act 2011} (Qld).
‘accident’ (a random unexpected act) does not convey the meaning under s 23(1)(b) which is an unintended, unforeseen and unforeseeable event. The amendment is mere window dressing because it fails to deal with the negative manner in which s 23(1)(b) is expressed. The real issue remains the continued presence of s 23(1)(b) in the Criminal Code (Qld), which was based on the Queensland Law Reform Commission’s recommendation that s 23(1)(b) should be retained.\textsuperscript{198} The Commission was apparently unable to envisage any other alternative but the repeal of s 23(1)(b) pointing out this would have far reaching consequences because accident applies generally to criminal offences and not just to manslaughter.\textsuperscript{199} The Commission concluded that the excuse of accident was ‘a critical provision of the Code’ and therefore the ‘Code should continue to include an excuse of accident’.\textsuperscript{200}

The Commission displayed a lack of vision in ignoring the Model Criminal Code and Chapter 2 of the Criminal Code (Cth) as examples to follow. The only reference to accident in the Criminal Code (Cth) is in relation to intoxication and offences involving basic intent in s 8.2(3)\textsuperscript{201} and the word ‘accident’ is not defined in s 8.2.\textsuperscript{202} For present purposes, Odgers has made the significant comment that ‘while it [accident] appears in the Griffith Codes, the context is entirely different so that authority on those Codes provides no assistance’.\textsuperscript{203} Odgers further pointed out that

\textsuperscript{199} Ibid 184.
\textsuperscript{200} Ibid 184-185.
\textsuperscript{201} The equivalent section in the Criminal Code (NT) is s 43 AS(2) which states that: ‘This section does not prevent evidence of self-induced intoxication being taken into account in determining whether conduct was accidental.’
\textsuperscript{202} The Queensland Law Reform Commission stated that for the purpose of s 23(1)(b) accident does not mean a random unexpected act but an ‘unintended, unforeseen and unforeseeable event’. See Queensland Law Reform Commission, above n 198, 179.
because s 23(1)(b) *Criminal Code* (Qld) deals with an event which occurs by accident, ‘it has no bearing on “conduct” under this [Commonwealth] Code’.\(^{204}\)

Once difficult and dated sections such as s 23 *Criminal Code* (Qld) are abandoned in favour of the flexibility of a structured suite of physical and fault elements to be found in Chapter 2 of the *Criminal Code* (Cth),\(^{205}\) the task of constructing new sections of a code becomes far easier. It would not then be possible to recommend the *status quo* on the grounds that s 23(1)(b) was ‘a critical provision of the Code’ and repealing the section would have ramifications well beyond manslaughter. The real difficulty with s 23 above is that, as demonstrated in *Stevens v The Queen*,\(^{206}\) the section was drafted before the House of Lords decision in *Woolmington v DPP*,\(^{207}\) and ‘the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood’.\(^{208}\)

The unsatisfactory and confusing two-step process between the subjective test for murder under s 302(1)(a) of the *Criminal Code* (Qld), and the objective test for accident under s 23(1)(b) *Criminal Code* (Qld), could be readily overcome if the process of establishing the fact of an unlawful killing and then characterising the killing as murder or manslaughter, with the defence of accident open for both offences, was abandoned completely. In a nutshell, the coexistence of an underlying fault standard of negligence in the Griffith Codes with the present supremacy of subjective tests is the fundamental reason why reform is needed. Under s 5.6(2) of the

\(^{204}\) Ibid.

\(^{205}\) To illustrate the point in relation to the adoption of Chapter 2 of the *Criminal Code* (Cth), Part 3.4 of the thesis contained the new s 161A of the *Criminal Code* (NT) entitled *Violent act causing death* to deal with killings that have resulted from so called ‘one-punch’ assaults, which have bedeviled s 23(1)(b) of the *Criminal Code* (Qld).

\(^{206}\) (2005) 227 CLR 319.

\(^{207}\) [1935] AC 462.

\(^{208}\) Goode, above n 97.
Criminal Code (Cth), the residual fault element for a physical element that consists of a circumstance or a result is recklessness, one step up on the fault staircase of criminal liability from negligence. Even though recklessness combines a subjective and objective fault element, the removal of the defence of accident and the test of an unintended, unforeseen and unforeseeable event from the Criminal Code (Qld), in favour of the general principles and the definitions of concepts in Chapter 2 of the Criminal Code (Cth), is the way forward.

However, the present definition of recklessness in s 5.4 of the Criminal Code (Cth), which combines awareness of a substantial risk with it being unjustifiable to take the risk, should be made purely objective as follows:

A person is reckless in relation to a result if: (a) the person is aware of a substantial risk that the result will happen or if the person is not aware of a substantial risk that the result will happen and an ordinary person would have been aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person or to an ordinary person, it is unjustifiable to take the risk.

Effectively, the above proposed definition of recklessness applies the test in DPP v Smith, of what the ordinary person would, in all the circumstances of the case, have contemplated as the natural and probable result. Alternatively, the definition mirrors both subjective and objective Caldwell recklessness.

210 Following Caldwell [1982] AC 341, the defendant is Caldwell reckless if the defendant is subjectively reckless or if the defendant does not foresee the relevant risk but an ordinary person would have foreseen it.
The immediate objection to such a definition is that it blurs the line between recklessness and negligence, which Chapter 2 of the *Criminal Code* (Cth) is at pains to maintain, and lowers the residual fault element on the fault staircase of criminal liability. Three responses to this objection can be made. The first is the moral public safety argument put by Holmes. For Holmes, the selection of the standard of the prudent person, the yardstick of general experience, is based on the view that the ‘object of the law is to prevent human life being endangered or taken … to compel men to abstain from dangerous conduct … at their peril to know the teachings of common experience’.\(^{211}\) The second response is based on some serious driving offences being strict liability offences, and manslaughter having fault elements of either recklessness or negligence.\(^{212}\) The third response is that there is in any event a thin line between recklessness and negligence - between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.\(^{213}\)

The adoption of such an objective test for recklessness would then enable an objective test to sit within the nomenclature of Chapter 2 of the *Criminal Code* (Cth). Such a test would serve to rehabilitate *DPP v Smith* in the guise of *Caldwell* recklessness on a principled basis, and avoid juries having to develop ‘a split personality’\(^{214}\) when weighing up combined subjective and objective tests. The effect of incorporating solely objective tests into the fault elements of recklessness and negligence, and including recklessness as a fault element for murder as an alternative to intention, is to

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\(^{211}\) Holmes, above n 117, 57.

\(^{212}\) See for example s 160 Manslaughter of the *Criminal Code* (NT).

\(^{213}\) *Simpson v The Queen* (1998) 103 *A Crim R* 19. See also above n 128.

recast and reclaim supremacy for the role of objective tests. Effectively, objective tests are vaulted to the top of the staircase of fault liability as a measure of public protection. The purpose is to reinforce the positive duty on any state to take appropriate steps to safeguard the lives of those within its jurisdiction, and a duty to put in place ‘effective criminal law provisions to deter the commission of offences against the person’. 215

5.7. THE OBJECTIVE TEST FOR PROVOCATION AND SELF-DEFENCE

5.7.1. A Hierarchy of Defences

The remaining sections of this Chapter continue the development of the third theme of the thesis, namely, the selection of the underlying fault element for a criminal code, which sets the baseline of criminal responsibility between the State and its citizens. However, the focus now turns away from fault elements to defences, mounting an argument consistent with the previous objective approach to the elements of offences.

In particular, the thesis examines the partial defence to murder of provocation, which has been abolished in three Australian jurisdictions, 216 and the complete defence of self-defence, which is available in all Australian jurisdictions. Both defences have been selected because they combine a subjective and an objective test.

In keeping with the argument in this Chapter for the reassertion of the place of objective tests in criminal responsibility, both defences have been re-written below to reflect a solely objective test. It is essential for a consistent criminal code structure

216 The partial defence has been abolished in Tasmania, Victoria and Western Australia.
that the underlying fault element be applied to both offences and defences. The
alternative is the present hotchpotch of subjective and objective tests which serves
only to confuse juries and unnecessarily complicate the criminal laws of Australia.

There is a further reason for the selection of these two defences which relates to
suggestions that ‘there is a hierarchy of defences in terms of those that reflect most
favourably on the defendant’ on top of which sits the justification defence of self-
defence followed by the excuses of duress and necessity. Provocation straddles both
justification and excuse. Baron makes the point that justifications and excuses are
not quite on a par, morally. ‘Given a choice between having some action of mine
deemed justified and having it deemed excused, I would rather it be deemed justified.

In this context, it is instructive to examine the elements of the excuse of duress, which
sits below self-defence and above provocation on the above hierarchy of defences,
using s 10.2 of the Criminal Code (Cth) as the vehicle of analysis.

10.2 Duress

(1) A person is not responsible for an offence if he or she carries out the
conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she
reasonably believes that:

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217 Chalmers and Leverick, above n 35, 245.
218 See, for example, sections 54 to 56 of the Coroners and Justice Act 2009 (UK), by virtue of which
the defence of provocation was abolished and substituted with a new partial defence entitled ‘Loss of
Control’. This marks a shift from one of excuse to one of justification.
(d) a threat has been made that will be carried out unless an offence is committed; and

(e) there is no reasonable way that the threat can be rendered ineffective [objective test of necessity]; and

(f) the conduct is a reasonable response to the threat [objective test of proportionality of response].

Thus, it can be seen that the elements for s 10.2 above are objective. The question being posed here is that if duress is a higher order excuse under the hierarchy of defences, then is there any reason not to apply objective tests to all defences and particularly to those which confusingly (to the jury) combine objective and subjective tests?

5.7.2. Provocation

The vehicle for the analysis of the defence of provocation is the two part test for provocation contained in s 158(2) of the Criminal Code (NT) below which follows the unanimous High Court decision in Stingel v R,\(^\text{220}\) which although the case concerned the now repealed provisions of the Criminal Code (Tas) applies equally to the common law.\(^\text{221}\)

\(^{220}\) (1990) 171 CLR 312.
\(^{221}\) Masciantonio v The Queen (1995) 183 CLR 58, 66.
(b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

Section 158(2)(a) above requires the defendant to have a loss of self-control induced by conduct of the deceased. The High Court has allowed all of the characteristics of the defendant into the subjective test of the gravity of the provocation for the purpose of loss of self-control.

Even more important, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the provocation involved in the relevant conduct. ²²²

The subjective first limb of the partial defence of provocation as per s 158(2)(a) is a very low bar. Trial judges are reluctant to withhold a defence from the jury given the obvious likelihood of an appeal. ²²³ However, Queensland has taken the very significant and commendable step of placing the legal onus on the defendant raising provocation, ²²⁴ which injects a greater degree of objectivity into this flawed defence. Such a legislative change brings provocation in line with the other partial defence to murder of diminished responsibility as regards the burden of proof on the defence. Where the defendant has to prove provocation on the balance of probabilities, the claim of provocation will likely need to be articulated more clearly, with the trial judge having a greater capacity to prevent weak claims going to the jury. The reversal

²²² Stingel v R (1990) 171 CLR 312, 326.
²²³ For example, R v Rae [2006] QCA 207 [35] (McMurdo P).
²²⁴ Following the enactment of the Criminal Code and Other Legislation Amendment Act 2011 (Qld), Queensland has placed the legal onus of proof for provocation on the defence on the balance of probabilities. See s 304(7) Criminal Code (Qld).
of the onus of proof for provocation is justifiable in the absence of the abolition of the defence.

Having accepted the relevance of the defendant’s characteristics for the purpose of assessing the gravity of the deceased’s conduct, the High Court then excluded these subjective considerations except for age when judging the effect of this conduct on the powers of self-control of the ordinary person, which finds expression in s 158(2)(b) above. The question then becomes whether the ordinary person faced by that degree of provocation could (not would) have killed the deceased. The High Court approved the following passage from Wilson J in the Canadian case of *R v Hill.*

The objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

The two part subjective and objective test for provocation contained in s 158(2) and derived from *Stingel v R* is conceptually confused, complex and difficult for juries to understand and apply. Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult.

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225 (1986) 1 SCR 313, 343.
226 (1990) 171 CLR 312.
227 See Victorian Law Reform Commission, *Defences to Homicide,* Final Report (2004) 26-35. There is an inherent confusion built into a test that seeks to distinguish between the gravity of the provocation from the perspective of the accused on the one hand, and an objective assessment of the reaction of the accused on the other hand.
[The test] bears no conceivable relationship with the underlying rationales of the defence of provocation … The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between the characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.\(^{228}\)

The essential change proposed here in a redrafted s 158 is that the test for provocation should be solely objective and all reference to the gravity of the offence should be removed. Thus, in keeping with a thesis that criminal codes can be rewritten with greater clarity and consistency, the confusion and complexity of a two part subjective and objective test is avoided. The language employed in sub-section (2) below seeks to embed the second limb of *Stingel* and specify the objective standard of the ordinary person.

### 158 Trial for murder – partial defence of provocation

(1) A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.

(2) The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant’s age and of ordinary temperament, defined as ordinary tolerance and self-restraint,\(^{229}\) to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

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\(^{229}\) It is of course open to the legislature to include a definition of an ordinary person. Following the second limb of *Stingel*, the only concession made is for the defendant’s age. Otherwise, all references are to ‘ordinary’ to reinforce the objective standard.
The partial defence to murder of provocation is here significantly narrowed in two ways. First, the defence only applies to fear of serious violence, and, secondly, the conduct of the deceased could have induced an ordinary person of ordinary temperament to have lost self-control sufficient to kill or cause serious harm. Thus, only the most serious provocations would qualify, and the instructions to the jury would not require them to engage in mental gymnastics between the subjective gravity of the provocation and the objective assessment of whether an ordinary person could have maintained self-control. Only an objective assessment of the reaction of the accused would apply.

5.7.3. Self-defence

Self-defence is a highly emotive but necessary defence of long standing. Nevertheless, like all defences it is open to abuse, particularly in circumstances where the alleged aggressor is dead and there were no other witnesses than the defendant. When Victoria abolished the partial defence of provocation it also introduced a new defence of defensive homicide which was designed to protect women. However, there are concerns as to the operation of the Victorian legislation. There have been 13 defensive homicide cases since the legislation was introduced in 2005, and all the offenders were male. Twelve cases involved a male victim, and one involved a female victim. Ten of the thirteen defensive homicide convictions have been the result of pleas of guilty. The average sentence imposed for the offence of defensive homicide is 8.8

230 Crimes (Homicide) Act 2005 (Vic) This created s 9AD Defensive Homicide of the Crimes Act 1958 (Vic).
232 Ibid 48 [200].
years, with the highest sentence to date being 12 years’ imprisonment with a non-parole period of 8 years in the case of *R v Middendorp*. There is a danger that defensive homicide is provocation in a new guise.

The real lesson from the Victorian experience with defensive homicide is that all defences have unintended consequences. This means there is a need for vigilance. Such vigilance can take the form of objective tests to protect society from the abuse of worthy defences. The vehicle for the analysis of the complete defence of self-defence (no criminal responsibility attaches to the conduct) is the two part test contained in the relevant subsections of s 43 BD of the *Criminal Code* (NT) extracted below.

(2) A person carries out conduct in self-defence only if:

(a) the person believes the conduct is necessary:

   (i) to defend himself or herself or another person; and

(b) the conduct is a reasonable response in the circumstances as he or she perceives them.

The key point is that the above test for self-defence is heavily subjective. Under sub-section (2)(a) above, the first limb of the test, the person must believe the conduct is necessary which is wholly subjective. Under sub-section (2)(b) above, the second limb of the test waters down the common law objective component of a reasonable response in the circumstances by the subjective qualification of the person’s

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233 Ibid 34 [125].
234 Ibid 34 [126].
235 [2010] VSC 202. This case raised major concerns as to the operation of the partial defence of defensive homicide. Luke Middendorp who stands 186-centimetres tall and weighs more than 90 kilograms stabbed Jade Bownds, who weighed 50 kilograms, four times in the back.
236 Similar provisions can be found in s 10.4 *Criminal Code* (Cth); s 42 *Criminal Code* 2002 (ACT); s 418 *Crimes Act* 1900 (NSW).
perception of those circumstances. There is no requirement that the perception of the circumstances must be reasonable.\textsuperscript{237}

As Bronitt and McSherry point out, ‘self-defence is open-ended in its formulation in the sense that there are not many substantive rules limiting its scope and it is very much a matter of fact for the jury’\textsuperscript{238}. The weakening of the objective limb needs to be rectified because, as with provocation, it introduces a subjective component into an objective test. This has three negative effects. First, the dual objective and subjective second limb unnecessarily complicates the law of self-defence. Secondly, such complexity confuses jurors and makes the outcome of a criminal trial more difficult to predict. Thirdly, dual tests undermine the need for a code to adequately communicate the nature of the defence to the public. To be able to describe self-defence as ‘open-ended’ provides the antidote to the argument that more detail in a code means more scope for judicial interpretation. When a short section such as s 43BD(2) above includes a dual objective and subjective test, the scope for both judicial interpretation and jury confusion rises exponentially.

An examination of the respective self-defence sections\textsuperscript{239} in Australian jurisdictions reveals that s 271(2) of the \textit{Criminal Code} (Qld), which deals with self-defence as a

\textsuperscript{237} \textit{Zecevic v DPP (Vic)} (1987) 162 CLR 645 is the leading common law case on self-defence. Wilson, Dawson and Toohey JJ framed the critical question as follows: ‘It is whether the accused believed upon reasonable grounds that it was necessary to do what he did’: at 661.

\textsuperscript{238} Bronitt and McSherry, above n 169, 335 [6.15], citing \textit{DPP Reference (No 1 of 1991)} (1992) 60 A Crim R 43, 46.

\textsuperscript{239} Section 15(1) of the \textit{Criminal Law Consolidation Act 1935} (SA) is little more objective than those jurisdictions that have followed the \textit{Model Criminal Code} as expressed in s 10.4 \textit{Criminal Code} (Cth). Section 15(1) above 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.’ The self-defence provisions of Victoria, Western Australia and Tasmania below reflect the common law as per \textit{Zecevic v DPP (Vic)} (1987) 162 CLR 645. Section 9AC Murder – self-defence of the \textit{Crimes Act 1958}. 230
defence to homicide where the Code distinguishes between provoked and unprovoked assault, contains the most objective test for self-defence in Australia.

271 Self-defence against unprovoked assault

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Under s 271(2), ‘the jury must first consider whether the accused apprehended death or grievous bodily harm and, secondly, whether the apprehension was a reasonable one’.

The use, in s 271(2), of the words ‘reasonable apprehension’ and the requirement that the belief be based ‘on reasonable grounds’ that there is no alternative way of self preservation, injects a strong element of objectivity into the use of the defence.

Further objectivity is evident in s 272(2), which covers self-defence against a provoked assault which causes death or grievous bodily harm, where the defence of self-defence is denied ‘unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable’.

(Vic) requires the person to believe that the conduct was necessary to defend himself or herself or another person from the infliction of death or really serious injury. Section 248(4) of the Criminal Code (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 (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.’

Bronitt and McSherry, above n 169, 337 [6.15].
The same overall result for self-defence to that presently prevailing in Queensland, without distinguishing between unprovoked and provoked assaults, could be achieved by re-writing s 43 BD of the *Criminal Code* (NT) with greater objective content as follows:

(2) A person carries out conduct in self-defence only if:

(a) the person *reasonably* believes the conduct is necessary:

   (i) to defend himself or herself or another person; and

(b) the conduct is a reasonable response in that it is *reasonably* proportional in the circumstances as he or she *reasonably* perceives them. (Words in italics added.)

In many homicide cases the victim is a silent witness. The defendant may elect to run both provocation and self-defence, which only require the defence to satisfy an evidential onus, and once these defences are allowed to go to the jury must be negatived beyond reasonable doubt. This section of the Chapter has made the case for the adoption of purely objective tests for both provocation and self-defence. Such a position is justified, first, on the ground of the inherent confusion in instructing juries based on a two part subjective and objective test, and, secondly, because of the danger of the subjective test overwhelming the objective component leading in turn to the victim’s family being left with a sense of justice denied.

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241 With the exception of Queensland which now places a legal onus on the defendant raising the partial defence of provocation, following the enactment of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See s 304(7) *Criminal Code* (Qld).
Historically, there is authority for the objective proposition that a sane person should be able to act and think reasonably such that a failure to do so is no excuse. Holmes famously held that ‘the test of foresight was not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen’. This Chapter, building on the measure of objectivity contained in reckless murder and constructive murder, has sought to redress the supremacy of subjective tests for criminal responsibility by tilting the balance back in favour of objective tests, and in so doing place greater emphasis on doing justice to the victim. The philosophy is unashamedly utilitarian.

Underpinning this contention for a shift away from subjective tests, is the identification of an objective test for recklessness as the underlying fault element of criminal responsibility, based on the natural and probable consequences test adopted in *DPP v Smith* in the guise of *Caldwell* recklessness. Consistent with this argument, the case is also made for the adoption of purely objective tests for the partial defence to murder of provocation and the complete defence of self-defence. One of the contentions put in this Chapter is that if dangerous driving offences causing death carrying possible 10 year prison sentences are offences of strict liability, and gross negligence manslaughter is potentially punishable by life imprisonment, then objective tests for offences of specific intent do not represent such a great shift in standard of criminal responsibility than might otherwise appear.

Arguably, s 161A Violent act causing death of the Criminal Code (NT), which applies strict liability to the result of conduct yet carries a maximum penalty of 16 years’

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242 Desch, above n 115, 660-661.
243 Holmes, above n 117, 54.
244 [1961] AC 290.
imprisonment, represents the shape of things to come as politicians respond to community concerns for public safety resulting from alcohol fuelled violence.

The purpose behind such support of objectivity in determining criminal responsibility is grounded on the view that the ‘object of the law is to prevent human life being endangered or taken … to compel men [and women] to abstain from dangerous conduct … at their peril to know the teachings of common experience’. Bentham, who claimed ‘the business of government is to promote the happiness of the society, by punishing and rewarding’, might well approve of the principle of utility guiding the hand of legislation.

In the next Chapter, the reasons why the Northern Territory abandoned its version of the Griffith Code in favour of Chapter 2 of the *Criminal Code* (Cth) are examined. Some of the arguments critical of the Griffith Code put in this Chapter, such as the negative manner in which s 23 is expressed, resonated with the Northern Territory Government sufficient to jettison the youngest of the Griffith Codes. The question to be examined is whether there are any insights to be drawn from such a changeover in code design in the search for a modern viable Benthamite code design.

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246 Holmes, above n 117, 57.
CHAPTER 6

OVERCOMING LEGISLATIVE INERTIA AND REWRITING THE
CRIMINAL CODE (NT)

6.1. OVERVIEW OF CHAPTER

This Chapter seeks to answer two main questions. First, why the most recently minted Criminal Code in Australia prior to the arrival of the Model Criminal Code was abandoned in progressive stages shortly after its 20th birthday. The present Criminal Code in the Northern Territory can best be described as a hybrid Code as it transitions from a form of Griffith Code to the Model Criminal Code. Secondly, whether the decision to change to a more modern code with far greater detail as regards physical and fault elements, lends support to the central theme of this thesis, namely whether Bentham’s concept of a comprehensive criminal code is desirable and achievable. It is also appropriate to examine the change from a species of Griffith Code to the progeny of the Model Criminal Code at this juncture, given the newest sections of the Criminal Code (NT) reflect the drafting style of Chapter 2 of the Criminal Code (Cth) which comes closest to the Benthamite code model. The questions become more pertinent when it is understood that the drafter of the Criminal Code (NT) was seeking to modernise the Criminal Code (Qld), after extensive consultation. Such modernisation had two aspects: (1) to avoid key problems that had emerged over the some 80 years Sir Samuel Griffith’s Code had been in existence, and (2) to take account of changes in community attitudes that had occurred since the turn of the century when the first two Griffith Codes were produced.
In seeking reasons for the changeover in Codes, secondary questions present themselves. Was the principal criminal responsibility section fundamentally flawed, as a former Chief Justice of the High Court of Australia suggested in describing the section as ‘astonishing’? Did the long process of consultation prior to the Criminal Code (NT) being rolled out, which was designed to build consensus, in fact achieve the opposite? Were the robust interactions between the architect of the Criminal Code (NT) and the legal profession just a precursor for the later sustained attacks upon the Code from judicial and academic quarters? Or, in the end, was it simply a political decision from an incoming Labor Government, who had never been in office since self government in 1978, to jettison a controversial Code in favour of the progeny of the Model Criminal Code: namely, Chapter 2 of the Criminal Code (Cth)?

The decision to progressively adopt Chapter 2 of the Criminal Code (Cth) may have been the correct one, but the drafter of the original Criminal Code (NT) was also prescient in his effort to turn away from the principal criminal responsibility section of the Criminal Code (Qld). As it transpired, while the technical problems with the original Code were exaggerated, the key factors in overcoming legislative inertia to overhaul such a youthful Code was the lack of support from the legal profession in the Northern Territory for the existing Code, and the availability of an ‘off the shelf’ alternative that meant Federal and Territory offences would be tried under the same regime for criminal responsibility.

Effectively, a unique combination of circumstances came together. The long standing dislike by the Labor Party of key sections of the original Criminal Code (NT) found support in both judicial and academic quarters. The Office of the Director of Public
Prosecutions was supportive of change after losing a High Court case in 2004, as was the Department of Justice which could rely on all the supporting material when the *Criminal Code* (Cth) was introduced in the Federal Parliament. Such Departmental support can be contrasted with the opposition Stephen faced in 1880 from officials in the Lord Chancellor’s Department and the Home Office, as discussed in 3.2 above. The small bar in the Northern Territory was not wedded to a young Code, and there was no academic publishing industry to placate. In short, there were minimal vested interests for the Northern Territory Government to overcome, and few ‘sunk’ costs in the original Code.

A central drafting objective of the original Code was to overcome the perceived problems that had emerged within the Griffith Codes, particularly section 23 which remains the principal section dealing with criminal responsibility. This Chapter will explore the reasons behind the Northern Territory Government’s decision in 2004 to announce its intention to overhaul the major criminal responsibility provision in section 31 of the *Criminal Code* (NT) which culminated in a decision in 2005 to adopt Chapter 2 of the *Criminal Code* (Cth) in stages.\(^1\) The focus is on the controversial sections of the *Criminal Code* (NT). This Chapter contends that although it was the sustained attacks on these sections which generated a momentum for change, the catalyst was the political will for criminal law reform. It will also be contended that while much of the judicial and academic criticism of key sections of the original

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\(^1\) Since 20 December 2006, the *Criminal Code* (NT) contains two separate and mutually exclusive criminal responsibility sections. There is the original Part II which still covers the vast majority of offences, and there is Part IIAA which is effectively Chapter 2 of the *Criminal Code* (Cth) which presently predominantly applies only to a very narrow range of offences against the person listed in Schedule 1. The Northern Territory Government originally indicated that all offences would come under Part IIAA within 5 years but Schedule 1 is largely unchanged in the past 7 years, except for the addition of a few new offences such as s 174FA Hit and run, s 176A Drink or food spiking, s 180A Endangering occupants of vehicles and vessels, and Part VII, Division 6 Criminal damage, which includes s 241 Damage to property, s 242 Sabotage, s 243 Arson, and s 244 Bushfires.
Criminal Code (NT) was misplaced, in the final analysis the Northern Territory Government made the correct decision to switch Codes. Whether the then Attorney-General’s claim that ‘at the end of the day, Territorians will have a Criminal Code that sets appropriate standards of criminality in our community’\(^2\) will be subjected to close analysis.

In terms of the central theme of the thesis, the fact that legislative inertia was overcome in a relatively short time (20 years) is significant. In the Northern Territory’s case, there was no attempt to tinker with its revised Griffith Code of 1983. Instead, the Griffith model was abandoned in a staged process that is still ongoing. As this Chapter will outline, it would have been quite possible for the Northern Territory Labor Government to follow the well-trodden path of Queensland and Western Australia and seek to amend its existing Code. Instead, it took the bold step and went for a more modern and more comprehensive Code. The political dimension to the decision to switch Codes in 2006 has come into sharper focus with the election of a Country Liberal Government in the Northern Territory in 2012. The Attorney-General of the Northern Territory convened a forum on 21 May 2013 to consider this threshold question: ‘Does the Northern Territory legal profession support the continued conversion of the Criminal Code to Part IIAA offences or should we as a jurisdiction cut our losses and revert back to the pre-existing (and still largely applied) system of criminal law?’\(^3\) Such a development raises the possibility that the Criminal Code (Cth) will itself be abandoned.

\(^2\) Northern Territory, Parliamentary Debates, Second Reading Speech: Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT), Legislative Assembly, 5 May 2005 (Dr Peter Toyne, Attorney-General).

\(^3\) Letter from the Hon. John Elferink, Attorney-General for the Northern Territory to Mr John Lawrence, President of the Northern Territory Bar Association, 17 April 2013, page 2.
In analysing the reasons for the 2006 decision to switch Codes, a singular conclusion emerges, namely, that the Northern Territory’s adoption of Chapter 2 of the *Criminal Code* (Cth) was a *de facto* step towards a Benthamite model for code design. In 6.5, entitled *The Introduction of Chapter 2 of the Commonwealth Criminal Code into the Northern Territory Criminal Code*, s 244 Bushfires is examined as an example of the ‘new style’ of clear and precise language that is available using the physical and fault elements of Chapter 2 of the *Criminal Code* (Cth). The provisions of the original *Criminal Code* (NT) are contrasted with newer sections in Schedule 1 of the Code (which enliven Part IIAA) such as s 244 Bushfires, s 241 Damage to property, and s 242 Sabotage, as examples of differing drafting styles. The former are based on the Griffith Code and the latter on Chapter 2 of the *Criminal Code* (Cth). Such a comparison is judged against twin criteria to evaluate a code’s effectiveness: (1) a comprehensive description of the rules of conduct, and (2) effective communication of those rules to the general public,⁴ as set out in Chapter 1 of the thesis.

Here, it should be stressed that while the focus of the Federal Code is naturally on Commonwealth offences, given only the Northern Territory and the Australian Capital Territory have taken up Chapter 2 of the *Criminal Code* (Cth), it is to these two Territory jurisdictions that one has to turn in order to see the potential full effect of such a comprehensive Code design at the Territory/State level. As none of the Griffith States (Queensland, Western Australia and Tasmania) have opted to change Codes, only the two Territories are available for an analysis of Chapter 2 of the *Criminal Code* (Cth) in a non federal jurisdiction, dealing with standard criminal offences consistent with the constitutional allocation of criminal laws to the States and

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Territories (unlike Canada’s uniform Code). This develops the earlier examination of s 161A Violent act causing death of the Criminal Code (NT) in 3.4 of the thesis, which is considered to be a model of Benthamite style drafting, as opposed to the clumsy and obscure s 281 Unlawful assault causing death in the Criminal Code (WA).

6.2. THE PROVENANCE OF THE CRIMINAL CODE (NT) 1983

On 1 July 1978, the Northern Territory was granted self-government under the Northern Territory (Self Government) Act 1978 (Cth). The principal piece of Northern Territory criminal law legislation, the Criminal Law Consolidation Act (NT), was regarded by the then Attorney-General as ‘a virtual anachronism’. In tabling the draft criminal code for the Northern Territory in 1981, the Attorney-General noted that ‘in Australia, we are lucky to have two criminal codes in existence already from which to draw experience’. Having observed that if it could be said that the tabled draft criminal code resembled any code it was the Criminal Code (Tas) which was the most modern, the Attorney-General went on to say:

Yet even the Tasmanian Code is, in several areas, outdated and in many aspects certainly does not reflect current Northern Territory government policy. I refer to the sexual offence areas, theft areas and criminal damage to property areas. Our draftsmen looked elsewhere for assistance, much of it coming from the English Law Reform Commission.

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6 Ibid, 787. The Attorney-General was referring to the Griffith Codes of Queensland and Western Australia which he described as virtually identical and the Tasmanian Code.
7 Ibid.
However, by 1983 the emphasis on the draft code’s provenance had changed slightly from the *Criminal Code* (Tas). A new Attorney-General identified that ‘a great deal of use has been made of the Queensland Criminal Code’, albeit with some new concepts such as the laws relating to intoxication, for the obvious reason that ‘we are introducing a document which is based on a code tested for some 80 years’.  

It is therefore unsurprising that in the seminal case of *Director of Public Prosecutions (NT) v WJI*, Kirby J was able to reflect:

> The provenance of the NT Code was different from State codes. It was enacted nearly a century after the Griffith Code was adopted in Queensland and long after the adoption of the criminal codes in Western Australia and Tasmania. As was mentioned in *Charlie*, the NT Code grew out of extensive consultations in Darwin. These were followed by a period of gestation that probably helps to explain the many points of difference from the other Australian criminal codes.

The philosophy behind the draft criminal code was expressed in utilitarian terms by the Attorney-General to be as follows:

> The Code aims to give complete protection to the innocent people of the Territory; that is the innocent victim and the innocent defendant. As an integral part of this protection of the innocent, the Code puts into effect the approach that, where a person takes a criminal course of action, he will be responsible to the people of the Territory through the criminal law for the course of action and its logical consequences.

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10 Ibid 67 (footnotes omitted).
11 Northern Territory, *Parliamentary Record*, above n 5.
At a later stage of the consultation process, the Attorney-General considered the revised draft code ‘to be a well-balanced and an effective piece of legislation’ which in his view ‘will be of considerable benefit to the community and truly reflects its wishes’.\(^\text{12}\) The Attorney-General singled out the new laws that dealt with intoxication which had been introduced ‘because of the tragic effects of intoxication’ but more particularly because of ‘its relevance in crime and the fact that the community is no longer prepared to tolerate intoxication as an excuse for crime’.\(^\text{13}\)

The architect and principal drafter of the Northern Territory’s original criminal code was Mr D. G. Sturgess QC, who was also the first Queensland Director of Public Prosecutions. Mr Sturgess wrote a Preface to the Criminal Code\(^\text{14}\) in which he gave an overview of the final draft criminal code that became the *Criminal Code Act 1983* (NT), which was assented to by the Administrator on 4 October 1983 and commenced on 1 January 1984.

The purpose of the *Criminal Code* (NT) was to replace the common law ‘in respect of the various matters therein dealt with’.\(^\text{15}\) In his preface, Mr Sturgess stated that it was natural that the *Criminal Code* (Qld) should be turned to for ‘the convenience of the Territory having the same criminal laws as two of its contiguous States’.\(^\text{16}\) However, Mr Sturgess acknowledged that too many years had passed since 1899 when the *Criminal Code* (Qld) had come into operation and that ‘time and cases, as must be

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15 *Criminal Code Act 1983* (NT), s 5.
16 Sturgess above n 14, 1.
expected, have both revealed and created problems, and moral values, which the criminal law must reflect, have much changed'.

Thus, it was with a degree of optimism that the *Criminal Code* (NT) was enacted on 1 January 1984. Both the Code’s architect and the Northern Territory Government were confident that this most recent Code was superior to the three earlier State Codes, and therefore less likely to be overhauled so soon. One of the reasons for this optimism can be found in the conviction that s 31, the principal section dealing with criminal responsibility in the *Criminal Code* (NT), overcame the problems associated with s 23 *Criminal Code* (Qld). Another reason lay in the belief that between them s 7 and s 154 satisfactorily addressed the problem of intoxication, which was considered to be in a state of disarray following the 4-3 High Court decision in *O’Connor v The Queen*.

The next section will address these two specific issues as they are both integral to the provenance of the *Criminal Code* (NT) and to the ultimate decision to incorporate Chapter 2 of the *Criminal Code* (Cth). As will be seen, the perceived failure of s 31 led the Northern Territory Labor Government to consider either redrafting s 31 or embracing a far more extensive reform of criminal responsibility in the form of Chapter 2 of the *Criminal Code* (Cth), by following the example of the Australian Capital Territory in 2002 which had previously adopted the common law based *Crimes Act 1900* (NSW).

Given the discussion in earlier Chapters of the thesis as to the inertia that sets in once a criminal code is enacted, it is particularly pertinent to examine the triggers that

\footnotesize{\textsuperscript{17} Ibid.\textsuperscript{18} (1980) 146 CLR 64.}
overcame such inertia and led directly to a fundamental overhaul of the original
Criminal Code (NT). As Robinson, Cahill and Mohammad have noted, inertia may
keep a poor code in place.

With little apparent cost to having a deficient criminal code and clear costs to undertaking a
reform of it, legislatures are likely to pass up the virtues of re-codification to keep the certainty
and familiarity of the status quo.19

In this regard, while it is true to say that all the Griffith Codes predate the Model
Criminal Code, of the four Griffith Codes, only the Northern Territory has switched to
Chapter 2 of the Criminal Code (Cth). It is also true to say that the Northern Territory
has the smallest jurisdiction by population of the four Griffith Codes, and is the only
Griffith Code that does not enjoy the constitutional status of Statehood. Consequently,
with a smaller bar and judiciary to consult, any change was easier for the Northern
Territory Government to manage, with the added pressure that the Commonwealth,
keen to promote the merits of a single Criminal Code for Australia, can exert on a
Territory as opposed to a State.20 It is arguably no coincidence that both the major
Territories have adopted Chapter 2 of the Criminal Code (Cth).

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19 P. Robinson, M. Cahill and U. Mohammad, above n 4, 2. The decision by the Northern Territory
Government to adopt Chapter 2 of the Criminal Code (Cth) and then feed in selected offences under
the reach of Chapter 2 in stages, addresses the inertia factor by not attempting wholesale reform in a
single step. ‘Criminal code reformers often hear judges, lawyers, and police officers complain that they
do not want to learn new rules, or even new code section numbers’: Ibid.
20 Section 122 of the Federal Constitution is entitled ‘Government of territories’ which gives the
Federal Parliament the power to make laws for the government of any territory.
6.3. TWO CENTRAL MATTERS TO THE PROVENANCE OF THE CRIMINAL CODE (NT) 1983

Two matters mentioned in the preface written by Mr Sturgess are worthy of attention as a momentum of criticism surrounded them after the Criminal Code (NT) came into operation, and are further developed in later sections of this Chapter. The first related to the principal section dealing with criminal responsibility, section 31, which builds on the previous discussion of s 23 of the Criminal Code (Qld), and the second concerned the treatment of intoxication. As to the former, Mr Sturgess said:

Perhaps the most troublesome area of the Queensland Criminal Code has been with respect to the meaning of its section 23, a section of fundamental importance, the counterpart of which in this code is section 31… it is hoped the difficulties found in the Queensland legislation have been removed…

This proved to be a pious hope and no section of the Criminal Code (NT) has aroused more criticism and controversy than section 31. Section 31 will be the subject of extensive analysis in this Chapter but at this juncture it is sufficient to note that Brennan J described section 31 as ‘astonishing’.

The second matter of significance discussed by Mr Sturgess in his preface to the criminal code is the treatment of intoxication, which is more fully discussed in Chapter 9. Having referred to the Northern Territory Government’s policy that a

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21 Sturgess, above n 14, 6.
22 R v Breedon, High Court of Australia, Special Leave Hearing, during argument, D1/1994, page 2 line 19. “To relieve a person from criminal liability for an act unless its consequences are foreseen is an astonishing proposition … It does not matter whether it is voluntary or not: however much the act is intended or willed, if he does not see what the results are going to be, he is going to be acquitted.” (Lines 19-27.)
defence based upon voluntary intoxication was to be regarded as an excuse of little merit, Mr Sturgess continued:

In giving effect to this policy the following matters have been provided for: involuntary intoxication has been given a strict definition (section 1); until the contrary is proved it is to be presumed that intoxication was voluntary and, unless it was involuntary, that the accused person foresaw the natural and probable consequences of his conduct and intended them (section 7); that voluntary intoxication is only relevant in relation to penalty when doing a dangerous act is charged and, in most cases, will increase the penalty (section 154).23

As it transpired part of this policy fell foul of the Federal Government’s strong stance on the presumption of innocence which forced a revision, and s 7 proved to be the first section of the newly minted Criminal Code (NT) to be amended.24 As originally worded, s 7 did not contain the word ‘evidentially’ which went to the onus of proof when evidence of intoxication was adduced. Instead, s 7 established a legal presumption (‘until the contrary is proved’) that, in any case where ‘intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence’, the accused ‘foresaw the natural and probable consequence, of his conduct and intended them’.25 In response to a question as to whether the onus of proof had been reversed under s 7, Mr Sturgess replied as follows at a seminar on the Criminal Code (NT) held shortly after the Code had been passed by the Northern Territory in October 1983: ‘No, you are talking about an inference here. An inference may be drawn in the circumstances that you intended what you actually did, and

23 Sturgess, above n 14, 8.
24 Criminal Code Amendment Act 1984 (NT).
25 See previous discussion in 5.5 above of Director of Public Prosecutions v Smith [1961] AC 290.
Lionel Murphy says that is the law – it always was the law – you are presumed to have intended what you did.  

The above reference was to Murphy J’s judgment in *O’Connor v The Queen*:

Perhaps no harm will be done if the (rebuttable) presumption continues to be used, even if it is described as a process of inference. It is important in cases where there is evidence of intoxication that the tribunal understand that, consistently with the presumption of innocence, an inference is available to it that a person intends the natural and probable consequences of his actions. In the absence of other evidence, this is the only reasonable inference open to them in most criminal cases.

This presumption of foreseeing the natural and probable consequences of conduct, discussed in 5.5 above, was criticised by the then Prime Minister, shortly after the *Criminal Code* (NT) had been passed in November 1983, as placing an ‘insuperable burden on a defendant’ and as a breach of article 14 (the presumption of innocence) of the 1966 International Covenant on Civil and Political Rights schedule to the *Human Rights Commission Act 1981* (Cth). It is perhaps no coincidence that the language of the then Prime Minister is strikingly similar to that of the then Labor Leader of the Opposition in the Northern Territory Parliament, Mr B. Collins, who just two months earlier had attacked the Northern Territory Government’s policy on intoxication as undermining the principle of *mens rea* whereby ‘an accused is now placed in a position where he must prove his innocence rather than the prosecution establish his

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26 Comments by D.G. Sturgess, Criminal Code Seminar Transcript (Darwin, October 1983) 119. Copy held in the Library of the Supreme Court of the Northern Territory.
27 *O’Connor v The Queen* (1980) 146 CLR 64, 116.
The fledgling Northern Territory Government immediately accepted the Prime Minister’s criticism under the threat of s 122 of the Federal Constitution.\textsuperscript{30}

This was a significant outcome for four reasons. First, no State could have been subjected to such a humiliation of having to amend criminal legislation at Federal behest. Secondly, it is not correct to equate a legal burden on the defence on the balance of probabilities with a breach of the presumption of innocence. Thirdly, the forced amendment reduced the intended impact of s 7, which is of significance given the vast majority of offences are still covered by the original criminal responsibility sections contained in Part II and not the new Part IIAA.\textsuperscript{31} Fourthly, it revealed the strong undercurrent of dislike for key aspects of the original \textit{Criminal Code} (NT) by the Labor Party, which was to culminate in a political decision to abandon the original Code some twenty years later when the Labor Party finally came into office.

The effect of the amendment was to change the presumption from a legal burden to an evidential one, such that the defendant must adduce evidence of intoxication but the burden of proving intention or recklessness remains on the prosecution.\textsuperscript{32} This interpretation of the amended s 7(1)(b) was confirmed by the Supreme Court of the


\textsuperscript{31} Section 7 is to be found in Division 2 Presumptions of Part 1 Introductory matters. Section 43AA(2) sets out the provisions of Part 1 which do not apply to Schedule 1 offences, one of which is s 43AA(2)(e) which covers s 7 (Intoxication).

\textsuperscript{32} \textit{Criminal Code Amendment Act} 1984 (NT), s 7(1)(b).
Northern Territory in *Charlie v The Queen* where two judges of the Court of Appeal spoke of s7(1)(b) establishing an evidential burden only.\(^{33}\)

However, notwithstanding the amendment, the government’s policy on intoxication, particularly in relation to s 154 Dangerous acts or omissions, continued to generate concern. This policy was a legislative response to the common law position on intoxication as decided in *O’Connor v The Queen*\(^{34}\) which was regarded by the Northern Territory Attorney-General ‘an unfortunate decision’.\(^{35}\) In *O’Connor*, Barwick CJ held that ‘proof of a state of intoxication, whether self-induced or not, so far from constituting itself a matter of defence or excuse, is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility’.\(^{36}\)

On one point the Chief Justice of the High Court and the Attorney-General of the Northern Territory were agreed, and that was the unsatisfactory position taken by the House of Lords in *DPP v Majewski*,\(^{37}\) which distinguished between crimes of ‘specific’ and ‘basic’ intent and held that evidence of intoxication was only relevant to the former. Lord Simon in *DPP v Morgan* classified crimes of basic intent to mean ‘those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*’.\(^{38}\) The Attorney-General found the distinction to be ‘confusing, illogical and so uncertain that it provides no real guidance as to how

\(^{34}\) (1980) 146 CLR 64.
\(^{36}\) *O’Connor v The Queen* (1980) 146 CLR 64, 71.
the courts will classify cases’. The Chief Justice was similarly critical of Majewski in concluding that ‘[i]t seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do’.

The Northern Territory Government was equally opposed to O’Connor (which was favoured by the Opposition) and Majewski, and the Attorney-General was not persuaded by the application of the principles in Majewski applying in the Code States of Western Australia, Queensland and Tasmania. This led to s 154 being constructed as ‘a fall back situation’. However, the potential for adoption of the Majewski principles had been foreshadowed as early as 1991. Mr Manzie, the then Attorney-General, during a parliamentary debate to introduce a minor amendment to section 154, indicated that he favoured ‘a uniform criminal code throughout Australia and I will continue to push for its introduction’. Mr Manzie made this comment in 1991, which was the same year that the Standing Committee of Attorneys-General established the Model Criminal Code Officers’ Committee (MCCOC) to prepare a uniform criminal code for all Australian jurisdictions, and is the earliest indication that the Northern Territory might be willing to adopt such a code.

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40 O’Connor v The Queen (1980) 146 CLR 64, 87.
41 Northern Territory, Parliamentary Record, Legislative Assembly, October 1982 – March 1983, 10-12, 25 November 1982, 3489 (Mr Everingham, Attorney–General). See Criminal Code (Qld) s 28; Criminal Code (WA) s 28; and Criminal Code (Tas) s 17(2).
42 Sturgess, above n 26, 23.
However, there was to be no indication that the Northern Territory would adopt the *Criminal Code* (Cth) until the Labor Party defeated the Country Liberal Party in 2001. The Labor Government secured a second term of office in 2005 and was thus able to implement its decision to insert Chapter 2 of *Criminal Code* (Cth) as Part IIAA of the *Criminal Code* (NT). The fortunes of political parties do play a role in the success or failure of criminal code legislation, as demonstrated by Stephen’s Code falling victim to the demise of the Disraeli government in 1880, discussed in 3.2 above of the thesis.

During the same parliamentary debate, Mr Manzie referred to the genesis of s 154 flowing from *O’Connor* as ‘Chief Justice Barwick, recognising that the decision left a gap, encouraged the introduction of legislation to provide for an alternative charge where intoxication negates intent’. The passage from *O’Connor* to which the Attorney-General alluded was as follows:

> There would be good sense…in a statutory provision which gave to a jury who were driven to the conclusion that an accused, due to the result of self-induced intoxication, was not culpable of the crime with which he is charged to be able to bring in an *alternative verdict* that he, by his own conduct, had brought himself to a state where he was not responsible for his acts. There should be a substantial penalty provided for his conviction of this alternative charge, a penalty of confinement…It would…be quite just to make the accused responsible for his act of having taken alcohol or other drug to the point I have described.

Section 154 was intended to provide that alternative charge as Mr D. Sturgess, who drafted the original *Criminal Code* (NT), had made clear. Given all the furore that

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44 Ibid, 360.
45 *O’Connor v The Queen* (1980) 146 CLR 64, 87 (emphasis added).
46 Sturgess, above n 26, 24. The alternative verdict provision, which provided that s 154 was an alternative verdict to manslaughter, found expression in the now amended s 318 Charge of offence against the person where s 31 or intoxication is a defence.
surrounded the introduction of s 154 being ‘very broad in scope and covering all manner of conduct’\(^{47}\) and constituting a departure from fundamental principles of criminal responsibility applicable to serious offences (which is discussed in the next section), it is significant that when s 154 was repealed it was in part replaced by s 174F Driving a motor vehicle causing death or serious harm.\(^{48}\) Under s 316(2) a person charged with manslaughter may alternatively be found guilty under s 174F(1). Section 174F(4) makes s 174(1) an offence of strict liability, which in turn only permits the defence of mistake of fact under s 43AX, whereas the much maligned s 154 at least required an ordinary person similarly circumstanced to have clearly foreseen the danger and not have done the act.

Thus, the Northern Territory Government’s policy on intoxication was bound up with the interaction of sections 31 and 154. As the main thrust of the criticisms of the *Criminal Code* (NT), from both the legal profession and the judiciary, centred on these two sections, it is now appropriate to consider these criticisms in detail. This Chapter is a partial history of the original *Criminal Code* (NT) as it singles out the controversial sections that built the momentum for a complete overhaul of the Code, and which will become even more apparent with inclusion of material that deals in part with Fairall’s review of the *Criminal Code* (NT) in 2004 that was commissioned by the incoming Labor Government and which contained very specific terms of reference.\(^{49}\)


\(^{48}\) *Criminal Code Amendment (Criminal Responsibility Reform) Act* 2005 (NT).

6.4. THE INTERACTION BETWEEN THE PRINCIPAL CRIMINAL RESPONSIBILITY SECTION AND MURDER, DANGEROUS ACTS, AND SEXUAL ASSAULT

6.4.1. The Principal Criminal Responsibility Section of the Original Criminal Code (NT): Section 31 Unwilled Act & Accident

6.4.1.1. The Rejection of s 23 Criminal Code (Qld)

At the outset, it is important to stress the centrality of the principal criminal responsibility section, s 31, to the Criminal Code (NT). Essentially, the original Northern Territory Code was a rebadged version of the Criminal Code (Qld) but with some key differences. The most important difference was the rewriting of s 23 of the Criminal Code (Qld) as s 31 of the Criminal Code (NT). The purpose was to remove the wholly objective standard of criminal responsibility contained in s 23, and replace it with a subjective standard in s 31. For this reason, it is necessary to explain why s 23, which continues to operate in Queensland, Western Australia and Tasmania (albeit as s 13), was rejected by the Northern Territory in 1983. Such a rejection also needs to be understood in the context that the Fairall Report recommended a return to s 23 in 2004.50

A public seminar was conducted by Mr D. Sturgess for the benefit of the legal profession prior to the enactment of the Criminal Code (NT). During the seminar, the architect of the Code stated that s 31 was an attempt ‘to set down… in different language exactly what Sir Samuel Griffith attempts to set down in his section 23 [of

50 Ibid, 5.
the Criminal Code (Qld)]. 51 Nevertheless, both academic commentators and judges consider that section 31 represents a radical departure from s 23, which arguably provided the genesis for a radical overhaul if the principal criminal responsibility section of the new Code was perceived to be flawed. This stems from an attempt to inject subjective criminal responsibility into section 31 while s 23 was drafted in the 19th century when the common law reflected objective criminal responsibility.

Mr Sturgess was perhaps prescient in anticipating the observations of Gummow and Hayne JJ in Murray v The Queen 52 that s 23(1) was ‘cast in terms consistent with the accused bearing the burden of establishing that there was an unwilled act or an accidental event’. 53 This conclusion follows because until the watershed case of Woolmington v The Director of Public Prosecutions 54 such had been the law for centuries. 55 Gummow and Hayne JJ go on to observe that ever since 1938, following Dixon J’s comments in R v Mullen, 56 ‘if the evidence raises a question about an unwilled act or an accidental event, it is for the prosecution to prove beyond reasonable doubt that s 23(1) does not apply’. 57 Given that Sir Samuel Griffith approached the task of drafting s 23(1) from a different perspective regarding the onus of proof to that taken post 1938, it is perhaps unsurprising that Mr Sturgess sought to redraft s 23(1) of the Criminal Code (Qld). The attempt to address the perceived problems with s 23(1) gave added reason for its architect and its sponsor to believe that the new Criminal Code (NT) would last a long time.

51 Sturgess, above n 26, 16. In a colourful image, Mr Sturgess added there were ‘so many legal barnacles encrusted upon section 23 of the Queensland Criminal Code that it is difficult to see what lies beneath it’.
53 Ibid, 206.
56 (1938) 59 CLR 124, 136.
6.4.1.2. Section 31 Criminal Code (NT)

As originally enacted (subsection (3) below has been amended to account for the repeal of s 154), section 31 of the Criminal Code (NT) was as follows:

Section 31 Unwilled act etc. and accident

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to the offences defined by Division 2 of Part VI.

Division 2 of Part VI then contained two sections: section 154 Dangerous acts or omissions and section 155 Failure to rescue, provide help, etc.

In his preface to the Criminal Code, Mr Sturgess sought to explain how section 31 and the criminal responsibility provisions generally were to be interpreted.

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58 The use of the collocation ‘act, omission or event’ was deliberate. Section 23(1) of the Criminal Code (Qld) distinguishes between an act or omission that occurs independently of the exercise of the person's will and an event that occurs by accident. See above n 55. In Ugle v The Queen [2002] HCA 25 [26], a case concerning the Criminal Code (WA), Gummow and Hayne JJ state that '[t]he distinction which is made in s 23 between “acts” and “events” is not without difficulty'. Gummow and Hayne JJ go on to cite Mason CJ, Brennan and McHugh JJ in R v Falconer (1990) 171 CLR 30, 38: 'The first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act: it excludes from criminal responsibility consequences of the act which are not only unintended but unlikely and unforeseen.' In Ugle v The Queen, it was the first limb of s 23 that was engaged, ‘whether the knife had entered the body of the deceased independently [impaled] of the will of the appellant’. [30]
Apart from any mental element that may be prescribed, an offence is constituted by an act, omission, event or a combination or series of them... Amongst the first tasks of the trial should be the identification of the act, omission or event the subject of the charge... Importantly, this inquiry should not be allowed to extend beyond the matters contained in the charge or in the section or sections creating the offence; to consider the actual conduct of the accused person is only to introduce a likely source of confusion.59

Examples were given in the preface such as assault being constituted by an act (the application of force) and unlawfully causing grievous harm being constituted by an event (the occurrence of grievous harm).60 The architect of the Code indicated the terms act and event were interchangeable ‘because the tests of criminal responsibility remain the same whether doing an act or causing an event is being considered’.61 Importantly, Mr Sturgess specifically drew attention to this not being ‘the position in section 23 of the Queensland Criminal Code’ and hence the often heard controversy ‘concerning what is the relevant act and what, if any, is the relevant event’.62 Gummow and Hayne JJ point out in *Murray v The Queen* that ‘[i]n deciding what is the relevant act, it is important to avoid an overly refined analysis’, going on to observe that the narrower the definition of act the more likely ‘to be some question about whether the accused willed the act’.63

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59 Sturgess, above n 14, 7.
60 Ibid, 6.
61 Ibid, 7.
62 Ibid.
63 *Murray v The Queen* (2002) 211 CLR 193, 209. Gummow and Hayne JJ cite H.L.A. Hart, ‘Acts of Will and Responsibility’ in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 90, 101 – 102. *Murray*, 210: ‘The simple but important truth is that we deliberate and think about actions, we do so not in terms of muscular movements but in the ordinary terminology of actions.’ In *Murray*, 212, the appeal turned on the trial judge’s lack direction on the first limb of s 23 (only instructed on the second limb of accident): ‘[T]he central issue for the jury in considering the charge of murder was did the appellant intend to fire the weapon [loaded shotgun] or merely present it to frighten the deceased?’
The first test of the interpretation of section 31 occurred in *R v Krosel*. The question in *Krosel* was what the Crown needed to prove in order to secure a conviction of manslaughter under the *Criminal Code* (NT). The Crown submitted that it was sufficient to prove that the ‘act’ was intended (which this Chapter contends is the correct interpretation and had it been accepted would not have started a judicial excursus into deconstructing ‘act, omission or event’). The defence submitted that the Crown had, in addition, to prove that the ‘event’ of death was foreseen. Nader J favoured the argument put by the defence in that his Honour concluded that intention in s 31 referred to an act and foresight referred to an event. Turning to the onus of proof, Nader J held that the Crown had to prove both that the act causing death was intended and the event of death was foreseen by the accused.

If the accused did not foresee death as a possible consequence of his conduct, he was excused from criminal responsibility for the death. He cannot be held criminally responsible for the death merely because he intended the act that caused it. He must also have foreseen the death as a possible consequence: the death is the event for which he is excused unless, at the very least, he foresaw it as a possible consequence of his conduct.

Even at this early stage it appears that judicial interpretation of s 31 was set to bedevil the principal section dealing with criminal responsibility. Notwithstanding the clear intention of the drafter of the *Criminal Code* (NT) to use the terms act and event synonymously, and to avoid the problems of interpretation associated with s 23 of

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64 (1986) 41 NTR 34.
65 ‘Act’ is defined in section 1 in relation to an accused person as meaning the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention.
66 ‘Event’ is defined in section 1 as meaning the result of an act or omission.
68 Sturgess, above n 59. The drafting was intended to overcome the division in the High Court in *Vallance v The Queen* (1961) 108 CLR 56 as to the meaning of ‘act’ and ‘event’ in s 13 of the *Criminal Code* (Tas).
the *Criminal Code 1983* (Qld), Northern Territory judges were already displaying artificial constructions of s 31 inconsistent with the design of the *Criminal Code* (NT).


Foresight seemed appropriate only for an event. So I suggested that the section [s 31] had the effect of excusing acts, omissions and events that were not intended and events that were not foreseen. But, I would now accept the charge of superficiality. A moment’s attention to the words of s 31(2) shows that the author of the section intended no such complete distinction between ‘act’ and ‘omission’ on the one hand and ‘event’ on the other … In *Krosel*, I should have adverted to the fact that the expression used in s 31(1) is ‘possible consequence of his conduct’, not ‘possible consequence of his act or omission’.[^70]

The judicial muddying of the waters regarding the interpretation of s 31 continued in *Pregelj v Manison* and maintained the implication that the meaning of s 31 was doubtful, thereby justifying ‘an extensive discussion of the common law doctrine of *mens rea* and of the meaning of the word “act” at common law’,[^71] while claiming such a discussion was only an ‘aid to understanding the intention of the *Criminal Code*’.[^72]

Nader J noted that s 31 differs from the other Codes in ‘the more indiscriminate use of the terms “act”, “omission”, and “event”’.[^73] His Honour’s use of the word ‘indiscriminate’ is unfortunate and indicates a fundamental misunderstanding as to

[^69]: (1987) 88 FLR 346. The appellants were charged with offensive behaviour under s 47 of the *Summary Offences Act 1978* (NT).
[^70]: Ibid 358-359.
[^73]: Ibid 358.
how s 31 operates. A better view is ‘comprehensive’ or ‘interlocking’ to describe the manner in which s 31 has been drafted. The same conclusion is reached whether ‘act’ includes consequences or ‘act’ is read with ‘event’. This comprehensive view is supported by Kirby J in *Director of Public Prosecutions (NT) v WJI* where his Honour describes the collocation ‘act, omission or event’ as a phrase that is ‘compendious’.74 Kirby J stressed that the High Court had repeatedly said it was a ‘mistake to dissect words and to endeavour to construe them in isolation’.75

In *Pregelj v Manison*76 the appellants had been convicted below for offensive behaviour upon a finding of an intent to do the act complained of rather than to offend. The issue before the Court of Criminal Appeal (NT) was whether, in a case involving sexual intercourse in public, the ‘act’ of the defendant in s 31(1) included the act of offending. In separate judgments Nader J and Kearney J held that it did and therefore the appellants were not criminally responsible for offensive conduct unless they either intended the punishable act or foresaw it as a possible consequence of their conduct.

In quashing the conviction, Nader and Kearney JJ parted company with Asche J who had upheld the conviction imposed by the Magistrate. Asche J had held that whether or not the behaviour is offensive is a matter to be determined objectively from the circumstances. His Honour concluded that ‘[i]n this case the appellants chose to have sexual intercourse naked and with the light on at night in circumstances when in my

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74 *DPP (NT) v WJI* (2004) 219 CLR 43, 70.
75 Ibid.
view they knew or should have known that any passer by in the lane could have seen them'.

It is contended here that Asche J was correctly applying s 31 by looking at both subsections 31(1) and (2). Thus, while s 31(1) is subjective, the circumstances of the case were sufficient for a judge or jury to conclude by an overwhelming inference that given their knowledge of the room and its proximity to the lane, the appellants must have foreseen their being seen as a possible consequence of their conduct, thereby activating the objective test in s 31(2) of an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct, which is effectively a reasonable risk-taking provision.

Nevertheless, the interpretation of s 31 favoured by Nader J and Kearney J has never been overruled and has had a far reaching effect given *Pregelj v Manison* was decided by the Court of Criminal Appeal just four years after the *Criminal Code* (NT) came into law. The following analysis of s 31 will now focus on the interaction between s 31 and other sections of the *Criminal Code* (NT) such as the now repealed s 154 Dangerous acts or omissions, the now repealed s 162 Murder, and the now amended s 192 Sexual Intercourse and Gross Indecency Without Consent.

The purpose of such a discussion is to develop one of the arguments of this Chapter that judicial dissatisfaction with s 31 and s 154 was of assistance to the Northern Territory Government in deciding to abandon the original *Criminal Code* (NT) in favour of Chapter 2 of the *Criminal Code* (Cth) in 2006. While the judiciary may have

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only contemplated the repeal of s 154 in favour of a broader manslaughter provision, along with the amendment of s 31 more in keeping with s 23 of the *Criminal Code* (Qld), the Northern Territory Government, not saddled with a profession wedded to a 100 year old Code, had a more sweeping option readily at hand. This option was Benthamite in structure rather than Griffith’s common law based Code. Irrespective of the differing judicial interpretations of s 31 discussed above, s 31 was derived from s 23 of the *Criminal Code* (Qld), and as such placed a legal straight-jacket on criminal law reform in the Northern Territory.

Ironically, the rocky introduction of the *Criminal Code* (NT) may have eventually benefited the Northern Territory. The original Code was drafted by Mr Sturgess, a Queenslander with no connection to the Northern Territory, who had been brought in for the task by the then Chief Minister, Mr Everingham. Contrast this with Sir Samuel Griffith’s domination of both political and judicial circles in Queensland. Griffith had the full support of his fellow judges for his *Code* and so there were no attacks on s 23 by judges in Queensland, unlike Nader J’s assault on s 31 in the Northern Territory. By the time serious criticism of the Griffith Code by the High Court of Australia emerged in the 1960s, the *Criminal Code* (Qld) was firmly embedded in the Queensland legal landscape. As discussed in 2.2.3.1 and 3.2 above, Victoria avoided a similar fate by default when its version of the Griffith Code failed to pass into law in 1905.
In *Breedon v The Queen* 79 the Court of Criminal Appeal considered the interaction between s 31 and the now repealed s 162 Murder. The appeal focused on constructive murder which required the consideration of s 31 and the then s 162(4) which stated: ‘In the circumstances referred to in subsection (1)(b) [the ‘trigger’ offence set at 7 years or longer] it is immaterial that the offender did not intend to hurt the person.’

The Crown argued that s 31 did not apply to a case of constructive murder because once the intention to permanently deprive and to use force are proven as prerequisites of robbery, then robbery itself is proven without recourse to s 31, and the only additional feature is the necessity to show the likelihood that the act will endanger human life. Section 162(4) made it immaterial that the offender [applicant] did not intend to hurt the deceased. 80

The Court of Criminal Appeal (Martin CJ, Gallop and Angel JJ) in a unanimous judgment rejected the Crown’s argument. The Court of Criminal Appeal held that any consideration of s 162 necessarily required consideration of s 31 because murder involves an unlawful killing and the use in s 162 of the word ‘unlawfully’ (defined in s 1 as meaning ‘without authorisation, justification or excuse’), required consideration of s 31 which is in Part II, Division 4 of the *Criminal Code* (NT) entitled ‘Excuse’. The only sections to which s 31 did not apply were stated in s 31(3) and did not include s 162. The Court therefore applied the maxim *expressio unius est exclusion alterius* (‘the express mention of one thing excludes all others’).

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80 Ibid 120.
There was no legislative inertia, and the Northern Territory legislature reacted by closing this loophole in amending s 162(4) as follows:

In the circumstances referred to in subsection (1)(b), notwithstanding section 31, it is immaterial that the offender did not intend to hurt any person or did not foresee the death of the deceased as a possible consequence of the act causing death.\(^{81}\)

As the Crown’s application to the High Court was refused,\(^{82}\) the next opportunity for the Court of Criminal Appeal to revisit the interaction between s 31 and s 162 occurred in *Charlie v The Queen*.\(^{83}\) The case concerned an appeal against conviction for murder under the now\(^{84}\) repealed s 162(1)(a) which read as follows:

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:

(a) if the offender intends to cause the death of the person killed or of some other person or if the offender intends to do to the person killed or some other person grievous harm;

is guilty of murder.

Counsel for the appellant naturally placed considerable reliance on *Breedon v The Queen* in arguing that s 162(1)(a) was qualified by s 31 such that a defendant would only be liable for murder based on an intention to cause grievous harm if in addition he or she foresaw death as a possible consequence under s 31. This argument was accepted by Angel J in dissent in holding that ‘*Breedon* is authority for the proposition that s 31, to the extent that in its terms it is operable, is applicable to, *inter

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\(^{81}\) *Criminal Code Amendment Act 1995* (NT), s 3.

\(^{82}\) Application to the High Court (Brennan, Deane and Dawson JJ) for special leave to appeal from the decision of the Court of Criminal Appeal refused on 25 August 1994.

\(^{83}\) (1998) 7 NTLR 152.

\(^{84}\) S 162 was repealed on 20 December 2006.
alia, offences of specific intent - including murder. It was not argued that *Breedon* is wrong or irrelevant to the present appeal’.85

Kearney J gave the leading judgment for the majority and adapted Dixon CJ’s approach in *Vallance v The Queen*86 such that murder in terms of s 162(1)(a) is one of a ‘large number of crimes [defined in the Code] … to the elements of which s 31(1) can have little … to say’.87 Kearney J concluded that ‘the legislature intended to set out comprehensively and exclusively in s 162(1)(a) the mental elements required for that type of murder’ and that the only role for s 31(1) is ‘its requirement that the homicidal act be intentional’.88

Unlike *Breedon*, the High Court granted special leave to hear an appeal in *Charlie v The Queen*.89 The High Court in a 3 to 2 decision90 upheld the Northern Territory Court of Criminal Appeal’s decision, with Callinan J giving the leading judgment for the majority. His Honour found that the majority in the Northern Territory Court of Criminal Appeal were correct in holding that the express reference to word ‘intent’ in s 162(1)(a) meant that s 31 of the *Criminal Code* (NT) did not have the effect contended by the appellant.91 Furthermore, Callinan J held that the definition of ‘grievous harm’ does ‘not require any element of awareness of result’92 in rejecting Lord Steyn’s view in *R v Powell* that murder involved either an intention to cause death or an intention ‘to cause really serious bodily harm coupled with an awareness

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85 *Charlie v The Queen* (1998) 7 NTLR 152, 169.
87 *Charlie v The Queen* (1998) 7 NTLR 152, 166-167.
88 Ibid, 167.
90 Gleeson CJ, McHugh and Callinan JJ were in the majority with Kirby and Hayne JJ in dissent.
92 Ibid, 411.
of the risk of death’. Callinan J drew attention to the fact that ‘the common law has never thought it anomalous that an offender having such an intention and taking such a risk should, if the consequences of the act exceed the intended purpose, be convicted of murder’.

Of course, one unintended side effect of the High Court’s decision in Charlie was to reduce the significance of the perceived problems with s 31, since it had now been explicitly stated that this section had no role to play in either murder or constructive murder in s 162(1)(a) and (b) respectively. Thus, by 1999, some sixteen years after the introduction of the Criminal Code (NT), the reach of s 31 had been clarified by the High Court. At this juncture, it seemed reasonable to conclude that just as the meaning of s 23 of the Criminal Code (Qld) was clarified by the judiciary over time, so too was the application of s 31 of the Criminal Code (NT) being worked out. There was as yet no positive indication that the alleged problems with s 31 were sufficient for it to be abandoned seven years later.

6.4.3. The Interaction Between Section 31 & Section 154 Dangerous Acts

Previous reference has been made in this Chapter to s 154 Dangerous acts or omissions being a legislative response or ‘fall back situation’ to O’Connor v The Queen, and when setting out s 31 in full it was noted that by virtue of s 31(3) the section did not apply to s 154. Subjective mental states are excluded from s 154. According to Blokland, s 154 was designed to ‘inculpate persons who might otherwise be acquitted of an offence on the grounds of lack of intent by reason of self-
induced intoxication'. To reinforce the legislative concern that the use of the excuse of intoxication be minimised under the Criminal Code (NT), s 154(4), which is set out below, made intoxication a circumstance of aggravation, not an excuse, which carried a penalty of further imprisonment for 4 years.

154. Dangerous acts or omissions

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.

Kearney J in R v Ashley described the general purpose of s 154(1) as ‘the punishment of those persons who, by their acts, endanger others’. In Baumer v The Queen the High Court in a unanimous decision described s 154 as an unusual section.

It casts a wide net, so as to cover all acts or omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious.

98 R v Ashley (1991) 77 NTR 27, 29.
100 Ibid 55.
However, the breadth of the offence of dangerous act is not the live issue, but rather the critical elements of s 154(1) which are first, the act causes ‘serious danger’; secondly, the danger must be ‘clearly foreseen’; and thirdly, the objective test of ordinary person similarly circumstanced. The leading case on s 154(1) is *Sandby v The Queen*[^101] where Mildren J discussed all three elements.

If the danger is ‘serious’, the quality of the seriousness of the risk is to be judged by the requirement that the danger must be clearly foreseeable by an ordinary man, and of such a quality, that the ordinary man would not have taken it. The use of the word ‘clearly’ indicates, as does the word ‘serious’, that the risk must not be too slight, too remote, too improbable or unlikely; but that is not to say that only risks that are fanciful or far-fetched are outside of the section. In my opinion the test of foreseeability of risk is not the same as reasonable foreseeability of risk of injury in the law of civil negligence.^[102]

These observations of Mildren J could be supplemented by noting that s 154(1) uses the words ‘clearly foreseen’ whereas s 31(2) uses ‘foresight’ against the objective test of ‘ordinary person similarly circumstanced’. Thus, whilst it is true that s 31(3) excludes s 31 from the operation of s 154, the language of s 154(1) makes ‘allowance for ordinary human fallibility’.^[103] As Gray pointed out ‘the courts have so far been careful to interpret it in such a way that it does not fulfil its obvious potential for injustice’.^[104]

Section 154 had many critics. Blokland categorised s 154 as representing ‘a departure from fundamental principles of criminal responsibility normally applicable in serious

[^101]: (1993) 117 FLR 218
[^102]: Ibid 231.
[^103]: Ibid.
cases’, while Leader-Elliott described it as ‘infamous’ and ‘draconic’ in arguing the effects of s 154 were ‘uncertain in practice and infected with paradox’. The Office of the Director of Public Prosecutions (DPP) noted that s 154 was drafted as an offence of criminal negligence but had probably primarily been used to prosecute intentional acts, omissions and events which the DPP considered to be ‘conceptually and philosophically wrong’ and if the offence of dangerous act is to be retained ‘its use should be restricted to the prosecution of criminal negligence’.

With the adoption of the criminal responsibility sections in Chapter 2 of the Criminal Code (Cth) in Part IIAA of the Criminal Code (NT), s 43AL Negligence (s 5.5 Criminal Code (Cth)) follows Nydam v The Queen and is an objective rather than a subjective test because the accused’s state of mind is irrelevant.

43AL Negligence

A person is negligent in relation to a physical element of an offence if the person’s 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.

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105 Blokland, above n 97, 74.
107 Fairall, above n 49, 10 – 11.
109 [1977] VR 430. Contrast Nydam and s 43 AL with the Queensland case of R v Jackson and Hodgetts [1990] 1 Qd R 456, 463-464, where the defendants had put meat preservative into a Coca-Cola tin thinking it would be unpleasant. However, the victim was suffering from advanced coronary disease and died. Thomas J held that a person cannot be found criminally negligent unless at least some serious harm was reasonably foreseeable by him or her.
This raises the obvious question as to why the test in Nydam, which is statutorily adopted in s 43AL above, is necessarily to be preferred for the offence of gross negligence manslaughter\(^\text{110}\) as opposed to s 154. Gross negligence manslaughter effectively in part replaces s 154, where the latter required an act causing serious danger has to be clearly foreseen and not done by an ordinary person similarly circumstanced. The preference for gross negligence manslaughter is at least questionable to the extent that s 154 has drawn such strong and, as here contended, unmerited criticism. More practically, the Northern Territory Law Society favoured the retention of s 154 because individuals who are often intoxicated ‘commit dangerous acts without either the requisite foresight or intent for the purposes of other offences’ such that as other witnesses are often similarly intoxicated were the offence of dangerous act to be abolished ‘in many instances these individuals would be acquitted’\(^\text{111}\).

The answer to the above question can be found at two levels. First, structurally the adoption of Chapter 2 in Part IIAA of the Criminal Code (NT) has given the Northern Territory Government far greater flexibility and avoids the crime du jour syndrome. Secondly, politically the Labor Government viewed s 154 in the same vein as its earlier opposition to the original s 7 of the Criminal Code (NT) dealing with the legal presumption that an intoxicated person intended the natural and probable consequence of his or her conduct.

\(^{110}\) Under s 160(c) Criminal Code (NT) the fault element for manslaughter can be either reckless or negligent. Under s 43AK Recklessness a person is reckless in relation to a result if the person is aware of a substantial risk that the result will happen, and having regard to the circumstances known to the person, it is unjustifiable to take the risk. This definition of recklessness is closer to reasonable foresight under s 154, but given recklessness and negligence are alternative fault elements for manslaughter under s 160, why would the Crown ever prosecute manslaughter under the higher test of recklessness when it can use negligence?

\(^{111}\) Fairall, above n 49, 11.
6.4.4. The Interaction Between Section 31 & Section 192 Sexual Intercourse Without Consent

Given the Supreme Court of the Northern Territory’s allowance for ordinary human fallibility in interpreting s 154 and the High Court’s clarification in Charlie v The Queen of the specific intent provisions of s 162(1)(a) excluding s 31, it is somewhat surprising that the Northern Territory Government’s decision to review the Criminal Code (NT) finally turned on the interaction between s 31 and s 192 Sexual Intercourse Without Consent. The specific case was Director of Public Prosecutions (NT) v WJI which like Charlie v The Queen was ultimately decided by the High Court.

The question before the High Court in Director of Public Prosecutions (NT) v WJI was whether the ‘act’ for the purposes of s 192 was the ‘act’ of sexual intercourse itself or whether it was the ‘guilty act’ of sexual intercourse without consent. As Gray observed ‘if the “act” were to be defined narrowly, the prosecution would need only to prove that the sexual intercourse itself was intended or foreseen in order to satisfy the requirements of s 31’. Conversely, a broad interpretation of “act” would result in the prosecution needing to prove ‘that the defendant at least foresaw that the sexual intercourse was without the victim’s consent’.

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112 Ibid, 3.
115 Ibid, 38.
The High Court, in a 4:1 decision,\textsuperscript{116} adopted a broad interpretation of ‘act’ such that the relevant act is having sexual intercourse with another person without the consent of the other person. Kirby J stated that the act of sexual intercourse was ‘neutral’\textsuperscript{117} as far as the *Criminal Code* (NT) was concerned given that sexual intercourse is overwhelmingly consensual and normally no criminal responsibility is attached to the act so there is nothing to be excused. ‘This is the fundamental reason why the reading hypothesised by the appellant does not work.’\textsuperscript{118} Kirby J added, having noted that the definition of ‘act’ was not limited to bodily movement, that this specific elaboration in the *Criminal Code* (NT) clearly indicated ‘there should be no further niceties about whether the relevant ”act” was the act of firing of an air gun pellet in the direction of a victim as distinct from the act of wounding of the victim’.\textsuperscript{119}

The High Court’s decision in *Director of Public Prosecutions (NT) v WJI* would have come as no surprise to the Northern Territory Government, as effectively there was appellate court forewarning. On 19 December 2002, the Northern Territory Court of Criminal Appeal in *DPP Reference No 1 of 2002*\textsuperscript{120} had decided 4 to 1\textsuperscript{121} in favour of the broad interpretation of ‘act’ for the purposes of s 192. On 6 October 2003, the Northern Territory Government appointed Professor Paul Fairall to review aspects of the *Criminal Code* (NT). The terms of reference were as follows:\textsuperscript{122}

To consider whether:

1. Dangerous act (s 154 of the Criminal Code) should be abolished;

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\textsuperscript{116} The majority comprised Gleeson CJ, Gummow, Kirby and Heydon JJ. Hayne J was in dissent.

\textsuperscript{117} *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43, 70.

\textsuperscript{118} Ibid.

\textsuperscript{119} Ibid 71, quoting *Vallance v The Queen* (1961) 108 CLR 56, 61 (Dixon CJ).

\textsuperscript{120} (2002) 12 NTLR 176.

\textsuperscript{121} Martin CJ, Thomas and Bailey JJ and Gallop AJ; Angel J dissenting.

\textsuperscript{122} Fairall, above n 49, 3.
2. Standard minimum non-parole periods can be introduced for manslaughter if
dangerous act is abolished, given many dangerous act offences would move into the
manslaughter offence;
3. A form of manslaughter resulting from recklessness as to serious harm should be
introduced;
4. An offence of dangerous driving causing death should be introduced; and
5. Whether other offences need to be introduced to cover the elements of the current
dangerous act offence which relate to grievous harm rather than death.

Fairall submitted his report in March 2004. One of the report’s recommendations was
that s 31 should be ‘replaced by a provision modelled on section 23 of the Griffith
Code’.\textsuperscript{123} The High Court’s decision in \textit{Director of Public Prosecutions (NT) v WJI}
was announced on 6 October 2004. On 25 October 2004 the Attorney-General
announced the Northern Territory Government’s ‘intention to repeal the dangerous act
provision in s 154 of the \textit{Criminal Code} (NT), and overhaul the major criminal
responsibility provision in s 31 of the \textit{Criminal Code (NT)}’.\textsuperscript{124} Gray stated that ‘these
proposals have been publicly cited as a response to the High Court’s decision in
\textit{Director of Public Prosecutions (NT) v WJI’}.\textsuperscript{125}

Fairall’s reason for his recommendation that s 31 be amended to accord with s 23 of
the Griffith Code was that the application of s 31 to homicide produced ‘very peculiar
results’\textsuperscript{126} Fairall referred to the defendant having a ‘protective shield’\textsuperscript{127} even if he
did foresee the possibility of death if an ordinary person similarly circumstanced and
having such foresight would have proceeded. Fairall concluded that ‘the recklessness

\begin{footnotesize}
\begin{enumerate}
\item Ibid, 5.
\item Gray, above n 114, 37, quoting ‘Drink, drugs not an excuse’, \textit{Northern Territory News} (25 October
2004).
\item Ibid.
\item Fairall, above n 49, 14.
\item Ibid.
\end{enumerate}
\end{footnotesize}
of the offender, in proceeding with conduct that he foresees might cause death, is expunged by the absence of negligence. Fairall’s main criticism of s 31 appears to be reduced to the effect of s 31 being to ‘drastically limit the operation of the homicide provisions’. This helps to explain why the Northern Territory Government selected the Criminal Code (Cth) as it had decided to repeal s 154 and replace that ‘fall back’ section with an expanded manslaughter section in conjunction with a series of sections covering endangering life and serious harm and driving a motor vehicle causing death or serious harm.

The Northern Territory Government’s decision to widen manslaughter, consistent with the equivalent section of the Criminal Code (Cth), to include gross negligence may have been influenced by Fairall’s observation that there is ‘no pressing policy reason why egregious negligent conduct resulting in death should not be prosecuted as manslaughter’. Fairall went on to address the question of self-induced intoxication stating that it was not a bar to prosecution where the fault element is gross negligence, rather, ‘far from providing a defence, the fact of intoxication may be relied upon to support a finding of gross negligence’. Ironically, this was exactly the genesis behind s 154, which went one step further and made self-induced intoxication a circumstance of aggravation.

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129 Ibid, 15.
130 Now s 160 Criminal Code (NT).
131 Now ss 174C to 174F of the Criminal Code (NT).
132 Manslaughter based on criminal negligence is a category of manslaughter to which the excuse or defence of accident does not apply.
134 Ibid.
The decision of the Northern Territory Government to expand the offence of manslaughter assists in an understanding of the selection of Chapter 2 of the *Criminal Code* (Cth), ahead of a reworked section 23 of the *Criminal Code* (Qld). In order to approximate to the new provisions contained in s 160 of the *Criminal Code* (NT), the definition of manslaughter in s 303 *Criminal Code* (Qld), which currently defines manslaughter as ‘a person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter’, would need to be amended to encompass conduct that causes the death of another person where the fault element is either recklessness or negligence. The difficulties with the outdated criminal responsibility architecture of the Griffith Codes reinforce the better choice of the Northern Territory Government to opt for Chapter 2 of the *Criminal Code* (Cth).

6.5. THE INTRODUCTION OF CHAPTER 2 OF THE COMMONWEALTH CRIMINAL CODE INTO THE NORTHERN TERRITORY CRIMINAL CODE

As mentioned at the commencement of this Chapter, in 1981 the existing Northern Territory criminal law legislation was described as ‘a virtual anachronism’. Some 24 years later the language is eerily reminiscent as a later Attorney-General, Dr Toyne, described the *Criminal Code* (NT) as ‘eclectic in the utilisation of earlier models, containing provisions that are quite individual; indeed, almost idiosyncratic’. The charge was made that under the existing criminal responsibility sections of Part II of the *Criminal Code* (NT) ‘offenders who cause the death of another have not been held criminally responsible to the same degree as they would

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135 See Northern Territory, *Parliamentary Record*, above n 5.
have been had they committed the identical act in another jurisdiction’. 137 The political barbs continued as the previous Country Liberal Party was alleged to have chosen ‘to stick with provisions of lower culpability specifically to apply to drunken, violent offenders’. 138

The justification for these statements was grounded in the narrow provision of the offence of manslaughter and the wide catch-all nature of the residual offence of dangerous act. Fairall had referred to ‘the distorting effect such a provision’ 139 (s 154 Dangerous act) had on the law of homicide in the context of doubting whether Barwick CJ would have anticipated such an outcome when proposing an alternative charge, 140 and drew attention to the remarks of Mildren J in R v Hofscuster. 141

Under the Northern Territory’s Criminal Code, the offences of murder and manslaughter are not the same as those offences at common law, and have their own peculiarities, which are not always easy to understand or explain. The main reason for this is s 154, which establishes a crime unknown to the common law, viz dangerous act. The effect of the provisions of the Code relating to murder, manslaughter and dangerous act, is that in some circumstances, what would amount to murder or manslaughter in other jurisdictions is the crime of dangerous act in this Territory. 142

The Attorney-General quoted Mildren J’s observations in his second reading speech as well as another case, Dooley v The Queen, 143 which had also been singled out by Fairall as a case where the defendant was convicted under s 154 but ‘it is doubtful

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137 Ibid.
138 Ibid.
139 Fairall, above n 49, 12.
140 O’Connor v The Queen (1980) 146 CLR 64, 87.
141 (1992) 110 FLR 385.
142 Ibid, 393 – 394.
143 [2003] NTCCA 6 (Angel, Mildren and Riley JJ).
whether a revenge vigilante style killing would result in anything less than, at the very least, a conviction for manslaughter in other Australian jurisdictions. Given Dooley was sentenced to nine years’ imprisonment with a non-parole period of five years, when the maximum term of imprisonment was 14 years because the defendant was intoxicated and the sentence was well within the normal range for manslaughter, it seems more a case of academic and political special pleading than a telling point against s 154.

The Attorney-General was on stronger ground when pointing to the advantage of adopting Chapter 2 as Part IIAA of the Criminal Code (NT) because the general principles of criminal responsibility provisions of the Criminal Code (Cth) are ‘now in force in the Territory in respect of the commission of federal offences’ and incorporating Chapter 2 in ‘our own Code seeks to create uniformity of standards in the criminal laws that apply in the Territory by aligning the criminal responsibility for Territory offences with that for federal offences’.

Significantly, the Attorney-General stated that Chapter 2’s ‘new style uses clear and precise language to make our criminal laws more readily understandable’. In R v JS, Spigelman CJ in discussing the Criminal Code (Cth) replacing case law spoke of ‘the comparative rigidity of a set of interconnecting verbal formulae which … involve the application of a series of cascading provisions, including definitional

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144 Fairall, above n 49, 13.
145 See Northern Territory, Parliamentary Debates, above n 2.
146 Ibid.
provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage'.

A good example of the ‘new style’ can be found below in s 244 Bushfires, which is designated as a Schedule 1 offence under the Criminal Code (NT). Section 244 affords the opportunity to examine how the physical and fault elements in Chapter 2 (or ‘set of interconnecting verbal formulae’) translate into an offence ‘intended to be capable of only one meaning’. Such singularity in meaning is at the heart of a Benthamite code. It can be seen that the physical and fault elements are clearly stated in subsection (1) where the underlying fault element of recklessness applies. For the purposes of subsection (1)(a), causing a fire is defined in subsection (3). Subsection (2) identifies the circumstances under which subsection (1) does not apply, giving both links to nominated legislation as well as specific examples of the application of such exemptions from criminal responsibility. As such, s 244 not only exemplifies the operation of the working of the Model Criminal Code in the form of Chapter 2 of the Criminal Code (Cth), but also is in keeping with a comprehensive Benthamite code design incorporating given examples.

244 Bushfires

(1) A person is guilty of a crime if:

(a) the person causes a fire; and

(b) there is a substantial risk that:

(i) the fire would spread to vegetation on property belonging to another person; and

(ii) the person would not be able to stop the spreading of the fire.

Ibid [145].
Fault elements:

The person:

(a) intentionally causes the fire or is reckless as to causing the fire; and

(b) is reckless as to the risk.

Maximum penalty: Imprisonment for 15 years.

(2) Subsection (1) does not apply to a person who caused a fire for the purposes of fire management or land management (or both):

(a) in accordance with a law in force in the Territory (including, for example, the [Aboriginal Land Rights (Northern Territory) Act 1976](https://www.legislation.gov.au/Details/C1976C0073) (Cth), the [Bushfires Act](https://www.legislation.gov.au/Details/C11990C00049) and the [Fire and Emergency Act](https://www.legislation.gov.au/Details/C11990C00206)); or

(b) in accordance with an agreement entered into by the Territory.

Example for subsection (2)(a)

A person who caused a fire in the course of carrying out fire management activities such as hazard reduction activities under the [Fire and Emergency Act](https://www.legislation.gov.au/Details/C11990C00206).

Example for subsection (2)(b)

A person who caused a fire in the course of carrying out fire management and land management activities under an agreement between the Territory and a private company established for the reduction of greenhouse gas emissions.

(3) For this section, a person causes a fire if the person:

(a) lights a fire; or

(b) maintains a fire.
Robinson, Cahill and Mohammad have developed two criteria to evaluate a code’s effectiveness in stating the rules of conduct (defined as conduct that is prohibited or required by the criminal law): ‘First, the code must be comprehensive in describing the rules of conduct. Second, it must communicate those rules effectively to the general public.’ Under the criterion of comprehensiveness, Robinson, Cahill and Mohammad argue that ‘a truly comprehensive criminal code must sufficiently define all relevant terms that reference to outside sources is unnecessary’. Under the criterion of effective communication, Robinson, Cahill and Mohammad suggest that clarity is required at two levels: ‘(1) within each rule, and (2) in the organisation of the rules into a code.’

Judged against these criteria, s 244 Bushfires in the Criminal Code (NT) measures up well. Furthermore, s 244 is to be found in Part VII, Division 6 Criminal Damage. Subdivision 1 covers interpretation such as s 238 Definitions (in this Division); Subdivision 2 details the offences; and Subdivision 3 sets out the circumstances in which there is no criminal responsibility such as consent and claim of right.

By contrast, in Queensland, the equivalent offence would be prosecuted under s 463 Setting fire to crops and growing plants in the Criminal Code (Qld), which simply states any person who wilfully and unlawfully sets fire to a specified fuel is guilty of a crime. The now repealed s 241 of the Criminal Code (NT) was written in similar terms to s 463 above. In Western Australia, the equivalent indictable offence with a possible term of imprisonment of 20 years is not found in the Criminal Code (WA), but in s 32 of the Bush Fires Act 1954 (WA). Robinson, Cahill and Mohammad argue under the comprehensive criterion ‘a code that is not self-contained, but admits of the

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149 P. Robinson, M. Cahill and U. Mohammad, above n 4, 5.
150 Ibid 9.
151 Ibid.
possession of criminal punishment for uncodified offences, cannot provide proper notice or assure consistent enforcement.  

Further examples of the superior drafting style of offences to be found in Part VII, Division 6 Criminal Damage of the *Criminal Code* (NT) are s 241 Damage to property, s 242 Sabotage, and s 243 Arson. This trio of offences share similar drafting styles to s 244 Bushfires above. Thus, for example, the fault elements for Damage to property are intention or recklessness, as opposed the ‘wilfully and unlawfully’ formula favoured by the Griffith Codes for the equivalent trio of offences.  

Again, bearing in mind the comprehensive criterion for a code, s 242(3) makes it an offence to threaten to damage a public facility. Typical of a comprehensive code drafting style to be found in Chapter 2 of the *Criminal Code* (Cth) and mirrored in Part IIAA of the *Criminal Code* (NT), the interpretation of the meaning of a threat is governed by s 242(4) below.

(a) it is not necessary to prove that the threatened person actually feared that the threat would be carried out; and

(b) a threat may be made by any conduct, and may be explicit or implicit and may be conditional or unconditional; and

(c) a threat to a person includes a threat to a group of persons; and

(d) fear that a threat will be carried out includes apprehension that the threat will be carried out.

The equivalent section in the *Criminal Code* (Qld) is s 469A Sabotage and threatening sabotage. In s 469A(3) threatening sabotage is couched in conditional terms, with no

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152 Ibid 6.
153 See, for example, s 469 Wilful damage, s 469A Sabotage and threatening sabotage, and s 461 Arson of the *Criminal Code* (Qld).
attempt to define the meaning of a threat other than inducing a belief the threat will be carried out. In the *Criminal Code* (NT), s 242(3) deals with the conditional aspect of threatening sabotage under fault elements as below.

Fault elements:

The person:

(a) intentionally makes a threat to another person to damage a public facility; and

(b) intends to cause the other person to fear that the threat will be carried out and will cause:

(i) major disruption to government functions; or

(ii) major disruption to the use of services by the public; or

(iii) major economic loss.

An objective comparison of s 242 Sabotage in the *Criminal Code* (NT) with the equivalent s 469A in the *Criminal Code* (Qld), against the twin criteria to evaluate a code’s effectiveness of a comprehensive description of the rules of conduct and effective communication of those rules to the general public, demonstrates the clear superiority of s 242 as there are fewer ‘blank spaces’ to be filled in by the courts.

6.6. CONCLUSION

The end result of the series of Northern Territory cases examined in this Chapter is that the perceived problems with s 31 were exaggerated at an early stage in the life of the *Criminal Code* (NT). Kirby J encapsulated the approach of some members of the
Supreme Court of the Northern Territory and the Director of Public Prosecutions with this barbed observation:

> The natural unit of comprehensible communication in the English language is the sentence. The approach of the appellant attempts to lead this Court back to the dark days of statutory interpretation by reference to isolated words.\textsuperscript{154}

Section 154 Dangerous acts also assumed major significance as it was the critical section dealing with the Northern Territory Government’s policy on intoxication and its legislative response to \textit{O’Connor v The Queen}.\textsuperscript{155} It is contended that s 154 was pilloried as a ‘bogey’ section by legal purists content to overlook the manifest problems securing convictions for intoxicated defendants in the Northern Territory, and, as was pointed out in 6.4.3 above, the Northern Territory Law Society opposed the repeal of s 154.\textsuperscript{156} The treatment of intoxication as an excuse has proved difficult in all jurisdictions, but it is certainly open to argue that s 154 generated more legal traction in dealing with intoxication than a watered down version of \textit{DPP v Majewski}\textsuperscript{157} in s 43AS which follows the equivalent section in Chapter 2 of the \textit{Criminal Code} (Cth). This point will be developed in Chapter 9 on intoxication.

The deficiencies in the treatment of evidence of intoxication in s 43AS appears to have been recognised with the current Attorney-General asking the Northern Territory Law Reform Committee ‘to investigate, examine and report on law reform in relation

\textsuperscript{154} \textit{Director of Public Prosecutions (NT) v WJI} (2004) 219 CLR 43, 70.
\textsuperscript{155} (1980) 146 CLR 64.
\textsuperscript{156} Fairall, above n 49, 11.
\textsuperscript{157} [1977] AC 443.
to the effect intoxication has on criminal liability'. Significantly, the terms of reference include (number 7): ‘Should a specific offence of committing a dangerous or criminal act, similar to the provisions previously found in the now repealed s 154 of the Criminal Code (NT) be reintroduced into the Northern Territory?’

Yet, even taking the criticisms of the original Criminal Code (NT) at their highest, does not explain the 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. 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.

In the end, the decision to abandon the original Criminal Code (NT) in 2006 reduced to the Northern Territory sensibly following the Australian Capital Territory in adopting Chapter 2 of the Criminal Code (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.

158 Letter from the Hon. John Elferink, Attorney-General for the Northern Territory to the Hon Austin Asche, President of the Northern Territory Law Reform Committee, 13 December 2012, page 1.
159 Ibid.
161 Ibid. Griffith fitted this criterion perfectly for Queensland in the 1890s.
The Criminal Code (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.\textsuperscript{162} In so doing, the Northern Territory Labor Government did not face a legal profession that fully embraced and supported the then existing Criminal Code (NT), which is the opposite of the long entrenched and parochial code landscape situation in Queensland. Following the return of a Country Liberal Government in the Northern Territory in 2012, the current Attorney-General is seeking to understand ‘the relative viewpoints of the legal community on the merits or otherwise of continuing to move towards the Model Criminal Code in the Northern Territory’.\textsuperscript{163} The political and cultural reasons for the success or failure of Criminal Codes will be considered in the Conclusion in Chapter 10, although it can be said that the presence of a political ‘champion’ needs to be matched either by a perceived pressing need or by the absence of opposition,

Irrespective of the outcome of the review of the Model Criminal Code in the Northern Territory, the staged process of adding offences to Schedule 1 from 2006 to 2012 has provided the opportunity to compare the original sections of the Criminal Code (NT) with the newer sections, based on the physical and fault elements set down in Part IIAA. The twin criteria to evaluate a code’s effectiveness of (1) a comprehensive description of the rules of conduct and (2) effective communication of those rules to

\textsuperscript{163} Letter from the Hon. John Elferink, Attorney-General for the Northern Territory, above n 3, page 1.
the general public has in this Chapter favoured the newer sections. However, such an assessment is not a universal endorsement of the newer offences in Schedule 1.

In the next two Chapters, the comparison between the original and new sections of the *Criminal Code* (NT) will focus on the offences of murder (Chapter 7), followed by complicity and common purpose (Chapter 8). It will be argued that these new sections, despite having the advantage of Part IIAA to assist in comprehensive drafting, leave too many ‘blank spaces’ and are inferior, as measured by the criterion of communication of the rules of conduct to the general public, in comparison to the original sections of the *Criminal Code* (NT).

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CHAPTER 7

A COMPARISON BETWEEN THE ORIGINAL AND CURRENT PROVISIONS FOR MURDER IN THE CRIMINAL CODE (NT)

7.1. OVERVIEW OF CHAPTER

This Chapter, building on the discussion in the previous Chapter, contains a comparison between the original and current provisions for murder, including causation, in the Criminal Code (NT). A similar comparison between the original and current provisions for complicity and common purpose is made in Chapter 8. The chosen vehicle is the Criminal Code (NT) because of the Northern Territory Government’s decision to incorporate Chapter 2 of the Criminal Code (Cth) as Part IIAA of the Criminal Code (NT).¹ The argument being made is that while the advantage of Part IIAA to assist in comprehensive drafting has improved the definition of physical and fault elements, the current provisions leave too many ‘blank spaces’. In the case of murder, attention will be given to the paucity of detail on causation, and in the case of complicity and common purpose the focus will be upon the limitations of seeking to combine the two concepts into a single section. In both cases, the new provisions are considered inferior in some respects to the original provisions, as measured by the criterion of communication of the rules of conduct to the general public.

In 5.5 above, the underlying fault element for a criminal code was discussed in the context of reckless murder and the natural and probable consequences test adopted in

¹ Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
Director of Public Prosecutions v Smith. In this Chapter, the discussion of the Code provision for murder encompasses causation. Causation is discussed in the context of the need for the legislature to specify the tests to be adopted where the chain of causation is deemed to have been broken.

In introducing the amendments to the provision for murder in 2006, the then Northern Territory Attorney-General said that ‘murder will mean murder … the amendments will ensure that those who commit murder are convicted of murder’. This claim will be closely scrutinised. The contention being made is that, consistent with the discussion in Chapter 5, recklessness should be included as a fault element in addition to intention. Murder is the most serious offence in the criminal calendar, and, given intention to cause serious harm is a sufficient fault element if the victim dies, leads to the need to specify the meaning of causation.

The ‘substantially contributes’ test for causation in s 149C of the Criminal Code (NT) is expanded to specifically encompass a suite of common law and statutory tests which are designed to make it very difficult for the accused to break the chain of causation. A Benthamite code requires the legislature to take a clear position on causation, and not delegate the task to the judiciary by merely specifying a single test in two words. Sitting behind the words ‘substantially contributes’ is a raft of common law cases, knowledge of which is required to interpret s 149C. The purpose of a code is to avoid such a situation.

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3 Criminal Reform Amendment Act (No 2) 2006 (NT).
Under a Benthamite code, the legislature is required to turn its attention to causation and, for example, consider whether conduct should encompass direct or indirect means, threats, intimidation or deceit, and define the meaning of ‘substantially’. Then again, the legislature is required to decide its position on subsequent medical treatment which may not have been entirely proper and, given the use of the word ‘substantially’ in s 149C, specify just how bad the treatment would have to be in order to break the chain of causation. Failure to undertake these tasks seriously undermines the claim that the statute is really a criminal code in the generally accepted meaning of a code.

7.2. THE PRESENT STATE OF THE LAW OF MURDER IN THE NORTHERN TERRITORY

Section 162 was the original section that covered murder in the Criminal Code (NT). Section 162(1)(a) encompassed a fault element for murder that included both an intention to kill and an intention to inflict grievous harm. Bronitt and McSherry have pointed out that ‘in all jurisdictions the fault element for murder includes an intention to inflict some form of serious bodily harm’. The new murder section in the Criminal Code (NT), s 156, retains intention to cause death or serious harm as the fault element. This Chapter supports the retention of serious harm for the purpose of classifying conduct as murder. However, given the leading case on reckless murder

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5 For example, does ‘substantially’ mean more than 50%, or more than minimal, or the main cause of death or the sole cause of death?
7 Section 1 of the Criminal Code (NT) defines serious harm as meaning any harm (including the cumulative effect of more than one harm) –
   (a) that endangers, or is likely to endanger, a person’s life; or
   (b) that is or is likely to be significant and longstanding.
8 See for example Law Reform Commission of Ireland, Homicide: The Mental Element in Murder, Consultation Paper No. 17 (2001) [4.097]: ‘A defendant who deliberately inflicts serious injury must be
at common law is *R v Crabbe*\(^9\) (discussed in 5.5 above) where the test is whether the accused knew that death was a probable as opposed to possible consequence of his or her conduct and which occurred in the Northern Territory prior to the introduction of the *Criminal Code* (NT), it is unclear whether Crabbe could only be charged with manslaughter today given the definition of intention in s 43AI of the *Criminal Code* (NT) which is discussed below.

On 20 December 2006, the amendments to the *Criminal Code* (NT) that had been passed in 2005\(^{10}\) and 2006\(^{11}\) became law. The 2005 amendments had the effect of bringing into operation a new Part IIAA which is virtually identical to Chapter 2 of the *Criminal Code* (Cth) which deals with criminal responsibility. Part IIAA applies to all offences listed in Schedule 1 which then and now are predominantly limited to a narrow band of offences in Part VI which cover offences against the person and which includes murder in s 156. The 2006 amendments brought into operation revamped offences in Part VI such as murder and manslaughter.

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:

\(\text{taken to know that he is risking life in view of the inherent vulnerability of the human body and mind. Such a defendant therefore possesses sufficient moral culpability to justify a murder conviction.}^{9}\)

\(\text{R v Crabbe (1985) 156 CLR 464.}\)

\(\text{Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).}\)

\(\text{Criminal Reform Amendment Act (No 2) 2006 (NT).}\)
1. The person engages in conduct
   - Physical element – Conduct
   - Fault element – Intention (s 43AM(1)\(^{12}\) 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.

For the purposes of this analysis, the focus is upon s 156(1)(c) where the fault element is intention,\(^{13}\) and in particular s 43AI(2) which defines intention in relation to a result as meaning to bring it about or an awareness it will happen in the ordinary course of events. The concept of awareness works in tandem with the definition of knowledge in s 43AJ. Here, knowledge is defined in relation to a result or circumstance as an awareness that it exists or will exist in the ordinary course of events.\(^{14}\)

It should be apparent that it is the exhaustive attempt to define the fault elements in the Criminal Code (Cth) that gives the Federal Code its power to crystallise the fault elements against the physical elements of an offence. This can be contrasted with the

\(^{12}\) 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.’

\(^{13}\) S 43AI Intention. (1) A person has intention in relation to conduct if the person means to engage in that conduct. (2) A person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events. (3) A person has intention in relation to a circumstance if the person believes that it exists or will exist.

\(^{14}\) S 43AJ Knowledge. 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.
Griffith Codes’ treatment of intention as an ordinary language concept thereby obviating the need to explain its meaning to juries.

Morgan has similarly recognised the need for the language of the fault elements of offences to be precise and workable in his discussion of the reform of murder in s 300 of the Indian Penal Code (IPC),\textsuperscript{15} noting that ‘[o]ne of the most striking features of Macaulay’s draft Code is the careful alignment of the physical element with the fault element’.\textsuperscript{16} Morgan, after having observed that ‘[t]he Australian Commonwealth Criminal Code, as a recent example of comprehensive codification, is a useful reference point’,\textsuperscript{17} has suggested the following definition of intention be included in the IPC:

A person intends something if he or she:

(a) means to bring it about;

(b) knows\textsuperscript{18} that it is absolutely certain to occur; or

(c) knows that it will in all probability occur.\textsuperscript{19}

The leading case on the elements of s 156(1) of the Criminal Code (NT) is \textit{Ladd v The Queen}.	extsuperscript{20} The appellant had been convicted of a stabbing murder. Martin CJ confirmed that s 156(1) specified two physical elements: namely, engaging in the relevant conduct (stabbing the deceased) and the result of the conduct (the death of

\textsuperscript{16} Ibid 63.
\textsuperscript{17} Ibid 60.
\textsuperscript{18} Morgan defines knowledge as: ‘A person knows something is likely if he or she realises or believes that it is likely to happen’: ibid 77.
\textsuperscript{19} Ibid 75. In keeping with Macaulay’s Code, Morgan also included illustrations for the three possible meanings of intention: ibid 75-76.
the deceased). The appellant sought to argue that, for the act of stabbing, the Crown was required to prove intention to stab the deceased in the particular area of the chest where the wound was actually inflicted. Martin CJ held that to require the Crown to prove an intention to stab the deceased in a particular area of the body for the purposes of s 156(1)(a) ‘would be to import a requirement that is not supported by the history of the law of murder or the provisions governing the crime of murder in the context in which they appear’.

In the alternative, the appellant sought to argue a two stage process applied such that the fault element for the result of death required both an intention to cause serious harm, and either an awareness that death will happen in the ordinary course of events or recklessness as to the result of death. The appellant argued that for the second physical element (conduct causing death), s 156(1)(c) does not specify a fault element and therefore s 43AM(2) applies (the default fault element of recklessness introducing awareness). The Crown responded to this construction by the appellant by contending that ‘s 156 is a stand alone provision that contains within it the fault elements for both physical elements’. Martin CJ agreed with the Crown’s submission in holding that ‘s 43AM(1) operates to insert a fault element of intention for the first physical element of engaging in conduct’ and that ‘s 156(1)(c) provides a fault element for the result of death in the form of an intention to cause death’.

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21 Ladd v The Queen [2009] NTCCA 6 [54].
22 Ibid [63].
23 Ibid [64].
24 Ibid [82].
25 S 43AM(2). If a law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element for the physical element.
26 Ladd v The Queen [2009] NTCCA 6 [84].
27 Ibid [92]. In Blacker v The Queen [2011] NTCCA 10, the court followed Ladd in a case involving negligently causing serious harm contrary to s 174E of the Criminal Code (NT), holding that the fault element of intention applies to the physical element of engaging in conduct in s 174E(a).
Consequently, it can be concluded that the judgment of Martin CJ (with which Mildren J agreed) in *Ladd v The Queen* supports the above breakdown of the physical and fault elements for s 156(1).

7.3. **THE PROPOSED STATE OF THE LAW OF MURDER IN THE NORTHERN TERRITORY**

The foregoing analysis of s 156(1) raises two questions: first, do the definitions for intention and knowledge set out above encompass recklessness? Secondly, if not, does s 156(1)(c) require amendment such that it specifically includes recklessness as an alternative fault element to intention, as found in s 115.1(d) of the *Criminal Code* (Cth)? Section 115.1 covers murder of an Australian citizen or a resident of Australia outside Australia, and s 115.1(d) refers to ‘intends to cause, or is reckless as to causing, the death’. Thus, a rewritten s 156(1)(c) of the *Criminal Code* (NT), following s 115.1(d) of the *Criminal Code* (Cth), would read as follows:

\[
S\ 156\ (1)(c): \text{the person intends to cause, or is reckless as to causing, the death of, or serious harm to, that or any other person by that conduct.}
\]

The insertion of the word ‘reckless’ would then bring s 43AK Recklessness into play, which uses the term awareness of a substantial risk that a result will happen or that the circumstance will exist.\(^{28}\) Clearly, a ‘substantial risk’ is equivalent to reckless murder.

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\(^{28}\) *S 43AK Recklessness.* (1) A person is reckless in relation to a result if: (a) the person is aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (2) A person is reckless in relation to a circumstance if: (a) the person is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (3) The question whether taking a risk is unjustifiable is one of fact. (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.
at common law as defined in *R v Crabbe*\(^{29}\) where the test was whether the accused knew that death was a probable as opposed to a possible consequence.\(^{30}\) Consequently, it can be safely argued that allowing recklessness as defined in s 43AK to be an alternative fault element to intention for murder, is equivalent to introducing common law reckless murder into the *Criminal Code* (NT).

Furthermore, there is a significant difference between an awareness ‘of a substantial risk that the result will happen’ for recklessness, as above, and an awareness that a result will happen in the ordinary course of events which goes to intention and encompasses an awareness that the result is virtually certain to occur.\(^{31}\)

Importantly, for the present purpose of clarifying the law of murder if an additional fault element is added, s 43AK(4) unequivocally states that where recklessness is an alternative fault element, as in the redrafted s 156(1)(c) above, proof of intention, knowledge or recklessness is sufficient to satisfy the fault element. This would appear to reinforce the conclusion that, given both intention and knowledge are higher up on the fault ladder than the default element of reckless, the addition of the fault element of reckless in the nomenclature of Part IIAA is equivalent to common law reckless murder.

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\(^{29}\) *R v Crabbe* (1985) 156 CLR 464.

\(^{30}\) See B. Fisse, *Howard’s Criminal Law* (The Law Book Company Limited, 5th ed, 1990) 58 for a distinction between a reckless killing where the D does not purposely seek to cause V’s death but is indifferent to it, and foresight of certainty that one’s actions will cause V’s death. ‘If the probability that D’s actions will kill V is so high as to be accounted certainty, D’s state of mind is equated with intention to kill; but if the probability is less high, D’s state of mind will be no more than recklessness as to the causing of death.’

\(^{31}\) In England and Wales, the House of Lords in *R v Woollin* [1999] 1 AC 82 affirmed previous authority given by Lord Lane CJ in *Nedrick* [1986] 1 WLR 1025, 1028F that ‘the jury should be directed that they are not entitled to infer the necessary intention [for murder], unless they feel sure that death or serious bodily harm was a virtual certainty as a result of the defendant’s actions and that the defendant appreciated that such was the case’.
As Campbell has pointed out ‘recklessness has been accepted by the High Court of Australia as constituting part of malice aforethought as the mental element of murder at common law’. Bronitt and McSherry state that ‘the Australian Capital Territory, New South Wales, South Australia, Tasmania and Victoria include recklessness as to causing death within the fault elements for murder’. For example, the definition of murder in the Australian Capital Territory refers to ‘with reckless indifference to the probability of causing the death of any person’, while in New South Wales the section states ‘with reckless indifference to human life’. In Tasmania, the Criminal Code refers to ‘the offender knew to be likely to cause death in the circumstances’. Thus, if the Northern Territory was to amend s 156(1)(c) to include recklessness as a fault element, it would be consistent with the five jurisdictions above.

At common law, the High Court of Australia in R v Crabbe stated that ‘[i]t is not the offender’s indifference to the consequences of his act but his knowledge that those consequences will probably occur that is the relevant element’. The significance of the emphasis on ‘knowledge’ in the above passage is because it sits alongside intention and above recklessness on the staircase of fault liability in the Criminal Code (Cth). As previously mentioned, s 43AJ of the Criminal Code (NT) defines knowledge, in relation to a result or circumstance, as an awareness that it exists or will exist in the ordinary course of events. Thus, while the definition of knowledge fits

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33 Bronitt and McSherry, above n 6, 526 [9.115], quoting Crimes Act 1900 (ACT), s 12(1)(b); Crimes Act 1900 (NSW), s 18(1)(a); Criminal Code (Tas), s 157(1)(b), (1)(c); R v Crabbe (1985) 156 CLR 464.
34 Crimes Act 1900 (ACT), s 12(1)(b).
35 Crimes Act 1900 (NSW), s 18(1)(a).
36 Criminal Code (Tas), s 157(1)(b), (1)(c).
37 (1985) 156 CLR 464.
38 R v Crabbe (1985) 156 CLR 464, 468 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
squarely with the common law test for reckless murder of whether the accused knew that death was a probable consequence of his or her conduct, it is unclear (a fatal flaw in a code) given the present definition of murder in s 156(1) of the Criminal Code (NT), whether either knowledge or recklessness are sufficient fault elements.

Chapter 2 of the Criminal Code (Cth), mirrored by Part IIAA of the Criminal Code (NT), is an exhaustive attempt to match in a seemingly geometric pattern a physical element with a requisite fault element.\textsuperscript{40} Under the principles of statutory interpretation, given the specific reference to intention in s 156(1)(c) of the Criminal Code (NT), it is arguably insufficient to rely on an awareness that a result will happen in the ordinary course of events, either through s 43AI(2) or s 43AJ, to import the fault element of recklessness into s 156(1)(c).

There is High Court of Australia authority for the proposition of an identity between recklessness and intention to be found in Vallance v The Queen\textsuperscript{41} where a minority of the High Court took a broad approach to the word ‘intentional’ in construing s 13 of the Criminal Code (Tas). In Vallance, Dixon CJ accepted that intention encompassed results foreseen as likely to flow or recklessness as to whether they will ensue or not.\textsuperscript{42} Windeyer J commented to similar effect: ‘the common law treats what was done recklessly … as if it had been done with actual effect’.\textsuperscript{43}

This led Campbell to conclude that while it seemed well established that recklessness was an alternative to intention as the mental element of murder, it seemed ‘less well established … that recklessness and intention may be regarded as identical in the

\textsuperscript{40} Section 43AC(b) of the Criminal Code (NT) states: ‘for each of the physical elements for which a fault element is required, one of the fault elements for the physical element.’

\textsuperscript{41} (1961) 108 CLR 56, 59 (Dixon CJ); 82 (Windeyer J).

\textsuperscript{42} Ibid 59.

\textsuperscript{43} Ibid 82.
common law of murder’. Campbell went on to opine that the doubt as to whether recklessness and intention are identical may be of little practical significance in common law jurisdictions, however, ‘the implications which this doubt holds for the Australian Criminal Codes have not yet been fully explored’. Campbell was writing in 1986, but Bronitt and McSherry writing in 2010 and therefore after the introduction of Part IIAA into the Criminal Code (NT), stated that given ‘the High Court has yet to provide a definition of “intention” it would seem that at present recklessness is not sufficient in Queensland, the Northern Territory and Western Australia’.

The purpose of the suggested redraft of s 156(1)(c) is to remove any doubts that recklessness has been specifically imported as a separate substantive fault element for murder, especially given past judicial pronouncements that if the legislature wishes a particular outcome it should speak in an unequivocal voice. The outcome being sought here is that recklessness would become an alternative fault element for murder in a redrafted s 156(1)(c) of the Criminal Code (NT), using the fault element nomenclature of Chapter 2 and the wording of s 115(1)(d) of the Criminal Code (Cth).

The real point is that a lay reader examining the murder provision in s 156(1) and the definition of intention in sub-section 43AI(2), might erroneously conclude that reckless murder was part of the criminal law of the Northern Territory. A comprehensive code section for the most serious of crimes, as with all criminal provisions, requires the rules of conduct to be clearly communicated to the general public. The present s 156(1) of the Criminal Code (NT) does not meet this criterion.

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44 Campbell, above n 32, 7.
45 Ibid.
46 Bronitt and McSherry, above n 6, 527 [9.115].
The next section considers the question of causation, and compares the present treatment of causation with the original provisions in the *Criminal Code* (NT).

7.4. APPROPRIATE DEFINITION AND TEST FOR CAUSATION

No murder provision can be considered comprehensive without dealing with causation. Causation is an element of an offence against the person. In contrast with the *Criminal Code* (Cth), the Griffith Codes give considerable attention to causation. For example, the general causation provision in the *Criminal Code* (Qld) is s 293 which is then extended by the terms of ss 294 to 298 which have the effect of deeming the defendant to have caused the death in particular circumstances. However, the test for causation is not defined in the Griffith Codes and judges have had recourse to decided cases. The leading case is *Royall v R* where the High Court identified four basic tests of causation: the operating and substantial cause test; the natural consequences test; the reasonable foresight of consequences test; and the *novus actus interviens* test.

The only Australian Criminal Code to specifically nominate any one of these tests of causation is the *Criminal Code* (NT), where in s 149C the operating and substantial cause test has been singled out. The original sections of the *Criminal Code* (NT),

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47 Section 293 states: ‘Except as in hereafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.’ The equivalent section in the *Criminal Code* (WA) is s 270.
48 The equivalent sections in the *Criminal Code* (WA) are ss 271-275.
51 Section 149C *Causing death or harm* states: ‘For an offence under this Part [Part VI Offences against the person and other matters], a person’s conduct causes death or harm if it substantially contributes to the death or harm.’ The implication from this single sentence is that the court is to apply *Hallett v R* [1969] SASR 141 which was approved by the two judges in *Royall* (Toohey and Gaudron JJ) who endorsed the operating and substantial cause test.
following the *Criminal Code* (Qld), comprised a series of deeming provisions found in s 157 Killing,\(^5\) s 159 Causing death by threats,\(^5\) and s 160 Injuries causing death in consequence of subsequent treatment.\(^5\) All three deeming provisions have been repealed and replaced\(^5\) with a new s 149C entitled Causing death or harm which appears to subsume all the old deeming provisions.\(^6\) The test adopted in s 149C is the substantially contributes to the death or harm test as in *Hallett v The Queen*\(^7\) where the South Australian Court of Criminal Appeal identified the test as whether at the time of death the original conduct is still an operating cause and a substantial cause. This test was approved by Toohey and Gaudron JJ in *Royall v The Queen*.\(^8\) Bronitt and McSherry have observed that whilst other tests\(^9\) have found favour with different courts at different times ‘the more modern cases, however, favour the substantial cause test, but it is not unusual for the courts to refer to these tests interchangeably’.\(^6\)

There is no issue with the selection of the substantial cause test over either the reasonably foreseeable consequence test or the natural consequence test. Introducing the concept of foreseeability of risk into a direction on causation is unhelpful, while a
focus on a natural consequence raises speculation about likelihood of an outcome in a situation where the victim may have acted irrationally. However, s 149C is an inadequate replacement for the three repealed deeming provisions above, and needs to be strengthened to more specifically cover indirect means, threats and medical treatment. The essential purpose of an expanded s 149C is a weighty eggshell skull rule making it very difficult to break the chain of causation. This is in line with other public policy positions taken in the thesis, which reflect the view that a criminal code requires a consistently applied underlying fault element and a utilitarian penal philosophy.

Causation is determined by an objective test, which under s 149C Criminal Code (NT) is the ‘substantially contributes’ test, and the jury should not be allowed to confuse the causation question with the subjective mental state of the defendant. The well-known passage from the judgment of Burt CJ in Campbell v The Queen\textsuperscript{61} is often quoted in support of the view that causation is a matter of common sense for the jury to determine. Such an approach is unhelpful from a comprehensive code perspective as it usually masks an inability to articulate the nature of the concept and how it is to be applied in a particular circumstance.

Colvin has suggested the difficulties surrounding causation ‘perhaps explain the paucity of statutory provisions on causation’ and has noted that ‘even in jurisdictions where an attempt has been made to codify criminal law completely, most matters of

\textsuperscript{61} [1981] WAR 286, 290. ’It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter.’
causation have tended to be left to the common law’. The proposed fuller expansion of the meaning of causation in s 149C below is an attempt to remedy this deficiency, and to provide greater guidance for the judge in instructing the jury than a reliance on the collective common sense of the jury.

Section 149C Criminal Code (NT) adopts the ‘substantially contributes’ test which Colvin has categorised as a retrospective test involving ‘looking backwards from a result in order to determine whether, in light of all that happened, a particular causal factor has played a substantial role in bringing about that result’. The leading Australian case on the substantial cause test is Hallett v The Queen64 where the Full Court of the Supreme Court of South Australia stated:

The question to be asked is whether an act or a series of acts … consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the beginning of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.65

The meaning of the term ‘substantial’ is not defined in s 149C or in any of the equivalent sections in the code jurisdictions in Australia. For the purposes of giving the jury some direction as to the meaning of ‘substantial impairment’ as regards the

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62 E. Colvin, ‘Causation in Criminal Law’ (1989) 1(2) Bond Law Review 253, 254. In a footnote (3), Colvin observed that: ‘Some codes specify generally that, for the purposes of homicide offences, death may be caused “directly or indirectly”: see the Criminal Code (Qld) s 293; the Criminal Code (WA) s 270 … These provisions merely indicate that someone can be held to have caused a result despite a degree of remoteness. They do not provide a general formula for determining when causation occurs.’
63 Ibid 259.
64 [1969] SASR 141.
65 Hallett v The Queen [1969] SASR 141, 149.
partial defence to murder of diminished responsibility,66 in *R v Lloyd*67 ‘substantial’ was held to be less than total but more than trivial or minimal impairment. In Australia, this scale found favour with Hart J in *R v Biess*.68 Building on this scale, there is judicial authority for the statement that for causation to be established ‘an accused’s act need not be the sole cause or even the main cause of the victim’s death’.69 This implies that ‘substantial’ can be less than 50% and therefore all that is required for causation to be established is that the accused’s act be more than a trivial or minimal cause of the victim’s death.

It may be objected that to use such an analogy is a questionable proposition, and raises the question of consistency with other provisions in the *Criminal Code* (NT) that use the word ‘substantial’ or ‘significant’. The response is twofold. First, there is nothing sacrosanct about the same word having different definitions within a code, as meaning commonly varies with context. Secondly, and more importantly, it is the absence of a definition of ‘substantially’ in s 149C which creates the greater problem from a code interpretation perspective, and invites the judiciary to turn to the common law by default.

A well-known example of the ‘substantially contributes’ test is the English case of *R v Smith*, where the medical treatment the victim eventually received was thoroughly bad and ‘might well have affected his chances of recovery’.70 The Court in rejecting the appeal applied the test of whether the original wound was ‘still an operating cause and

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66 A fuller discussion of the need to define ‘substantial’ is undertaken in Chapter 10 where reference is made to the partial defence to murder of diminished responsibility.
67 [1967] 1QB 175, 176.
69 *R v Pagett* (1983) 76 Cr App R 279, 288 (CA).
70 *R v Smith* [1959] 2 All ER 193, 198 (Courts-Martial AC).
a substantial cause'. Only if the original wound merely provided the setting in which another cause of death operated, could it be said that the chain of causation had been broken. The Victorian Court of Criminal Appeal followed *R v Smith* some 17 years later in *R v Evans and Gardiner (No 2)*. Similarly, Beldam J, in *R v Cheshire*, held that the negligent medical treatment needed to be so independent of the accused’s acts, and in itself so potent in causing death, that the contribution made by the accused was reduced to insignificance.

The test in *R v Cheshire* can be applied to any *novus actus interveniens*, which in turn is supported by a principle stressed in *R v Pagett* that later conduct can only constitute a *novus actus interveniens* if it was not itself caused by the earlier conduct. *Pagett* is also authority for the general requirement that a *novus actus interveniens* must be voluntary in the sense that the intervening act is ‘free, deliberate and informed’.

For the purpose of clarifying the law on medical intervention in the *Criminal Code* (NT) following the general principle advanced in *Pagett*, s 166 of the *Crimes Act 1961* (NZ) is adopted. As Colvin has pointed out, under the New Zealand legislation ‘prima facie, only treatment which is not applied in good faith (such as “treatment”

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71 Ibid.
73 [1991] 3 All ER 670.
74 76 Cr App R 279, 289-290 (CA).
75 *R v Pagett* (1983) 76 Cr App R 279, 289. (CA). In *Pagett* the appellant used a girl as a shield in a shoot out with police who had returned fire in self-defence and whose shots had killed the girl. The English Court of Appeal ruled a reasonable act of self-preservation was not a *novus actus interveniens* if it was caused by the accused’s own act.
76 *Crimes Act 1961* (NZ) s 166 Causing injury the treatment of which causes death. Every one who causes to another person any bodily injury, in itself of a dangerous nature, from which death results, kills that person, although the immediate cause of death be treatment proper or improper, applied in good faith.
which is in fact intended to kill or which is administered with reckless disregard of known risks) can constitute a *novus actus interveniens*. 77

The foregoing analysis can now be distilled into a proposed revised s 149C Causing death or harm which is designed to fully reflect the common law (and to a lesser extent statute law) under the rubric of the ‘substantially contributes’ test of causation. The original test in s (1) is unchanged but its operation is now qualified by virtue of the specific definition of ‘conduct’ in s (2) and ‘substantially’ in s (3).

**S 149C. Causing death or harm**

(1) For an offence under this Part, a person’s conduct causes death or harm if it substantially contributes to the death or harm.

(2) For the purpose of this section, conduct includes direct or indirect means, threats, intimidation or deceit.

(3) For the purpose of this section, substantially means more than trivial or minimal but need not be the sole cause or even the main cause of the victim’s death.

(4) For the purpose of this section, a new intervening act must be voluntary in the sense that the intervening act is free, deliberate and informed, and later conduct can only constitute a new intervening act if it was not itself caused by the earlier conduct. The test to be applied is that the later conduct must be so independent of the accused’s acts, and in itself so potent in causing death, that the contribution made by the accused is reduced to insignificance.

(5) For the purpose of this section, any person who causes to another person any harm from which death results, kills that person, although the immediate cause of death be treatment proper or improper, applied in good faith. 78

77 Colvin, above n 62, 269.
78 Sub-section 5 mirrors s 166 of the *Crimes Act 1961* (NZ), above n 76. The use of ‘any harm’ is very broad and reflects the design of s 149C to make the chain of causation difficult to break. If the legislature wishes to adopt a less draconian approach, then it needs to specify the gravity of the harm rather than delegate the task to the judiciary.
The point being made is not whether the proposed s 149C represents the preferable law on causation, but that the legislature has consciously selected sub-sections (1) to (5). Thus, in this template, the legislature has chosen the ‘substantially contributes’ test, specifically excluding other tests. The legislature has adopted a broad definition of conduct; has specified the meaning of ‘substantially’; has clarified what constitutes a new intervening act; and has addressed the meaning of intervening medical treatment.

The argument runs that the proposed s 149C provides far more clarity than the present s 149C, because the options available to the legislature under the existing common law and statute law on causation have been selectively set down in one comprehensive section. The result is a combination of sub-sections that make it very difficult for the chain of causation to be broken. A number of choices are available to the legislature, and it matters not whether the chain of causation is tightly or loosely drawn. What matters is that the legislature has specifically considered the options and consciously made choices. This is the nature of a Benthamite code. The proposed s 149C is clearer in its terms than the present s 149C, which delegates statutory interpretation of causation to the judiciary. By contrast, the proposed s 149C usefully minimises judicial discretion, which is one of the major objectives of any code.

Lamentably, the *Criminal Code* (Cth) has ignored the question of causation altogether. Thus, for ss 115.1 to 115.4 which respectively cover murder, manslaughter, intentionally causing serious harm and recklessly causing serious harm, the courts will have to decide which test of causation is applicable in the circumstances of the case as to whether the chain of causation has been broken. Devereux and Blake have suggested that for the Griffith Codes of Queensland and
Western Australia the ‘test should be whether the accused’s actions were a substantial or significant cause of death’ arguing that if the test of foreseeability is adopted ‘there is little or no scope for the operation of the excuse of accident [s 23] under the Codes’. However, the Queensland and Western Australia legislatures remain silent on this matter, presumably preferring the flexibility of the common law.

7.5. CONCLUSION

The main purpose of this Chapter has been to put forward a comprehensive code provision for murder in Australia by using s 156 and s 149C of the Criminal Code (NT) as templates. It has been argued that recklessness as defined in s 43AK should be an alternative fault element to intention for murder, thereby making s 156 consistent with common law reckless murder. The revised s 156(1)(c) below is similar in form to s 115.1(d) of the Criminal Code (Cth).

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, or is reckless as to causing, the death of, or serious harm to, that or any other person by that conduct.

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79 Here the words ‘substantial or significant’ are used interchangeably, which indicates the weakness of reliance on the common law where for causation the meaning is left open to common sense.
80 J. Devereux and M. Blake, Kenny: An Introduction to Criminal Law in Queensland and Western Australia (LexisNexis Butterworths, 8th ed, 2013) 239 [12.23].
81 Ibid. Under s 23 an accused is not criminally responsible for an event which is unforeseen by him and not reasonably foreseeable. Devereux and Blake cite R v Jemielita (1995) 81 A Crim R 409 where the appellant appealed his murder conviction on the grounds that the evidence did not allow the sequence of the injection and ingestion of drugs to be established beyond reasonable doubt, and therefore the deceased’s own conduct may have constituted an intervening act.
A comprehensive code provision for murder includes a definition of causation, which is covered by s 149C of the *Criminal Code* (NT). The present definition, which relies on the two words ‘substantially contributes’, is inadequate and requires expansion by specifically importing common law rules and tests. Section 149C has been redrafted accordingly in 7.4 above.

The approach taken in the proposed s 156 and s 149C of the *Criminal Code* (NT) is consistent with three principles which underpin the thesis. First, to design a comprehensive code section (here, the offence of murder) that is consistent with precedent and principle. Secondly, to provide as much clarification as possible within the relevant section of the code so as to be able to avoid unnecessary recourse to the common law, and consequently to be clear to the general public. Thirdly, to demonstrate the need for a code to have a consistently expressed penal philosophy, rather than *ad hoc* responses to the *crime du jour* randomly inserted into the Code. Thus, here, murder has a wide definition and the chain of causation is hard to break.

If the legislature was more diligent in specifying the elements and tests for individual offences, then a greater awareness of consistency and the need to adhere to the underlying fault element of the code would eventuate. A Benthamite code requires the legislature to both take pains and not to delegate its function to the judiciary, and to regularly update the code in a consistent manner. Neither of these tasks is beyond modern legislatures supported as they are by law reform commissions, parliamentary committee inquiries and research bodies.
In the next Chapter, which deals with complicity and common purpose, the offence of murder is further considered in the wider context of other parties.
CHAPTER 8

A COMPARISON BETWEEN THE ORIGINAL AND CURRENT PROVISIONS FOR COMPLICITY AND COMMON PURPOSE IN THE CRIMINAL CODE (NT)

8.1. OVERVIEW OF CHAPTER

In this Chapter, building on the discussion in the previous Chapter, the offence of murder is used as the means to examine the clarity and comprehensiveness of the statutory provision for complicity and common purpose (a doctrine by which the complicity of a secondary party in an offence may be established). The difficulties the judiciary has experienced in clearly distinguishing and defining the process of attributing criminal responsibility to offences involving other parties, make the doctrine of complicity and common purpose a suitable test for a Benthamite code.

The chosen vehicle is the Criminal Code (NT) because of the Northern Territory Government’s decision to incorporate Chapter 2 of the Criminal Code (Cth) as Part IIAA of the Criminal Code (NT).¹ This means that two separate but mutually exclusive provisions, depending on whether the particular offence is in Schedule 1 or not, operate side by side.² This affords a comparison between these two provisions as

¹ Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
² Under s 43AA(2) of the Criminal Code (NT), section 8 (Offences committed in prosecution of common purpose), section 9 (Mode of execution different from that counselled), and section 12 (Abettors and accessories before the fact) do not apply to Schedule 1 offences, which schedule is presently predominantly limited to offences against the person. Instead, Schedule 1 offences come under Part IIAA. For present purposes, the focus is upon s 11.2 of the Criminal Code (Cth) which has become s 43BG of the Criminal Code (NT). Thus, for criminal responsibility for complicity and common purpose in relation to murder, a Schedule 1 offence, the relevant provision is now s 43BG in Part IIAA.
well as providing an opportunity to contrast both provisions in the *Criminal Code* (NT) with the equivalent sections in the Griffith Codes.

This Chapter mounts a defence of the original reverse onus of proof provisions for common purpose contained in sections 8 to 10 of the *Criminal Code* (NT), on the basis that these original provisions have a comprehensive reach and are far easier to communicate to the general public. As with the analysis of murder in Chapter 7, despite the potential advantage of Part IIAA to assist in comprehensive drafting, the current provisions for complicity and common purpose are limited and confusing because they unnecessarily combine the two concepts into a single section. A Benthamite code does not necessarily have to utilise long sections in order to exhibit clarity and comprehensive coverage of the field.

8.2. BACKGROUND TO DOCTRINE OF COMPLICITY AND COMMON PURPOSE

In searching for a clear and comprehensive code provision for complicity and common purpose in Australia, there are four main choices for a legislature: the common law; the Griffith Codes; the *Criminal Code* (Cth); and the original provisions of the *Criminal Code* (NT). A Benthamite code requires the legislature to make a clear and comprehensive choice. In the area of complicity and common purpose, essentially the choice involves how strong the legislature intends to be the reach of secondary criminal liability.
Only the Griffith Codes adopt an objective test, and only the original provisions contained in sections 8 to 10 of the Criminal Code (NT) reverse the onus of proof. The Criminal Code (NT) has been chosen as the vehicle for the analysis because it is presently in a hybrid transitional state while Chapter 2 of the Criminal Code (Cth) in the form of Part IIAA is progressively applied to all offences. Thus, the original provisions of the Criminal Code (NT) can be directly compared with the treatment of complicity and common purpose in the Criminal Code (Cth).

The touchstone for the criterion of a comprehensive code provision for complicity and common purpose is the clear translation into statute of the law’s hostility to criminal groups, whether comprising violent gangs or criminal organisations. Measured against such a touchstone, the clearest provisions to deal with criminal groups are contained in the original sections 8 to 10 of the Criminal Code (NT). These sections contain a subjective focus on foresight and the reversal of the onus of proof. The objective provisions of the Griffith Codes are rooted in the 19th century with an underlying fault element of negligence. On the one hand, the Griffith Codes do not deal with ‘recklessness’, while on the other hand the complicity and common purpose provisions of the Criminal Code (Cth) are confusing and restricted because of that Code’s collapse of complicity and common purpose into one section.

The law surrounding criminal responsibility and other parties to offences has historically evidenced both complexity and controversy. As such, clarity in defining criminal provisions dealing with other parties is at a premium. The terms complicity,
common purpose and acting in concert have caused the courts and law reform bodies\(^3\) some difficulty, and case law in this area of the law has also been the subject of extensive academic critique.\(^4\) As the High Court has acknowledged ‘[t]hose terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime’.\(^5\) The reference to ‘an additional means’ recognises that liability can attach beyond accessory before the fact (aids, abets, counsels or procures) and principal in the second degree (present at the scene and aids or abets).

The High Court defined a common purpose as arising ‘where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime’.\(^6\) This need not be express, can be inferred from all the circumstances, and encompasses ‘any other crime falling within the scope of the common purpose which is committed in carrying out that purpose’.\(^7\)


\(^6\) Ibid 114.

\(^7\) Ibid.
In 1992, the MCCOC produced its Final Report on *General Principles of Criminal Responsibility*.\(^8\) *Inter alia*, the MCCOC attempted to clarify and reform the law of complicity, but in the end left the fundamentals intact such as retaining the dual distinction between accessory before the fact and common purpose.\(^9\) However, the MCCOC and subsequently the *Criminal Code* (Cth) was silent in terms of ‘acting in concert’ liability, and this did not form part of the scheme of complicity liability until the insertion of s 11.2A Joint Commission into the *Criminal Code* (Cth) in 2010\(^10\) rectified the absence of ‘acting in concert’ to deal with organised crime.\(^11\)

The original absence of ‘acting in concert’ from complicity and common purpose was not only a mistake but also unfathomable given one of the objectives was to clarify the law. If the MCCOC had left out common purpose completely and simply dealt with complicity, such an omission would have been understandable. The MCCOC rightly rejected the objective test in Griffith Codes, but would have better achieved its purpose of clarifying the law with the adoption of the common law. The actual choice of the MCCOC, which found expression in s 11.2 of the *Criminal Code* (Cth), was a retrograde one which is discussed in more detail in 8.4 below. From a Benthamite code perspective, s 11.2 fails both the criteria of clarity and comprehensiveness.

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\(^9\) Ibid, 88 – 93. The MCCOC had proposed to abolish the common purpose rule in the Discussion Draft but, at 91: ‘[w]ith the abolition of recklessness generally from complicity, it was decided to restore common purpose in a modified form based on the general test of recklessness used in the Code’.

\(^10\) *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth). Section 11.2A Joint Commission deals with parties who enter into an agreement (which may consist of a non-verbal understanding) to commit an offence, and covers offences committed in accordance with the agreement (of the same type) and in the course of carrying out the agreement (a person is reckless about the commission of the joint offence that another party in fact commits in the course of carrying out the agreement).

The doctrine of ‘acting in concert’ requires the parties to be present, unlike the doctrine of common purpose, although both doctrines may overlap depending on the factual matrix which may then in turn create complex jury directions. Arguably, in *Osland v The Queen*,¹³ the High Court recognised ‘acting in concert’ as a new primary form of joint liability. McHugh J stated that under this category ‘the liability of each person present as a result of the concert is not derivative but primary’ (principal in the first degree) such that ‘each of the persons acting in concert is equally responsible for the acts of the other or others’.¹⁴ McHugh J cited *R v Lowery and King (No 2)*,¹⁵ *Tangye*,¹⁶ and an academic text¹⁷ as authority. McHugh J observed that the correct principle ‘is that they are all equally liable for the acts that constitute the *actus reus* of the crime’¹⁸ and is accurately stated by Brett, Waller and Williams as follows:¹⁹

> [E]ven if only one participant performed the acts constituting the crime, each will be guilty as **principals in the first degree** if the acts were performed in the presence of all and pursuant to a preconceived plan. In this case, the parties are said to be acting in concert.²⁰

*Osland* was decided in 1998, yet it took a further 12 years and the growing emergence of organised crime to prompt the insertion of s 11.2A Joint Commission into the *Criminal Code* (Cth) in 2010. Certainly, the recognition by the High Court of ‘acting

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¹⁴ *Osland v The Queen* (1998) 197 CLR 316, 342.


¹⁸ *Osland v The Queen* (1998) 197 CLR 316, 343.

¹⁹ Brett, Waller and Williams, above n 17.

²⁰ *Osland v The Queen* (1998) 197 CLR 316, 343 (emphasis in original).
in concert’ complicated the existing law dealing with complicity and common purpose. A further complication emerges when it is understood that cases like Giorgianni v R\textsuperscript{21} are in conflict with ‘a line of cases\textsuperscript{22} which on true analysis, impose secondary liability on the basis of something like recklessness’.\textsuperscript{23} In light of the various forms of derivative and primary liability constituted by criminal complicity, this Chapter seeks to identify the clearest and most comprehensive statutory provision to cover criminal complicity.

8.3. THE ORIGINAL STATE OF THE LAW OF COMPLICITY AND COMMON PURPOSE IN THE NORTHERN TERRITORY

8.3.1. Common Purpose

The architect of the Criminal Code (NT), Mr D. Sturgess, QC, decided against adopting the objective test of ‘a probable consequence’ in s 8 of the Criminal Code (Qld) when designing his own section on common purpose. Instead, as with s 31 (discussed in 6.4 above), Sturgess preferred a subjective test but went further in reversing the onus of proof. Such a reversal in the onus of proof was also consistent with the treatment of intoxication in the original s 7 of the Criminal Code (NT), which contained a rebuttable presumption (‘until the contrary is proved’) that an intoxicated

\textsuperscript{21} (1985) 156 CLR 473. This case concerned a truck with defective brakes which was involved in a fatal accident when the brakes failed. The owner of the truck, Giorgianni, was not present at the time of the accident. The High Court held that, on a charge of culpable driving, Giorgianni could be held liable only if he knew that the driver was going to commit an offence and he intended to assist. Recklessness was insufficient and knowledge meant actual knowledge.

\textsuperscript{22} Johns v The Queen (1980) 143 CLR 108; Miller v The Queen (1980) 32 ALR 321; McAuliffe and McAuliffe v R (1995) 183 CLR 108; Gillard v The Queen 219 CLR 1.

\textsuperscript{23} D. Lanham, B. Bartal, R. Evans and D. Wood, Criminal Laws in Australia (2006) 500. ‘The language is that of common purpose but in reality it is foresight rather than purpose which is being punished’ citing Gray, ‘I Didn’t Know, I Wasn’t There’, above n 4, 201.
person ‘foresaw the natural and probable consequences of his conduct and intended them’ (discussed in 6.3 above).

Part 1 of the *Criminal Code* (NT) is entitled Introductory Matters and Division 2 is captioned Presumptions where s 8 is to be found dealing with the presumption for offences committed in prosecution of common purpose. For common purpose, s 8 contains a rebuttable presumption that each of the parties aided or procured the perpetrator to commit the offence unless he or she could prove on the balance of probabilities lack of foresight that the commission of the offence was a possible consequence. Once the Crown is able to prove beyond reasonable doubt the common intention to prosecute an unlawful purpose, a reversal of the onus of proof operates under a subjective test of foresight.

### 8 Offences committed in prosecution of common purpose

(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed by one or some of them, the other or each of the others is presumed to have aided or procured the perpetrator or perpetrators of the offence to commit the offence unless he proves he did not foresee the commission of that offence was a possible consequence of prosecuting that unlawful purpose. (Emphasis added.)

(2) Two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another when they agree to engage in or concur in engaging in any

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24 Similar rebuttable presumptions are contained in s 9 Mode of execution different from that counselled and s 10 Death or serious harm caused in the course of violence of 2 or more persons. Section 9 is similar in form to s 9 of the Griffith Codes. Section 10, which has no counterpart in the Griffith Codes, is constructed to avoid each defendant being acquitted because of the Crown’s inability to prove which defendant actually struck the final fatal blow. However, unlike s 8 and s 9, s 10 does apply to Schedule 1 offences, as s 10 is not included in s 43AA(2), which contains a list of provisions of Part 1 which do not apply in relation to Schedule 1 offences, such as s 43AA(2)(f) in excluding s 8 and s 43AA(2)(g) in excluding s 9. The non exclusion of s 10 to Schedule 1 offences would appear to be necessary given that sub-section (7) of 11.2 Complicity and common purpose of the *Criminal Code* (Cth) does not appear in s 43BG of the *Criminal Code* (NT).
conduct that, if engaged in, would involve them or some or one of them in the commission of an offence or a tort.

Thus, for example, under s 8 above the ‘accessories in *McAuliffe*’\(^\text{25}\) would need to prove, on the balance of probabilities, that ‘they did not foresee murder as a possible consequence of their plan to “roll” or “bash” someone’.\(^\text{26}\) By contrast, at common law, the test for an accessory is the possibility that the principal offender might kill in circumstances amounting to murder. However, under the new s 43BG of the *Criminal Code* (NT) discussed in 8.3 below, which has replaced s 8 for Schedule 1 offences such as murder, the prosecution has an even harder task. As Gray and Blokland point out, under s 43BG, ‘the defendant would only be liable if the prosecution were able to show that he or she was aware of a “substantial risk” that the principal offender might kill in such circumstances’.\(^\text{27}\) Thus, s 43BG represents a more difficult test for the prosecution than the common law, and a considerably more difficult task for the Crown to satisfy than s 8 of the *Criminal Code* (NT).

The power of s 8 can be illustrated by the case of *Lewin and Raymond v Bradley*,\(^\text{28}\) where six men including the two appellants assaulted the victim at a nightclub. The events were captured on CCTV. The Crown relied on s 8 because it was unable to attribute the harm to any particular kick or blow inflicted upon the victim by any particular individual, alleging that each of the appellants formed a common intention with the other attackers to assault the victim. The appeal hinged on whether the Crown had correctly based its case on s 8. Kelly J held that this was ‘a classic case for the application of s 8 [because] each of the persons who formed the common intention

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\(^{27}\) Ibid 196-197.

\(^{28}\) [2011] NTSC 28 (1 April 2011) (Kelly J).
to commit the assault, is presumed to have aided or procured whichever one or more of the others caused the harm’.  

By contrast to a subjective test with a rebuttable presumption in s 8(1) Criminal Code (NT), under the Griffith Codes (Queensland, Western Australia and Tasmania) which ‘depart from the common law and Code provisions [of the Commonwealth, Australian Capital Territory and Northern Territory] in a number of respects’ the test is objective as to whether the offence was a probable consequence of the common intention to prosecute an unlawful purpose. Section 8 of the Criminal Code (WA) has been singled out below because unlike its ‘sister’ Code in Queensland it contains a specific section on withdrawal, which can be compared to s 11.2 of the Criminal Code (Cth) and s 43BG of the Criminal Code (NT).

8. Offences committed in prosecution of common purpose

(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person —

(a) withdrew from the prosecution of the unlawful purpose;

(b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and

29 Lewin and Raymond v Bradley [2011] NTSC 28 [10].
30 S. Bronitt and B. McSherry, Principles of Criminal Law (Thomson Reuters, 3rd ed, 2010) 425 [7.125]. The authors suggest that the Griffith Codes ‘continue to apply the 19th century approach to fault, in adopting an objective test for assessing whether the crime committed by the principal offender was a probable consequence of carrying out the common purpose’: ibid.
31 See s 8 Criminal Code (Qld). See also s 4 Criminal Code (Tas) which adopts the objective test.
Recent High Court authority on s 8 is contained in *Darkan v R*\(^{32}\) where the majority (comprising Gleeson CJ, Gummow, Heydon and Crennan JJ) discussed the meaning of ‘probable consequence’ in relation to ss 71 and 72 of Stephen’s Draft Code of 1879.\(^{33}\) The majority found that the trial judge had ‘failed to steer a course between saying that a probable consequence was one which was more likely to occur than not … and saying that a probable consequence was a real or substantial possibility or chance’.\(^{34}\) In seeking to clarify the law, the majority held that the expression ‘probable consequence’ means that ‘the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible’.\(^{35}\) In framing a correct jury direction under s 8 the majority concluded that the commission of the offence ‘had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose’.\(^{36}\)

The test of ‘probable consequence’ was further considered by the High Court in *The Queen v Keenan*.\(^{37}\) Hayne J pointed out that the formation of the common purpose ‘may not have been accompanied by any consideration, let alone detailed

\(^{32}\) (2006) 227 CLR 373. Darkan and two other men had been recruited by the victim’s former partner to give the victim ‘a touch up’ and to ‘fix him up’. None of the men knew the victim. The victim was hit with a pickaxe handle and kicked repeatedly, with one of the men wearing steel-capped boots. The victim was crying for help. His body was found the next day with severe bruising, a broken jaw and facial lacerations. The cause of death was aspiration of blood due to severe facial trauma. One of the men gave evidence for the prosecution in return for receiving a reduced sentence.

\(^{33}\) Ibid 385-386. The Draft Code of 1879 was put to Parliament as the Criminal Code Bill in 1880. The extent of Griffith’s reliance on Stephen’s 1880 Code Bill was discussed in the 3.3.3 above on Griffith and the Queensland Code.

\(^{34}\) Ibid 396 – 397.

\(^{35}\) Ibid 398.

\(^{36}\) Ibid.

\(^{37}\) (2009) 236 CLR 397. Keenan, in company with three other men, had confronted the victim, Coffey, who allegedly had failed to pass on $7,000 collected for Keenan. One of the men, Booth, was carrying a small baseball bat. Another of the men, Spizzirri, allegedly produced a sawn-off gun and shot Coffey several times in the spine leaving him a paraplegic. There was no evidence that using a gun had been discussed beforehand. Keenan was convicted of doing grievous bodily harm with intent and appealed.
consideration, of what was to be done, how it was to be done, and who was to do what
to bring about the intended purpose’, and cited Gibbs J in Stuart v The Queen\textsuperscript{38} in
support. The test to be applied under s 8 was identified by Kiefel J as referring to ‘the
probable consequences of the common plan, not what the parties might have
foreseen’.\textsuperscript{39} Thus, it matters not under such an objective test that the parties did not
consider the possibility that the type of offence actually committed would be
committed, or be aware that it was a probable consequence.

In summarising the above authority on the meaning of the words ‘probable
consequence’ in s 8, extension of criminal responsibility is confined to only such
offences as are objectively the probable consequence of the common intention. Thus,
foresight of the offence is immaterial; rather, the meaning of probability varies with
the context and is to be contrasted with possibility. The focus in Darkan was on a
meaning of a probability of less than 50/50 but must be probable as distinct from
possible, which was refined in Keenan to refer to the probable consequences of the
common plan as opposed to what the parties might have foreseen.

What emerges from this tortuous path to the High Court and that court’s several
attempts to determine the meaning of the words ‘probable consequence’ in s 8, is that
the Queensland legislature has effectively delegated the task to the judiciary,
declining numerous opportunities to settle the matter itself. This is not how a true
criminal code should operate, and such legislative inertia has cost the Queensland
taxpayer dearly through the cost of numerous appeals. The implications for a Criminal
Code of such legislative inertia and fixing a code at one point in time were explored in
2.2.3 above.

\textsuperscript{38} (1974) 134 CLR 426, 442 (Gibbs J): ‘in fact the nature of the offence [may be] such that its
commission was a probable consequence of the prosecution of the common unlawful purpose’.

\textsuperscript{39} The Queen v Keenan (2009) 236 CLR 397, 434.
One of the hallmarks of a Benthamite code is a process of continuous updating consistent with the structure of the code. However, there comes a point in time when the original structure needs to be abandoned and recast to account for developments in criminal law theory. This is the case with the Griffith Codes, and s 8 above is a prime example of a key provision of the Griffith Codes needing to be completely redrawn. In this context, the MCCOC correctly rejected the treatment of complicity and common purpose under the Griffith Codes. Such rejection was based on an objection to the objective test of ‘probable consequence’, but could equally have been based on the legislature’s failure to clarify the meaning of ‘probable consequence’. Over one hundred years after s 8 was introduced, the judiciary was still attempting to explain the meaning of ‘probable consequence’, yielding a low score against one of the criterion to measure a Code’s effectiveness, namely, that of communication of the rules of conduct to the general public.

8.3.2. Complicity

From its earliest days our criminal law has recognised that a person may be convicted of committing a crime that was in fact committed by someone else.\(^{40}\)

Part 1 of the Criminal Code (NT) has two distinct sections dealing with common purpose (s 8) and parties to offences (s 12 dealing with abettors and accessories before the fact). Accessorial liability arises where there is no agreement (as opposed to joint criminal enterprise) to commit a crime among participants.\(^{41}\) Section 12 below


\(^{41}\) A. Simester and R. Sullivan, Criminal Law: Theory and Doctrine (Hart, 2\(^{nd}\) ed, 2003) 221.
overlaps\textsuperscript{42} with s 8 but as opposed to a rebuttable presumption adopts a deeming provision whereby aiders, counsellors or procurers to the offence are deemed to have taken part.

\textbf{Division 3 Parties to Offences}

\textbf{12 Abettors and accessories before the fact}

(1) When an offence is committed, the following persons also are deemed to have taken part in committing the offence and may be charged with actually committing it:

(a) every person who aids another in committing the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another to commit the offence; and

(c) every person who counsels or procures another to commit the offence.

(2) A person who counsels or procures another to commit an offence may be charged with committing the offence or counselling or procuring its commission.

(3) A finding of guilt of counselling or procuring the commission of an offence entails the same consequences in all respects as a finding of guilt of committing the offence.

Section 12 above has its origins in s 7 of the \textit{Criminal Code} (Qld) which is entitled Principal offenders and also employs deeming provisions for accessories. Section 12 is solely focused on complicity and leaves common purpose to be covered by s 8, which follows the approach taken by the Griffith Codes, and differs from the \textit{Criminal

\textsuperscript{42} The doctrine of complicity has three categories: joint criminal enterprise, extended common purpose and accessorial liability. In practice there is considerable overlap between them. See D. Brown, D. Farrier, S. Egger, L. McNamara and A. Steel, \textit{Brown, Farrier, Neal and Weisbrot’s Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales} (Federation Press, 4\textsuperscript{th} ed, 2006) [11.4.1].
Code (Cth) which combines complicity and common purpose into the one section, s 11.2.

The structure of s 12, following the Griffith Codes, separates aids from counsels and procurers which reflects the traditional distinction of aiders being present during the commission of the offence, and counsellors and procurers being absent. Section 12(1)(b) ‘covers a person who supplies materials or information for use in committing and offence’ which includes the getaway driver or the lookout.

8.4. THE NEW STATE OF THE LAW OF COMPLICITY AND COMMON PURPOSE IN THE NORTHERN TERRITORY

By contrast with the dual sections 8 and 12 in the Criminal Code (NT) dealt with in the previous section, s 11.2 of the Criminal Code (Cth), which for 15 years stood alone and which has become s 43BG of the Criminal Code (NT), combines complicity with common purpose into the one section. This was a mistake which was

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43 J. Devereux and M. Blake, Kenny: An Introduction to Criminal Law in Queensland and Western Australia (LexisNexis Butterworths, 8th ed, 2013) 185 [9.2]. Under s 7 of the Griffith Codes the categories of liability reflect those at common law. ‘Para (a) describes a principal in the first degree [person who does the act], paras (b) and (c) describe a principal in the second degree [person who does an act to aid anyone to commit the offence or aids anyone in committing the offence] and para (d) describes an accessory before the fact [counsels or procures].’

44 Thambiah v The Queen [1966] AC 37.

45 Gray and Blokland, above n 26, 188.

46 Section 43BG of the Criminal Code (NT) does not include s 11.2(7) of the Criminal Code (Cth). Section 11.2(7) states: ‘If the trier of fact is satisfied beyond reasonable doubt that a person either: (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or (b) is guilty of that offence because of the operation of subsection (1), but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.’ The absence of s 11.2(7) in s 43BG may partly explain why s 10 of the Criminal Code (NT), which covers death or serious harm caused in the course of violence of 2 or more persons, and is constructed to avoid each defendant being acquitted because of the Crown’s inability to prove which defendant actually struck the final fatal blow, is not on the list of provisions of Part 1 in s 43AA(2) which do not apply in relation to Schedule 1 offences. However, the rebuttable presumption contained in s 10 has no reverse onus of proof counterpart in s 11.2(7) which permits a guilty verdict even if the trier of fact is unable to determine whether guilt was because of the operation of subsection (1) or not. Subsection (1) states: ‘A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.’
belatedly recognised with the insertion of s 11.2A Joint Commission,\textsuperscript{47} although s 11.2 was left unaltered.

The use of the words ‘is taken to have committed’ in s 43BG(1) below replicate the deeming language of s 12(1) of the Criminal Code (NT), subject to proof of either of the fault elements (intention or reckless) in 43BG(3) and proof of the absence of withdrawal (‘terminated involvement’ and ‘took all reasonable steps to prevent the commission of the offence’) under s 43BG(5).

\textbf{Subdivision 4 External factors}

\textbf{43BG Complicity and common purpose}

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) the person's conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

\textsuperscript{47} Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth). The Australian Capital Territory followed the Commonwealth’s lead by inserting s 45A Joint Commission into the Criminal Code 2002 (ACT) in 2010. However, the Northern Territory has yet to amend its Code to include joint commission.
(b) the person's conduct would aid, abet, counsel or procure the commission of an
offence and have been reckless about the commission of the offence (including its
fault elements) that the other person in fact committed.

(4) Subsection (3) has effect subject to subsection (7).

(5) A person cannot be found guilty of aiding, abetting, counselling or procuring the
commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A person may be found guilty of aiding, abetting, counselling or procuring the commission
of an offence even if the principal offender has not been prosecuted or has not been found
guilty.

(7) Any special liability provisions that apply to an offence apply also to the offence of aiding,
counselling or procuring the commission of that offence.

In R v Kaldor, a case involving the procurement of prohibited imports, Howie J in
interpreting s 11.2 of the Criminal Code (Cth) stated that the ‘provision, in its terms,
does not create an offence but merely states a way in which a person may commit an
offence’ and that the section ‘does no more than extend criminal liability for an
offence contained in the Code’. Thus, a person is ‘made criminally responsible for
the offence committed by the principal offender’ and the provision operates as an
extension of principal offences. Therefore, any prosecution of the ‘accomplice’

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49 Ibid [77].
50 Ibid [79].
52 See note to s 11.6 Criminal Code (Cth).
requires both proof that the offence was committed by the principal offender and proof of all the elements of the provision.

The fault elements for complicity and common purpose for Schedule 1 offences are given in s 43BG(3) above, which is virtually identical to s 11.2.3 of the *Criminal Code* (Cth). Sub-sections 11.2(3)(a) and (b) were considered in *R v Choi (Pong Su) (No 12)* in the context of whether the fault element of recklessness applied to both sub-sections. Kellam J held that recklessness only applied to s 11.2(3)(b) dealing with common purpose, in contradistinction to s 11.2(3)(a) dealing with complicity for which the fault element was intention. To find otherwise would render redundant the specification of ‘recklessness’ in s 11.2(3)(b). In *R v Choi*, Kellam J was concerned only with s 11.2(3)(a) and concluded that the Crown must prove:

(a) That the conduct of each or any of the accused persons in fact aided, abetted, counselled or procured the commission of the offence which was committed by the other person (s 11.2(2)(a)).

(b) That the offence which was so aided, et cetera, was committed by the other person.

(c) That the accused person intended that his conduct would aid, abet, counsel or procure the commission of *any offence* (including its fault elements) *of the type* the other person committed (s 11.2(3)(a)). In this case the type of offence is the offence of importing prohibited imports to which s.233B(1)(b) of the *Customs Act* applies.

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55 Ibid [45].
56 Ibid [49], original emphasis.
In *Ansari v R*,\(^{57}\) Howie J (with whom Simpson and Hislop JJ agreed), in giving the leading judgment for the Court of Criminal Appeal, approved Kellam J’s interpretation above of s 11.2 of the *Criminal Code* (Cth).

These provisions accord with the Common Law principles as to aiding and abetting. Because the accused must have intended to assist the commission of the offence by the principal, the accused must have known of all the facts that would make the conduct that he was assisting a criminal offence. Recklessness as to the existence of facts is not sufficient: *R v Choi (Pong Su)* (Ruling No 12) [2005] VSC 32. This reading of s 11.2 is both consistent with the Common Law and would be consistent with the approach to conspiracy under the Code that I favour.\(^ {58}\)

A similar approach was taken in *Mulkatana and Mulkatana v The Queen*,\(^ {59}\) which is the leading Northern Territory appeal case on aiding and abetting for the crime of murder under s 43BG(3)(a). In this case, the Crown did not advance a case of common intention, but instead relied upon aiding and abetting.

In order to prove the crime of murder by way of aiding and abetting, the Crown was required to prove that GM knew all the essential facts of the crime of murder committed by EM. This knowledge had to exist at the time that GM aided and abetted EM to commit the crime of murder. The Crown was required to prove that GM was aware that EM was unlawfully striking the blows to the deceased and that, at the time EM was striking those blows, EM intended to cause serious harm to the deceased.\(^ {60}\)

Thus, under s 43BG(3)(a), for murder, the Crown is required to prove not only knowledge of the particular act, but also knowledge of an intention on the part of the principal offender (here EM) to cause serious harm. What would have been the situation if the Crown had proceeded under s 43BG(3)(b), which covers the situation

\(^{57}\) *A. Ansari v R, H.Ansari v R* [2007] NSWCCA 204.
\(^{58}\) Ibid [80].
\(^{60}\) *Mulkatana and Mulkatana v The Queen* (2010) 29 NTLR 31 [66] (Martin CJ, Riley and Southwood JJ).
where an aider knows that he or she is aiding an offence but does not know which one it is, instead? Essentially, once a person’s intention to aid, abet, counsel or procure has been established, ‘the defendant is liable for any further offences actually committed if he or she is reckless’ as to their commission’. Given the definition of recklessness under s 43AK, the Crown would have to prove, first, that the defendant was aware of a ‘substantial risk’ that the further offence would occur, and, secondly, that it was ‘unjustifiable’ for the defendant to take that risk. The Crown did not have the option of proceeding under joint commission, as the Northern Territory Government has yet to follow the example of the Federal Government in inserting s 11.2A Joint Commission into the Criminal Code (Cth).

The Commonwealth’s Guide for Practitioners makes it quite clear that ‘the common law doctrine of “acting in concert” has no counterpart in the Code’ going on to state that the essence of the doctrine is that ‘liability is taken to be direct rather than derivative’ such that all the participants in a joint enterprise ‘are taken to be principal offenders’. It follows from the derivative nature of accomplice liability under s 43 BG (s 11.2) that, as acting in concert is a form of direct criminal liability, joint criminal enterprise ‘is incompatible with the structure of the Code and has no place in Commonwealth jurisprudence’. Such a statement no longer holds true for

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61 See above n 28 in Chapter 7 for a definition of recklessness under s 43AK of the Criminal Code (NT).
62 Gray and Blokland, above n 26, 196.
63 The Crown in the Northern Territory can still utilise s 8 for non-Schedule 1 offences such as aggravated assault.
65 Ibid.
66 Ibid.
67 Ibid, 263.
the *Criminal Code* (Cth) following the insertion of s 11.2A Joint Commission, but it remains the case in the Northern Territory.

The introduction of s 11.2A was ‘targeted at offenders who commit crimes in organised groups, and hence the relevance to serious and organised crime … and targets members of organised groups who divide criminal activity between them’. As Biddington noted, the introduction of s 11.2A ‘has largely gone unnoticed … and will put the common law principle of joint criminal enterprise into the legislative framework’.

However, a significant difficulty with s 11.2A is that it mirrors the form of its sister section 11.2 in that recklessness is the fault element in s 11.2A(3) for an offence committed in the course of carrying out the agreement. As mentioned above, it is contended that the *Criminal Code* (Cth)’s definition of recklessness that the awareness of the risk must be substantial and unjustifiable, rather than the common law’s mere awareness of a possibility, does not sufficiently meet the mischief presented by complicity, common purpose and joint commission. Fundamentally, the insertion of s 11.2A has the hallmark of a shoehorned section to deal with a glaring omission, which overlooked the opportunity to take common purpose out of s 11.2(3), given there is no rational basis for the separation of s 11.2(3)(b) and s 11.2A on the grounds of a distinction between secondary and primary liability.

68 The Explanatory Memorandum to the *Crimes Legislation Amendment (Serious and Organised Crime Bill (No. 2) 2009* (Cth) set out a definition and effect of joint commission. ‘Joint commission applies when two or more people agree to commit an offence together, and an offence is committed under that agreement. The effect of joint commission is that responsibility for criminal activity engaged in under that agreement by one member of the group is extended to all other members of the group.’


71 Section 11.2A(3) states that: ‘An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.’
The introduction of s 11.2A is a minimum provision as it fills an obvious deficiency in the original s 11.2. The definition of agreement in s 11.2(5),\textsuperscript{72} which encompasses a non-verbal understanding, is to be applauded as it imports the ambit of McAuliffe.\textsuperscript{73} However, s 11.2A(2)(a)\textsuperscript{74} provides that an offence is committed in accordance with the agreement only where the offence actually committed is an offence of the same type as the offence in the original agreement. Such a limitation is unnecessarily restrictive. The simplicity and reach of s 8(2) of the Criminal Code (NT) is plain from the definition of common intention as ‘to prosecute an unlawful purpose in conjunction with one another when they agree to engage in or concur in engaging in any conduct that, if engaged in would involve them or some or one of them in the commission of an offence’ (emphasis added).

The clearest statutory approach to deal with the limitations of s 43BG (s 11.2) is to rename s 43BG to cover complicity only, by simply removing s 43BG(3)(b) completely. This would then allow common purpose to be dealt with separately in the manner adopted by the existing sections 8, 9 and 10 of Part I Criminal Code (NT). The test of recklessness in s 43BG(3)(b) sits between the probability test in the Griffith Codes and the possibility test in s 8 of the Criminal Code (NT), as recklessness combines the subjective intent of the secondary participant and the objective situation.\textsuperscript{75} The rebuttable presumptions in sections 8 to 10 of the Criminal Code (NT), apart from being more effective against organised crime, are clearer and

\textsuperscript{72} Section 11.2A(5) states that: ‘The agreement (a) may consist of a non-verbal understanding; and (b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.’

\textsuperscript{73} McAuliffe and McAuliffe v The Queen (1995) 183 CLR 108.

\textsuperscript{74} Section 11.2A(2)(a) states that: ‘An offence is committed in accordance with the agreement if the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to.’

\textsuperscript{75} Law Reform Commission of New South Wales, Complicity, Consultation Paper No 2 (2008) 6.13. See also s 43 AK(1) above n 28 in Chapter 7, ‘recklessness’ involves an awareness of a substantial risk by the secondary participant and a lack of justification in taking that risk.
more comprehensive than the addition into s 43BG of a parallel offence of joint
commission along the lines of s 11.2A in the Criminal Code (Cth).

8.5. CONCLUSION

This Chapter has sought to develop a Benthamite code provision for complicity and
common purpose in Australia, a complex area for judicial interpretation, with a focus
on the crime of murder discussed in Chapter 7. The subjective approach and
rebuttable presumptions contained in sections 8, 9, and 10 of the original Criminal
Code (NT) are preferable to the objective approach adopted by the Griffith Codes of
Queensland and Western Australia in the equivalent sections 7, 8, and 9. Furthermore,
s 11.2 of the Criminal Code (Cth) is less than satisfactory because by combining
complicity and common purpose into the one section, the reach of common purpose
was unnecessarily restricted. Even with the belated insertion of s 11.2A Joint
Commission, the Criminal Code (Cth) provisions remain restricted because of the
definition of ‘recklessness’. In this context, ‘comprehensive’ does not necessarily
imply merely length, but also structure. Clarity can be succinct as demonstrated by the
simplicity and reach of s 8(2) of the Criminal Code (NT) above.

The revised s 43BG and s 11(2) should be renamed Complicity by the expedient of
removing s 43BG(3)(b) from the Criminal Code (NT) and s 11.2(3)(b) from the
Criminal Code (Cth). This argument had merit when s 11.2 stood alone but has been
strengthened, at least for the Criminal Code (Cth), with the belated arrival of s 11.2A.
The clearest approach for the Criminal Code (NT) is to deal with common purpose
separately in the manner adopted by the existing sections 8, 9 and 10 of Part I
Criminal Code (NT) rather than import s 11.2A. These sections should be entitled Presumptions and inserted into Part IIAA as s 43BGA (1), (2) and (3).

In this search for a comprehensive Benthamite code provision for complicity and common purpose, the redrafted provisions are justified on public policy grounds and are designed to present the lowest degree of difficulty to the Crown to establish secondary liability. These provisions address the need to assist judges to explain more clearly the law of complicity to juries in place of the present ‘potentially confusing’ state of secondary liability. Essentially, the treatment of complicity and common purpose in one section (s 11.2 in the Criminal Code (Cth) and s 43BG for the Criminal Code (NT)) has unnecessarily complicated the criminal law. The belated insertion of 11.2A Joint Commission into the Criminal Code (Cth) filled a glaring gap in the law in dealing with acting in concert, a gap still unfilled due to legislative inertia in the Northern Territory. It would have been more advisable to either have enshrined the common law into both Codes, or for the Northern Territory to have retained the clear and powerful sections 8-10 for Schedule 1 offences.

In the next Chapter, public policy issues and comprehensive code provisions are further developed in a consideration of the effective treatment of evidence of intoxication. It will be contended that the new provisions for intoxication in s 43AS of the Criminal Code (NT), which are closely modeled on s 8.2 of the Criminal Code (Cth), are overly complex and virtually meaningless. As with of murder in Chapter 7 and complicity and common purpose in Chapter 8, the desired outcome of a clear and comprehensive treatment of evidence of intoxication was not achieved. As will be discussed, the legislature had choices available that would have clarified the law, but

76 Gillard v The Queen (2003) 219 CLR 1, 20 (Kirby J); Clayton v The Queen (2006) 81 ALJR 439, 460 (Kirby J). See also Gray, above n 4, 210; Eames, above n 12.
instead perversely selected a novel treatment of evidence of intoxication seemingly designed to achieve the lowest possible score against effective communication of the provisions to the general public. The discussion in 5.5 above in relation to *DPP v Smith*, 77 is also extended to demonstrate the option of placing a legal burden on the defence where intoxication is raised that the intoxicated person foresaw or intended the natural and probable consequences of his or her conduct.

CHAPTER 9

A COMPARISON BETWEEN THE CURRENT AND PROPOSED
PROVISIONS FOR INTOXICATION IN THE CRIMINAL CODE (NT)

9.1. OVERVIEW OF CHAPTER

As with any section of a criminal code, the legislature has choices which should be explicit and clear. In the case of the treatment of evidence of intoxication, the legislature could revert to the old common law (pre 1920)\(^1\) and treat evidence of intoxication as irrelevant. The other end of the spectrum is to follow the *Queen v O’Connor*\(^2\) and to always allow evidence of intoxication to be relevant to voluntariness and intention depending on the circumstances surrounding the case. Another alternative is to follow *DPP v Majewski*\(^3\) and to distinguish between types of offences such that evidence of intoxication is entirely discounted for offences where the fault element is at the lower end of the fault ladder of criminal responsibility. A Benthamite code requires the legislature to select one of the above options and make it clear to the lay reader where criminal responsibility when a person is intoxicated will fall.

The *Model Criminal Code*, which on intoxication finds expression in s 43AS of the *Criminal Code* (NT), adopts none of the above options. By virtue of the numerous

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\(^1\) Until the case of *Director of Public Prosecutions v Beard* [1920] AC 479 (House of Lords), the common law had made no concession to evidence of intoxication. In *Beard*, Lord Birkenhead laid down that if the defendant was rendered incapable of forming the intent to kill or causing grievous bodily harm, then he would not be guilty of murder, but would be guilty of manslaughter. His Lordship emphasised that intoxication was merely a means of demonstrating that the defendant lacked, on a particular charge, the mental element necessary.

\(^2\) (1980) 146 CLR 64.

\(^3\) [1977] AC 443 (House of Lords).
qualifications to be discussed in this Chapter, it is closest to O’Connor and the option of always allowing evidence of intoxication to be relevant to criminal responsibility. The level of confusion surrounding the interpretation of s 43AS is compounded by the title of the section reading Intoxication – offences involving basic intent, when the official guide to the Criminal Code (Cth) explicitly states the intoxication provisions are not based on Majewski.

The purpose of this Chapter is not to debate the relevant merits of the policy options open to a legislature, but to focus on the need for the legislature to clearly and comprehensively state the law surrounding the option chosen. However, it will be argued that s 43AS is the worst possible outcome judged against these twin criteria of effectiveness of a criminal code. For example, if the MCCOC had explicitly opted for O’Connor, then it would be a straightforward drafting matter to write s 43AS accordingly. Similarly, if the MCCOC had explicitly adopted Majewski, then it would have been a simple matter of adopting similar wording to the other Australian jurisdictions that follow Majewski, such as New South Wales whose legislation specifically identifies which offences are specific intent provisions.

This Chapter extends the comparison between the original and current provisions of the Criminal Code (NT) discussed in the two previous Chapters. Here the focus is on a comparison between the current and proposed provisions for intoxication. The analysis is conducted through the relevant intoxication provisions in the Criminal Code (Cth) and the Criminal Code (NT), developing the discussion of the law on intoxication in the Northern Territory in 6.3 above. The argument is made that these two Codes have the most confusing and least effective version of the Majewski
principle of all Australian jurisdictions, such that the relevant basic intent provisions make the prohibition virtually meaningless.

Redrafted provisions that follow the nomenclature of Part IIAA covering intoxication have been proposed for s 43AS Criminal Code (NT). The overriding objective of these redrafted provisions is to strengthen the reach of s 43AS, and to make these provisions the clearest and most effective version of the Majewski principle in Australia. The assumption is made that the MCCOC’s use of the term basic intent in the title of the intoxication section was meant to indicate some link to Majewski despite the actual outcome of the provisions being closer to O’Connor.\(^4\) To this end, recklessness is used as the touchstone for basic intent, which is consistent with the need for such an underlying fault element in a criminal code, as discussed in Chapter 5 of the thesis. Furthermore, from a utilitarian public policy perspective, the analysis demonstrates the feasibility of placing a legal burden on the defence, where intoxication is raised, to rebut the presumption that the intoxicated person foresaw or intended the natural and probable consequences of his or her conduct.

9.2. BACKROUND TO THE TREATMENT OF EVIDENCE OF INTOXICATION

This Chapter will critically examine the role of evidence of intoxication (a term which for present purposes encompasses alcohol and drugs) in determining criminal liability in Australia. It is possible to divide Australian jurisdictions into two groups for the purpose of classifying the treatment of evidence of intoxication: those that follow The

\(^4\) It is acknowledged that the Majewski approach has been criticised for treating the fact of intoxication as irrelevant for crimes of basic intent, which is arguably artificial, but then Majewski is based on public policy.
In O’Connor, the High Court decided by a majority of 4 to 3 that evidence of intoxication was part of the totality of the evidence in determining whether the Crown had proved beyond reasonable doubt that the defendant had acted voluntarily and intentionally. By contrast, in Majewski, the House of Lords held that offences should be divided into specific and basic intent. An offence of basic intent is one where the defendant intends to commit the proscribed conduct such as to strike the victim in a case of common assault. For an offence of specific intent some further intention is required such as not only intending to strike the victim but also intending to cause the victim serious harm in a case of causing serious harm. Evidence of intoxication is only relevant to an offence of specific intent. The decision in Majewski was rooted in a public policy principle that if a person voluntarily consumes alcohol then it is justifiable to hold that person criminally responsible for any injury caused whilst intoxicated. As will be discussed in the body of the Chapter, considerable criticism has been directed at the arbitrariness and difficulties in dividing offences between specific and basic intent.

The clearest and neatest solution to resolving the problems surrounding such a distinction would be to exclude evidence of voluntary intoxication from a

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5 (1980) 146 CLR 64. Victoria and South Australia follow the O’Connor principle.
6 [1977] AC 443 (House of Lords). See Criminal Code (Qld) s 28(3); Criminal Code (WA) s 28(3); Criminal Code (Tas) s 17(2); Criminal Code 2002 (ACT) s 31; Criminal Code (Cth) s 8.2; Criminal Code (NT) s 43AS; Crimes Act 1900 (NSW) s 428C. For the import of such a distinction see G. Orchard, ‘Criminal Responsibility and Intoxication – The Australian Rejection of Majewski’ (1980) The New Zealand Law Journal 532, 533: ‘Where an offence requires a specific intent the accused is entitled to acquittal if he lacked the required intent, even though this resulted from the effects of voluntary intoxication.’
7 A typical jury direction under O’Connor would be to the following effect: ‘The mere fact that the defendant’s mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.’ See R v Sheehan and Moore (1975) 60 Cr App R 308.
8 Ja v Goldsmith [2004] ACTSC 15 [15] (Crispin J). Crispin J was construing s 31 of the Criminal Code 2002 (ACT) in relation to grievous bodily harm and concluded that ‘this provision does not apply to an allegation of a specific intent such as an intent to cause grievous bodily harm [and] hence, the appellant’s state of intoxication had to be taken into account’.
determination of voluntariness and intention for all offences, including murder.\textsuperscript{9} Section 43AF(5) of the \textit{Criminal Code} (NT) states that ‘evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary’.\textsuperscript{10} It is feasible to adopt a similar absolute exclusion for self-induced intoxication and intention,\textsuperscript{11} or, in the alternative, to take the position that the defence must discharge a legal burden on the balance of probabilities that the defendant did not foresee or intend the natural and probable consequences of his or her conduct because this is peculiarly within the knowledge of the defendant.

Chief Justice Barwick in \textit{The Queen v O’Connor} asked the question whether ‘intoxicated violence’ was sufficient to warrant a departure from established common law principles.\textsuperscript{12} That question was answered in the affirmative by the minority in \textit{O’Connor} that a defendant who chooses to become intoxicated is morally accountable for any offences committed while in that state.\textsuperscript{13}

In the alternative, for the purpose of reversing the onus of proof in relation to evidence of intoxication, it is feasible for the legislature to adopt the rebuttable presumption that every person intends the natural and probable consequences of his or her acts, as discussed in 5.5 above and the case of \textit{Director of Public Prosecutions v Smith}.\textsuperscript{14} Under this option, if the defence introduces intoxication as evidence as to why the defendant did not have the requisite state of mind, then the defence must

\textsuperscript{9} In early Anglo-Saxon law, no concession was made in practice to an intoxicated accused. See R. Singh, ‘History of the Defence of Drunkenness in English Criminal Law’ (1933) 49 \textit{Law Quarterly Review} 528, 529.
\textsuperscript{10} See also s 4.2(6) \textit{Criminal Code} (Cth); s 15(5) \textit{Criminal Code} 2002 (ACT); s 428G(1) \textit{Crimes Act 1900} (NSW).
\textsuperscript{11} The note to \textit{Criminal Code} (NT) s 43AS(1) states: ‘A fault element of intention in relation to a result or circumstance is not a fault element of basic intent.
\textsuperscript{12} (1980) 146 CLR 64, 86.
\textsuperscript{13} \textit{The Queen v O’Connor} (1980) 146 CLR 64, 94 (Gibbs J); 109-110 (Mason J); 136 (Wilson J).
\textsuperscript{14} \textit{Director of Public Prosecutions v Smith} [1961] AC 290 (House of Lords).
overcome an objective test that every person intends the natural and probable consequences of his or her acts. Thus, the ‘artificiality’ of the subjective test where the jury is required to infer the defendant’s state of mind, is replaced, when intoxication is raised, by a clearer objective test as to what a reasonable sober person might have intended or foreseen.

For the purpose of analysis, the approach taken in this Chapter is to examine the Criminal Code (NT) which recently adopted Chapter 2 of the Criminal Code (Cth) as a new Part IIAA.\(^{15}\) In particular, attention will be focused on s 43AS Intoxication – offences involving basic intent, which is closely modeled on s 8.2 Criminal Code (Cth). Essentially, both of these Codes have opted for the Majewski model of distinguishing between offences of specific and basic intent. However, the Commonwealth Criminal Code’s Guide to Practitioners states that ‘specific intent has no counterpart in Chapter 2 and basic intent is given a restricted definition’ such that Majewski is ‘of little or no use in determining the application of the Code provisions’.\(^{16}\) This statement is confusing given the heading of s 43AS refers to ‘offences involving basic intent’.

Section 43AS(1) of the Criminal Code (NT) states that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. However, s 43AS (1) is qualified by a note that states that ‘a fault element of intention in relation to a result or circumstance is not a fault element of basic intent’, and by subsections which allow self-induced intoxication to be taken into consideration in determining whether the conduct was accidental (s 43AS(2)) or

\(^{15}\) Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).

whether the person had a mistaken belief about facts (s 43AS(3)). As Odgers has pointed out, the prohibition on the use of evidence of voluntary intoxication has no application in determining whether a fault element existed in relation to ‘a physical element of circumstance or a physical element of result; an ulterior (or specific) intention; or knowledge, recklessness or negligence’. It will be contended that the note and the two exceptions have the effect of making the prohibition in s 43 AS(1) virtually meaningless. The de facto consequence of the exceptions is to move s 43AS closer to O’Connor than to Majewski.

The vexed question of intoxication and criminal responsibility can be addressed at four levels. The first, and simplest, option would be for the legislature to extend the Majewski model to cover all offences. This is sometimes referred to as the ‘absolutist’ position which has the effect of reverting to the common law prior to 1920. Secondly, and equally straightforward, would be to adopt O’Connor. Thirdly, to make evidence of intoxication harder to use by inserting a rebuttable presumption, where intoxication evidence is raised, relating to foresight and intention of the natural and probable consequences of actions. Fourthly, to introduce a revised s 43AS containing the general rule that, where recklessness is the fault element, evidence of intoxication is inadmissible, such that it has a more wide-reaching effect on offences of basic intent. Such a proposed s 43AS is, by way of demonstration, supplemented by a subsection giving a short list of offences of specific intent in order to avoid confusion as to which offences are covered by the prohibition. Each of these options meets the criterion for a criminal code, previously discussed in 7.4 above on causation, of clear communication of the rules of conduct to the general public.

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18 DPP v Beard [1920] AC 479 (House of Lords).
19 See for example Crimes Act 1900 (NSW), s 428B.
9.3. DECONSTRUCTING INTOXICATION IN PART IIAA CRIMINAL CODE (NT)

9.3.1. Voluntariness

The incorporation of Chapter 2 of the *Criminal Code* (Cth) as Part IIAA of the *Criminal Code* (NT) brought two sections into play for the purposes of the treatment of evidence of intoxication. The first is s 43AF which deals with voluntariness (s 4.2 in the *Criminal Code* (Cth) which was discussed 3.3.3.above), and the second is s 43AS which covers intoxication. Section 43AF(1) states that conduct can only be a physical element\(^{20}\) if it is voluntary, and s 43AF(2) explains that conduct is only voluntary if it is the product of the will of the person whose conduct it is. By way of clarification, examples of conduct that is not voluntary are given such as a spasm, convulsion or other unwilled bodily movement; an act performed during sleep or unconsciousness; and an act performed during impaired consciousness depriving the person of the will to act. These two subsections set out well settled legal territory on voluntariness and specifically import automatism into the *Criminal Code* (NT).

For present purposes, it is s 43AF(5) which moves centre stage. Section 43AF(5) states that evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary. Section 43AD(1) defines conduct as an act, an omission to perform an act or a state of affairs, while s 43AE sets out that a physical element of an offence may be conduct, or a result of conduct, or a circumstance in which

\(^{20}\) Under s 43AC, which deals with establishing guilt of offences, a person must not be found guilty of committing an offence unless the existence of the physical elements of the offence and for each physical element one of the fault elements (where required) for the physical element is proved.
conduct, or a result of conduct, happens. Thus, clearly, the effect of s 43AF(5) above is to exclude evidence of self-induced intoxication from the physical element of an offence (or the *actus reus*). As Odgers has pointed out:

If the only evidence tending to suggest that a person’s conduct was not the product of the person’s will is evidence the person was intoxicated, and the intoxication was self-induced, such evidence must be disregarded by the tribunal of fact. If it must be disregarded then, presumably, the inference of voluntariness will be drawn.\(^2\)

It is illuminating to consider the ramifications of s 43AF(5) in the context of the well known passage from Barwick CJ’s judgment in *The Queen v O’Connor*.\(^2\)

But the state of intoxication may, though perhaps only rarely, divorce the will from the movements of the body so that they are truly involuntary. Or, again, and perhaps more frequently, the state of intoxication, whilst not being so complete as to preclude the exercise of the will, is sufficient to prevent the formation of an intent to do the physical act involved in the crime charged.

If one conceives of these two states of intoxication on a scale of 0 to 10, where 0 is stone cold sober and 10 is paralytic, then 7.5 could represent a person being sufficiently intoxicated to prevent the formation of an intent to do the physical act which goes to the fault element or *mens rea*. Then again, 9 could represent a person who is so intoxicated that the will has been divorced from the movements of the body which goes to the physical element or *actus reus*. It is this second or super intoxicated state that s 43 AF(5) has knocked out from the evidential equation. However, for crimes of specific intent, the *O’Connor* principle, which treats intoxication as being

\(^2\) Odgers, above n 17, 37 [4.2.200].
\(^2\) (1980) 146 CLR 64, 72.
part of the totality of the evidence, is enlivened for the first intoxicated state above of 7.5 relating to the fault element of intention to do the physical act.

The mechanics of evidence of intoxication being excluded for voluntariness and included for intention under Part IIAB can be illustrated for the specific intent offence of murder, previously discussed in 7.2 above.

**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

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.
Consequently, it can be seen that s 43AF(5) means that evidence of intoxication cannot be considered for the physical element of conduct as in s 156(1)(a) above where the person engages in conduct. The requirement of voluntariness applies only to conduct. By contrast, evidence of intoxication is able to be considered as to whether the person intended the result of that conduct as in s 156(1)(c) above.

9.3.2. Majewski Writ Small

One of the main criticisms of the Majewski approach is the problem of distinguishing between offences of specific and basic intent. The rule in Majewski is that if the Crown can prove the defendant committed the external element of an offence with a fault element of recklessness whilst intoxicated, liability can be sheeted home despite the defendant’s lack of appreciation of the relevant risk, provided the Crown can prove that the defendant would have appreciated that risk if he or she had been sober. In effect, the rule in Majewski allows the Crown to pursue an alternative objective basis to establish liability by qualifying the normal subjective approach for offences requiring no more than recklessness as the fault element. Consistent with the presumption of innocence, if it is reasonably possible that the defendant would have been unaware of the relevant risk even if sober or that a sober person might have made the same mistake, then the defendant is not liable for the offence. However, as mentioned earlier, Majewski is of limited use in determining the intoxication provisions of the Criminal Code (Cth) as the Guide for Practitioners, the Commonwealth Government’s official guide to the interpretation of the Criminal Code (Cth) written by one of the architects of the Code, makes clear.

23 See for example The Queen v O’Connor (1980) 146 CLR 64, 81 (Barwick CJ): ‘With great respect to those who have favoured this classification of crimes, it is to my mind not only inappropriate but it obscures more than it reveals.’
The physical elements of an offence are conduct, circumstances or results. The Code provisions on intoxication require a distinction to be drawn between conduct elements of an offence and circumstantial or result elements.\textsuperscript{24} When evidence of intoxication would have a rational bearing on proof of intention, knowledge, recklessness, negligence or any other fault element relating to an incriminating circumstance or result of conduct, the court must give consideration to that evidence.\textsuperscript{25}

Leader-Elliott has identified in a table in a recent article that for the physical element of conduct, the fault element is intention; for the physical element of circumstance, the fault element is knowledge; and for the physical element of result, the fault element is recklessness or negligence, or others as specified.\textsuperscript{26} The contention here is that, assuming that for policy reasons the Northern Territory legislature, which faces particular problems related to intoxication discussed in Chapter 6, prefers Majewski to O’Connor,\textsuperscript{27} then, under the criterion of clarity, recklessness should be the dividing line for a general rule regarding the admissibility of self-induced intoxication evidence, which would limit such evidence to proof of intention or knowledge.

The Guide for Practitioners continues with a discussion that intoxication can lend credibility to a defendant’s denial of intention, knowledge or recklessness because drunks are poorly co-ordinated, display bad judgment and make mistakes. Therefore, the argument runs, ‘[d]epending on the circumstances, these decrements in

\begin{itemize}
  \item \textsuperscript{24} See the note to s 8(2) \textit{Criminal Code} (Cth) and the note to s 43AS(1) \textit{Criminal Code} (NT).
  \item \textsuperscript{25} Leader-Elliott for the Commonwealth Attorney-General’s Department, above n 16, 145 (original emphasis). The \textit{Guide for Practitioners} at 149 makes the point that a defendant who claims that the act causing harm was a mere stumble can equally well deny that there was any intention to cause harm. ‘The same conclusion follows for all offences which require proof of fault with respect to a result. If the act causing the result was not intentional, the result is not intentional either.’
  \item \textsuperscript{27} In Australia, only Victoria and South Australia follow O’Connor. All other Australian jurisdictions follow Majewski. See above n 5 and n 6.
\end{itemize}
performance can displace the usual inference that anyone of normal intelligence must have known what they were doing or must have intended the consequences of their actions: s 9.1(2).  

Section 9.1(2) of the Criminal Code (Cth) deals with mistake or ignorance of fact for fault elements other than negligence and allows the jury to consider whether the mistake was reasonable in the circumstances. Odgers states that s 9.1(2) is ‘superfluous’ as the jury in determining whether the defendant entertained a mistaken belief about some fact that negated a fault element ‘would inevitably consider the reasonableness of making such a mistake’ under the circumstances. Odgers goes on to make the following pertinent observation as regards the nature of the test.

What this provision does not do is replace a subjective test with an objective one. While the reasonableness of the mistake is relevant in deciding whether the defendant might have made it, the ultimate issue is whether the defendant might have made it, not whether the mistake was a reasonable one.

On the question of proof, Odgers points out that while there is an evidential burden on a defendant who relies on mistake of fact, this is of ‘no practical significance because there is no evidential burden on the defendant who argues that the prosecution has failed to prove an element of the offence’. The prosecution must prove every

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28 Leader-Elliott for the Commonwealth Attorney-General’s Department, above n 16, 145.
29 See also s 43AW(2) Criminal Code (NT).
30 Section 9.1(2) Criminal Code (Cth) states: ‘In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.’
31 Odgers, above n 17, 96 [9.1.120].
32 Ibid (original emphasis).
33 Ibid 97 [9.1.160].
element of an offence and there is no evidential burden on a defendant who argues mistake of fact prevents a fault element being proven.

Taking issue with the present legislation, it is contended that if the defence argument is intoxication displaced the inference that a normal person intended the consequences of his or her actions, then the ‘superfluous’ s 9.1(2) above needs to go further than simply allowing the jury to consider the reasonableness of the mistake as regards negating a fault element from the subjective perspective of the defendant. The test should become objective by requiring consideration of whether the mistake was a reasonable one and not whether the defendant might have made the mistake.

The above contention derives some support from the position taken by the Law Commission of England and Wales who recommended that:

[A] defendant should not be able to rely on mistake of fact arising from self-induced intoxication in support of a defence to which the defendant’s state of mind is relevant, regardless of the nature of the fault alleged. The defendant’s mistaken belief should be taken into account only if the defendant would have held the same belief if the defendant had not been intoxicated.\textsuperscript{34}

Such a critical view of the present legislation becomes more apparent when the content of s 8.2(4) of the \textit{Criminal Code} (Cth) is considered.\textsuperscript{35} Section 8.2(4) operates as an exception to evidence of self-induced intoxication being excluded in determining whether a fault element of basic intent existed, and allows such evidence


\textsuperscript{35} See also \textit{Criminal Code} (NT) s 43AS(3).
to be taken into consideration in deciding whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed. As Odgers notes, while this exception only applies if the person has given consideration as to the existence of the facts, ‘it is a limitation of little practical significance’ because ‘[i]f a person has a belief about facts, he or she has invariably considered, to some extent, whether or not the facts exist’. 36

The Guide for Practitioners states that s 8.2(4) ‘has no bearing on proof of basic intent’ as the provision applies ‘only to the defence of reasonable mistake of fact in offences which impose strict liability’. 37 The mistake has to be reasonable by virtue of s 8.2(5)(b) which uses the words ‘honestly and reasonably believed’. The Guide for Practitioners comments that the prosecution can ‘rely on evidence of the defendant’s intoxication to defeat the defence ... by proving the mistake to have been unreasonable’. 38 If intoxication is being used to support a defence of reasonable mistake of fact, then, even for an offence of strict liability, the defendant’s mistaken belief should be taken into account only if a reasonable sober person would have held the same belief (or at a minimum only if the defendant would have held the same belief if the defendant had not been intoxicated).

Furthermore, s 8.2(4) needs to be considered in tandem with the ‘sister’ exception of accident in s 8.2(3) 39 which allows evidence of self-induced intoxication to be taken into consideration in determining whether conduct was accidental. The Guide for Practitioners observes a claim that conduct was accidental ‘is no more than a denial

36 Odgers, above n 17, 90 [8.2.180].
37 Leader-Elliott for the Commonwealth Attorney-General’s Department, above n 16, 153.
38 Ibid.
39 See also Criminal Code (NT) s 43AS(2).
that the conduct was intended’.  

There is therefore a distinction between a denial of intention based on mistake (not permitted) and a denial of intention based on accident (permitted), albeit a ‘fine’ distinction. The Guide for Practitioners optimistically opines that the accident exception to the rule excluding reliance on evidence of intoxication ‘is likely to be narrowly construed’. Odgers offers the alternative view in concluding that the exceptions in ss 8.2(3) and (4) ‘to a large extent remove the prohibition created by the rule’. 

Odgers reinforces the weakness of the prohibition by noting that because the prohibition is restricted to whether the defendant intended to engage in particular conduct (s 8.2(2)), ‘it follows that evidence of self-induced intoxication … may be considered in determining whether a fault element of intention existed in relation to a physical element of circumstance or a physical element of result’. In R v Collins, Weinberg J was considering the equivalent section, s 31(1) of the Criminal Code 2002 (ACT), in relation to manslaughter which His Honour stated had three physical elements: an act or omission; causing death; that is unlawful. Justice Weinberg noted that the first element constituted conduct, the second the result of conduct, and the third as a circumstance in which conduct, or a result of conduct, happens. His Honour concluded that ‘s 31(1) would appear to apply to the fault element for the acts or omissions, but not to any fault elements of the other two physical elements’.

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40 Leader-Elliott for the Commonwealth Attorney-General’s Department, above n 16, 151.  
41 Ibid.  
42 Ibid.  
43 Ibid.  
44 Ibid.  
46 Ibid [83]-[84].
9.3.3. General Rule of ‘Recklessness’ Governing the Admissibility of Intoxication Evidence

This then raises the question as to the nature of the general rule governing the admissibility of intoxication evidence. A very useful starting point is the recommendation of the Law Commission of England and Wales which argued there should be a general rule that:

1. if the defendant is charged with having committed an offence as a perpetrator;
2. the fault element of the offence is not an integral fault element (for example, because it merely requires proof of recklessness); and
3. the defendant was voluntarily intoxicated at the material time;

then, in determining whether or not the defendant is liable for the offence, the defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication.\(^{47}\)

The Law Commission adopted recklessness (both subjective recklessness and objective ‘Caldwell’\(^ {48}\) recklessness) as the touchstone for disregarding the effects of self-induced intoxication.\(^ {49}\) The Law Commission identified the following integral fault elements as exceptions to the above general rule and therefore should always have to be proved: intention as to a consequence (but not intention as to conduct); knowledge as to something (but not knowledge as to a risk which falls within the

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\(^{47}\) The Law Commission of England and Wales, above n 34, 3.35.

\(^{48}\) Following R v Caldwell [1982] AC 341, the defendant is Caldwell reckless if the defendant is subjectively reckless or if the defendant does not foresee the relevant risk but a reasonable person would have foreseen it.

\(^{49}\) See also, US Model Penal Code, Proposed Official Draft, American Law Institute (1962) s 2.08(2): ‘When recklessness establishes an element of an offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.’
scope of subjective recklessness); belief as to something (this is a belief amounting to a certainty or near-certainty); fraud; and dishonesty.\(^{50}\)

If proof of the fault element of recklessness was to become the sole criterion for the admissibility or otherwise of evidence of self-induced intoxication, then s 43AK of the *Criminal Code* (NT) would be engaged. As discussed in 5.5 above, s 43AK uses the term awareness of a substantial risk that a result will happen or that the circumstance will exist, and that having regard to the circumstances known to the person, it is unjustifiable to take the risk. Applying the above integral fault elements as exceptions to the general rule of recklessness, because knowledge as to a risk is deemed to fall within the scope of subjective recklessness, evidence of self-induced intoxication would be completely precluded for manslaughter (an offence of basic intent) under s 160 of the *Criminal Code* (NT) as recklessness or negligence are alternative faults elements.

9.4. RECONSTRUCTING INTOXICATION IN PART IIAA CRIMINAL CODE (NT)

In keeping with the four levels on which this Chapter has addressed the important question of intoxication and criminal responsibility, the relevant sections of Part IIAA of the *Criminal Code* (NT) are here rewritten to reflect each level, starting with the initial position that evidence of intoxication be inadmissible for any offence. Historically, this has been the law as held in the sixteenth century case of *Reniger v* 

\(^{50}\) The Law Commission of England and Wales, above n 34, 3.46.
Feogossa which in turn draws on the ethics of Aristotle and moral responsibility. Coke states that: ‘As for the drunkard who is voluntarius daemon, he hath no privilege thereby, but what he hurt or ill soever he doeth, his drunkenness doth aggravate it’. Furthermore, some jurisdictions specifically exclude evidence of intoxication if the person ‘had resolved before becoming intoxicated to do the relevant conduct or became intoxicated in order to strengthen his or her resolve to do the relevant conduct’. The simplest and most clear cut approach to achieve the objective of excluding evidence of intoxication completely would be to rewrite s 43AS as follows:

Section 43AS Intoxication

Evidence of self-induced intoxication cannot be considered in determining whether a fault element of specific intent or of basic intent existed. (Words in italics added and the rest of s 43AS deleted.)

The second, and equally simple option, is to adopt O’Connor. Thus, s 43AS would be rewritten in terms similar in effect to the following:

Section 43AS Intoxication

51 (1551) 1 Plowden 19, 31. ‘If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory: but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.’
54 Crimes Act 1900 (NSW) s 428C(2). See also s 28(2) Criminal Code (Qld); s 28(2) Criminal Code (WA). Such prior resolution amounts to constructive mens rea. This is the ‘Dutch courage’ situation discussed by Lord Denning in Bratty v Attorney-General for Northern Ireland [1963] AC 386 (House of Lords).
Evidence of intoxication is to be treated as part of the totality of the evidence for all offences in determining whether the prosecution has proved beyond reasonable doubt that the defendant had acted voluntarily and intentionally.

The third option is to address the admissibility of evidence of intoxication from the perspective of changing the onus of proof from an evidentiary burden to a legal burden on the defence. This would effectively restore the original s 7 of the Criminal Code (NT) discussed in 6.3 above. As originally worded, section 7 did not contain the word ‘evidentially’ and established a legal presumption (‘until the contrary is proved’) that, in any case where ‘intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence’, the accused ‘foresaw the natural and probable consequence, of his conduct and intended them’.

Currently, s 43BV of the Criminal Code (NT) deals with the legal burden of proof on the defence, and relevantly states that a legal burden on the defence is only imposed if the law expressly specifies the burden is a legal burden, or requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved. Adopting the latter presumption, a new sub-section would be inserted into s 43AS, which is labeled s 43AS(6) in the proposed complete revision of s 43AS given below

Sub-section 43AS(6)

Where evidence of self-induced intoxication is admitted under one of the specified fault elements operating as an exception to the general rule that a defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the
intoxication, the intoxicated person is presumed to have foreseen or intended the natural and probable consequences of his or her conduct unless the contrary is proved.

Consistent with the proposed new subsection 43AS(6) above and with the objective test of a reasonable sober person for the purpose of mistaken belief of fact for an offence of strict liability, a new section would be added to s 43AX Mistake of fact – strict liability,\(^{55}\) which is similar in form to s 43AU(3)\(^{56}\) which deals with the relevance of intoxication to defences such as the defence of sudden or extraordinary emergency.

Section 43AX(3)

If any part of an excuse of mistaken belief as to the existence of facts is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

The fourth option for the treatment of evidence of intoxication, which is not mutually exclusive with a legal burden of proof on the defence in the proposed new subsection for s 43AS above, is to rectify the restricted definition of basic intent in Part IIAA, and to specify the fault elements that operate as exceptions to the general rule that, where the fault element of recklessness satisfies the fault element for an offence, evidence of self-induced intoxication cannot be considered. A variation on this option could follow the standard Majewski formula as exampled by s 428B and s 428D of the Crimes Act 1900 (NSW).\(^{57}\) However, the purpose here is to follow the nomenclature

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\(^{55}\) See n 185 in 5.6 above. See also Criminal Code (Cth) s 9.2.

\(^{56}\) See also Criminal Code (Cth) s 8.4(2).

\(^{57}\) Section 428B(1) defines an offence of specific intent as ‘an offence of which an intention to cause a specific result is an element’. Section 428B(2) states: ‘Without limiting the generality of subsection (1), the offences referred to in the Table to this section are examples of offences of specific intent.’
of Part IIAA and s 43AS, and clarify the meaning of s 43AS by using recklessness as the dividing line between offences of specific and basic intent.

Presently, s 43AS *Criminal Code* (NT) reads as follows:

43AS Intoxication – offences involving basic intent

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.\(^{58}\)

*Note for subsection (1)*

A fault element of intention in relation to a result or circumstance is not a fault element of basic intent.

(2) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(4) A person may be regarded as having considered whether or not facts existed if:

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

\(^{58}\) Section 43AS follows s 8.2 *Criminal Code* (Cth) but omits s 8.2(2) which states: ‘A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.’ Instead, the language of s 8.2(2) *Criminal Code* (Cth) is to be found in Section 1 Definitions of the *Criminal Code* (NT). ‘Fault element of basic intent, for Part IIAA and Schedule 1 provisions, means a fault element of intention for a physical element that consists only of conduct.’ This is of course consistent with the note for s 43 AS(1) that a fault element of intention in relation to a result or circumstance is not a fault element of basic intent.
(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

The note for subsection (1) above and the two exceptions of accident and mistake of fact in subsections (2) and (3) respectively, have the effect of leaving the prohibition in s 43 AS(1) with very little work to do. The proposed revision of s 43AS below takes as its starting point the language of the general rule advocated by the Law Commission of England and Wales suitably adjusted for the nomenclature of Part IIAA Criminal Code (NT). The short list of specific intent offences in the proposed s 43AS(5) below is restricted to three offences because at present Part IIAA only applies to a narrow band of offences listed in Schedule 1 of the Criminal Code (NT). However, in principle, to assist clarification and avoid judicial discretion, all specific offence provisions should be listed, as in s 428B of the Crimes Act 1900 (NSW). This avoids the need for the judiciary to determine whether a particular offence is classified as being one of specific intent or not, as the list is exclusive and closed. A Benthamite code reserves the policy decision as to those offences to be listed as being offences of specific intent to the legislature. The proposed new subsection 43AS(6) above dealing with a legal onus of proof on the defence is incorporated into the completely revised s 43AS below.

43AS Intoxication – offences involving basic intent

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed, and the person is to be treated as having been aware of anything which the person would then have been aware of but for the intoxication.

(2) A fault element of basic intent is defined as not being a fault element of specific intent in subsection (3), such as a fault element that requires proof of recklessness.
(3) For the purposes of this section, a fault element of specific intent means an intention as to a result or circumstance (but not intention as to conduct)\textsuperscript{59} or knowledge as to something (but not knowledge as to a risk which falls within the scope of recklessness as defined in s 43AK of this Code).\textsuperscript{60}

(4) However, evidence of self-induced intoxication cannot be considered in determining whether a fault element of intention or knowledge existed if the person had resolved before becoming intoxicated to do the relevant conduct, or became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

(5) The only offences in Schedule 1 to which subsection (3) applies are:

(a) Section 156 Murder

(b) Section 162 Assisting and encouraging suicide

(c) Section 176A Drink or food spiking.

(6) Where evidence of self-induced intoxication is admitted under one of the specified fault elements operating as an exception to the general rule that a defendant should be treated as having been aware of anything which the defendant would then have been aware of but for the intoxication, the intoxicated person is presumed to have foreseen or intended the natural and probable consequences of his or her conduct unless the contrary is proved.

\textit{Note for subsection (6)}

\textsuperscript{59}This follows the language of s AI Intention where a person has intention in relation to conduct if the person means to engage in that conduct; a person has intention in relation to a result if the person means to bring it about or is aware it will happen in the ordinary course of events; and a person has intention in relation to a circumstance if the person believes that it exists or will exist. Thus, using the example of shoplifting, an offence requiring proof of ulterior intention, ‘the shoplifter cannot rely on evidence of intoxication to support a denial of intention to appropriate the publication [but] that evidence \textit{can} be considered, however, when the court comes to consider whether the publication was appropriated with intent to deprive permanently’. See Leader-Elliott for the Commonwealth Attorney-General’s Department, above n 16, 149-151 (original emphasis).

\textsuperscript{60}Section AJ Knowledge states: ‘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 presumption of foresight or intention of the natural and probable consequences of conduct applies only where evidence of intoxication is admitted and does not apply to any other defences.

It is possible to illustrate the operation of the proposed s 43AS above by looking at two offences that are in Schedule 1 of the Criminal Code (NT) but are not listed as offences of specific intent in the proposed s 43AS(5) above. The first is s 192 Sexual intercourse without consent, and the second is s 240A Causing bushfires. Both of these offences specify the fault element of recklessness. Therefore, given the proposed s 43AS(3) above precludes evidence of intoxication being considered for a physical element where proof of recklessness is sufficient to satisfy the fault element, evidence of self-induced intoxication is inadmissible for both of these serious offences.

Two of the major themes of the thesis are the need for clarity and consistency in a criminal code. A comparison with the present and proposed s 43AS reveals the latter contains far greater clarity. The public policy decision as to whether the intoxication provisions in s 43AS should be closer to O’Connor, as at present, or Majewski, as proposed, are properly matters for the legislature. The revised s 43AS both clarifies the distinction between specific and basic intent in ss 43AS(2) and (3), as well as spelling out in s 43AS(5) exactly which offence are covered by the specific intent provisions. Furthermore, the ‘Dutch courage’ situation is provided for in s 43AS(4).

The need for a consistency with an underlying fault element of objective recklessness is reflected in three ways in the proposed s 43AS. First, following the nomenclature of Chapter II and Part IIAA, recklessness (here, s 43AK) is used as the dividing line between specific and basic intent. Secondly, the objectivity of the awareness of the reasonable person is incorporated into s 43AS(1) for offences of basic intent. Thirdly,
for the specific intent provisions, there is a rebuttable presumption that the intoxicated person foresaw or intended the natural and probable consequences of his or her conduct.

9.5. FUTURE REFORM OF S 43AS CRIMINAL CODE (NT)

As discussed in 6.6 above, the deficiencies in the treatment of evidence of intoxication in s 43AS appears to have been recognised, with the current Attorney-General asking the Northern Territory Law Reform Committee (NTLRC) ‘to investigate, examine and report on law reform in relation to the effect intoxication has on criminal liability’.

The terms of reference are set out below because they illustrate two points relevant to the thesis. First, the terms of reference are comprehensive and require the NTLRC to consider all the policy options available to the legislature in the treatment of evidence of intoxication. Secondly, the legislature is seeking a draft bill from the NTLRC which, given the comprehensive terms of reference and the extent of the intoxication problem in the Northern Territory, is indicative of an intention by the legislature to ‘cover the field’ thereby minimising the scope for judicial interpretation. Such an approach is entirely in keeping with a Benthamite code design.

Matters for the Committee to Consider

Is there a public policy benefit in holding persons criminally responsible for their actions whilst intoxicated, irrespective of whether they acted voluntarily or intentionally? If so, what is the best way to achieve this policy initiative?

61 Letter from the Hon. John Elferink, Attorney-General for the Northern Territory to the Hon Austin Asche, President of the Northern Territory Law Reform Committee, 13 December 2012, page 1.
2 Should this apply only to certain offences, say, to driving offences and not to offences of violence?

3 Will removing the admissibility of evidence of self-induced intoxication in relation to the commission of an offence achieve the purported public policy benefit, by limiting the use a tribunal of fact may make of such evidence?

4 Should there be a distinction between offences of basic intent and specific intent for the purposes of the use of evidence of self-induced intoxication?

5 If admissibility of evidence of self-induced intoxication is to be limited, for which fault elements should this rule apply?

6 Should the onus of proof of fault elements be reversed when self-induced intoxication is sought to be admitted so as to deny criminal responsibility?

7 Should a specific offence of committing a dangerous or criminal act, similar to the provisions previously found in the now repealed section 154 of the Criminal Code be reintroduced into the Northern Territory?

8 To what extent should evidence of self-induced intoxication be disregarded in relation to sexual offences?

9 To what extent should evidence of self-induced intoxication be disregarded for the purposes of determining the partial defences of provocation and/or diminished responsibility?

10 Are there other offences where evidence of self-induced intoxication should be inadmissible or disregarded by virtue of the charge?

For the purpose of this report, intoxication is taken to mean the temporary action of a chemical substance (whether illicit or lawful) upon the physiological and mental sobriety of a person, resulting in a toxic, abnormal condition.

In formulating this report the Committee ought to consider the applicability of *R v O’Connor* (1980) 146 CLR 64 and *DPP v Majewski* [1977] AC 443. I request the Committee present me with a draft bill prepared with the assistance of Parliamentary Counsel by 30 June 2013.\(^\text{62}\)

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\(^{62}\) Ibid, pages 1 and 2. The NTLRC’s reporting date is now 31 December 2013.
A reading of the matters the Attorney-General has raised for the NTLRC’s consideration reveals all the key questions are covered. Should evidence of intoxication be treated as irrelevant under all circumstances or just for some offences, and if the latter which offences and on what basis? The NTLRC has the option of recommending *O’Connor*, or *Majewki*, or tightening *Majewski* through a reversal of the onus of proof and/or specifying a range of offences beyond those of basic intent and/or selecting the fault element of recklessness as the dividing line between offences of specific and basic intent.

The measuring rod is public policy benefit, which is both a subjective and philosophical concept. Advocates of the supremacy of the presumption of innocence will favour *O’Connor*, whilst those of a more utilitarian frame of mind will prefer *Majewski*. Ultimately, the final decision rests with the legislature. The point is that whichever option is selected the wording of the section should be comprehensive and clear to the lay reader.

9.6. CONCLUSION

This review of the law relating to the admissibility of evidence of self-induced intoxication in the *Criminal Code* (Cth) and the *Criminal Code* (NT) has found it wanting in clarity. The attack on these two Codes has been made from the perspective that these two Codes have the most confusing and least effective version of the *Majewski* principle of all Australian jurisdictions such that the relevant basic intent provisions make the prohibition virtually meaningless.
Consistent with such a perspective, legislative options have been proposed.\footnote{For a fuller discussion, see A. Hemming, ‘Banishing Evidence of Intoxication in Determining Whether a Defendant Acted Voluntarily and Intentionally’ (2010) 29(1) University of Tasmania Law Review 1.} The first or ‘absolutist’ option is the inverse of *O’Connor* by reverting to the pre 1920 common law position, such that evidence of intoxication is never relevant to criminal liability. This approach avoids the difficulties associated with the division of offences into specific and basic intent by arguing that the *Majewski* measuring rod of recklessness should be extended to intention. The second option, equally straightforward in avoiding the specific/basic intent division, but at the other end of the spectrum, is *O’Connor*, such that evidence of intoxication is part of the totality of the evidence.

The clash between principles of criminal liability and public policy has been neatly summed up by one commentator who has observed that ‘the issue presents a choice of whether the magnitude of an offence should be measured from the objective perspective of the community or the subjective perspective of the offender’.\footnote{M. Keiter, ‘Just say no excuse: the rise and fall of the Intoxication Defense’ (1997) 87 Journal of Criminal Law and Criminology 482, 482.} Such an objective and utilitarian perspective finds support in the United States Supreme Court decision in *Montana v Egelhoff*.\footnote{(1996) 116 S. Ct. 2013.} In *Egelhoff*, the Court considered a due process challenge to S 45-2-203\footnote{S 45-2-203 stated: ‘A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defence to any offence and may not be taken into consideration in determining the existence of a mental state which is an element of the offence unless the defendant proves that he did not know it was an intoxicating substance.’} of the Montana Code which forbade consideration of intoxication evidence in homicide offences. The Court held 5-4 that this evidentiary exclusion was not a due process violation because deference had to be accorded to the States to establish their own criminal justice regimes,\footnote{10 States including Montana adhere to the common law rule.} and because the historical
common law tradition of excluding intoxication evidence supported such an exclusion in the Code.\textsuperscript{68}

As an alternative to the ‘absolutist’ position, the option of a reversal in the onus of proof where evidence of intoxication is led has been canvassed. Such a legal burden does not place an insuperable burden on the defendant, being on the balance of probabilities. Support for this proposition can be found in Canada where the ‘Canadian Supreme Court has often found that a persuasive burden of proof can be held constitutional as a demonstrably justified reasonable limit under section 1,'\textsuperscript{69} as the Court has decided for defenses of mental disorder, extreme intoxication and, very recently,\textsuperscript{70} sane automatism.\textsuperscript{71}

Finally, and not mutually exclusive with a legal onus, revised provisions dealing with intoxication have been outlined for s 43AS Criminal Code (NT). The overriding objective of these redrafted provisions is to strengthen the reach of s 43AS, and to make these provisions the clearest and most effective version of the Majewski principle in Australia.

Each of these four options meets the criterion for a criminal code of clear communication of the rules of conduct to the general public, a central theme of the thesis. Irrespective of the option actually selected, which largely turns on a subjective

\textsuperscript{68} Montana v Egelhoff (1996) 116 S. Ct. 2013, 2023-2024 (plurality opinion).
\textsuperscript{69} Section 1 reads: ‘The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982 (Canada), being Schedule B to the Canada Act 1982 (UK) c.11, s 1.
\textsuperscript{70} See The Queen v Stone [1999] 2 SCR 290.
and philosophical viewpoint as to the nature of ‘good public policy’ in the treatment of evidence of voluntary intoxication, the legislature will satisfy the requirement under a Benthamite code of making its choice crystal clear.

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CHAPTER 10

CONCLUSION

10.1. THE CENTRAL THESIS QUESTION

This thesis has examined whether Jeremy Bentham’s concept of a criminal code having ‘no blank spaces’,\(^1\) thereby minimising the role of the common law and judicial interpretation, is both desirable and achievable. Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient with the practice that ‘inevitable ambiguities of language make this impossible’.\(^2\) A central theme of this thesis is to test whether the latter statement can be overcome. An alternative way of considering the central question is to determine whether Bentham’s vision of the legislature clearly stating its intentions sufficient for the ordinary citizen to fully comprehend his or her criminal liability is beyond the capacity of any criminal code architect in the 21st century.

The measuring rod that has been utilised to test the central thesis question are two criteria developed by Robinson, Cahill and Mohammad to evaluate a code’s effectiveness in stating the rules of conduct (defined as conduct that is prohibited or required by the criminal law): ‘First, the code must be comprehensive in describing the rules of conduct. Second, it must communicate those rules effectively to the general public.’\(^3\) Under the criterion of comprehensiveness, Robinson, Cahill and Mohammad argue that ‘a truly comprehensive criminal code must sufficiently define

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all relevant terms that reference to outside sources is unnecessary’.\textsuperscript{4} Under the criterion of effective communication, Robinson, Cahill and Mohammad suggest that clarity is required at two levels: ‘(1) within each rule, and (2) in the organisation of the rules into a code.’\textsuperscript{5}

10.2. CONCLUSIONS ON THE AUSTRALIAN CRIMINAL CODE LANDSCAPE

In Australia there is little to distinguish the Griffith Codes from the various State Crimes Acts.\textsuperscript{6} The Griffith Codes are not in practice codes as generally understood by the meaning of the word ‘code’, because they fail the fundamental test for a code of comprehensively stating the criminal law in one statute. Legislative inertia has been the reality of the Griffith Codes in Australia. The fact that the original Griffith Code, the \textit{Criminal Code} (Qld), strongly reflects the common law has led to two outcomes. In the first place, the organic development of the common law has been infused into code interpretation, thereby reducing the great divide that Blackstone and Savigny envisioned if codification replaced the common law. In the second place, fundamental inadequacies in the Griffith Codes, arising both from developments in the common law and code design defects, have not been remedied.

To qualify as a \textit{bona fide} code, a code should achieve a high score against the two criteria of comprehensiveness and clear communication to the general public set out above in 10.1. Given the communication criterion, the audience of a criminal code is the general public or lay reader. Given the comprehensiveness criterion, a criminal

\textsuperscript{4} Ibid 9.
\textsuperscript{5} Ibid.
\textsuperscript{6} E. Colvin and J. McKechnie, \textit{Criminal Law in Queensland and Western Australia} (LexisNexis, 6\textsuperscript{th} ed, 2012) 6 [1.12].
code should be exclusive. The two criteria developed by Robinson, Cahill and Mohammad are firmly rooted in a Benthamite code design.

There is an inherent ambiguity in language, and legal drafting attempts to be more precise by providing more detail open up the possibility of further complications. Greater detail may lead to even more discretion in judicial interpretation than the interpretation of sparse criminal code sections with ‘gaps’. However, the developments in criminal law theory in the 20th century have meant that the legislature can avoid such ambiguity by specifying the exact relationship between physical and fault elements in a formulaic manner.

The lens of the legal history of codification is used to examine the viewpoint that the more detailed a code, the more vulnerable it is to statutory gridlock. In rebuttal, the outstanding Benthamite code of the 19th century was Macaulay’s Indian Penal Code because it successfully incorporated illustrations, and the treatment of mens rea questions anticipated modern element analysis. The arrival in the 20th century of the US Model Penal Code paved the way for Australia’s Model Criminal Code now operational as the Criminal Code (Cth). Thus, not only does the Criminal Code (Cth) represent the only Australian Code that approaches the true definition of a code, but also that this most recent of Australian Codes can be usefully developed further on Benthamite lines. The result will not be incoherence or inconsistency, but legislative dominance through amplitude of the views of the legislator.

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8 Hart (ed), Jeremy Bentham, Of Laws in General, above n 1, 239.
The essential conclusion is that from Bentham’s familiarity with the characterisation problem, through Macaulay’s treatment of mens rea questions, to modern element analysis in the US Model Penal Code, criminal law theory is now well placed to deliver Bentham’s vision of a comprehensive criminal code. The Criminal Code (Cth) provides the framework for this vision to come to fruition in Australia.

Chapter 2 of the Criminal Code (Cth) contains both a General Part and an underlying fault element. The selection of an underlying fault element in the General Part is important both from a consistency perspective and to reflect the penal philosophy of the code. The decision to vary the underlying fault element for a specified offence, whether it be to require intention or knowledge on the one hand, or, to dispense with a fault element and make an offence one of strict liability on the other hand, is clearly one that should be made by the legislature in a criminal code context.

The underlying sub silentio fault element in the Griffith Codes is negligence (objective test), whereas the underlying fault element for the result of conduct is recklessness in the Model Criminal Code. The definition of recklessness in the Model Criminal Code is a combination of subjective (awareness of risk) and objective (unjustifiable to take the risk) recklessness. The clearest choice for the legislature for the underlying fault element of a criminal code is between a subjective or objective test of criminal responsibility.

The legislature has the option of adopting an explicit objective underlying fault element consistent with a utilitarian philosophy. An objective test for recklessness as the underlying fault element of criminal responsibility has been proposed, based on
the natural and probable consequences test adopted in *DPP v Smith*\(^9\) in the guise of *Caldwell*\(^10\) recklessness.

A criminal code should reflect a consistent penal philosophy. One option is to adopt a public policy position of giving greater weight to the objective requirements of the community than to the subjective perspective of the individual. Bentham, who claimed ‘the business of government is to promote the happiness of the society, by punishing and rewarding’;\(^11\) adopted the principle of utility. Modern legislators have the option of utilising utility or public policy as the guiding hand of legislation.

The *Criminal Code* (NT) has provided a unique opportunity to examine a Griffith Code transitioning into the *Model Criminal Code*. The decision to switch Codes can only be explained in a political context. Irrespective of the outcome of the 2013 review of the desirability of continuing with the *Model Criminal Code* in the Northern Territory, the staged process of adding offences to Schedule 1 from 2006 to 2013 has provided the opportunity to compare the original sections of the *Criminal Code* (NT) with the newer sections, based on the physical and fault elements set down in Part IIABA. The twin criteria to evaluate a code’s effectiveness of (1) a comprehensive description of the rules of conduct and (2) effective communication of those rules to the general public has favoured the newer sections. However, such an assessment is not a universal endorsement of the newer offences in Schedule 1.

It is an interesting question to speculate on the possible criminal code landscape in Australia if Griffith had not succeeded in piloting his Code through the political

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processes of Queensland. There would have been no code for Western Australia or Tasmania to follow, and Australia today could be in much the same position as the United Kingdom in relying on statute and the common law, with each State having its own Crimes Act like New South Wales, Victoria and South Australia.

The vagaries and vicissitudes of political life and cultural perceptions have been instrumental in determining the success or failure of codes in the common law world. But for the fall of the Disraeli government in 1880, England would have had Stephen’s Criminal Code. But for the Indian Mutiny or the North-West Rebellion, India and Canada would have been far less likely to have adopted their Codes. But for Griffith’s unique position in Queensland’s political and legal circles, Australia would not have the Griffith Codes.

Australia lacked someone of John A. Macdonald’s vision in the 19th century, but the belated impetus towards the unification of Australian criminal law, which began with the work of the MCCOC from 1990, has yielded one code of substance: the Criminal Code (Cth). Despite the fact that thus far only the Australian Capital Territory and the Northern Territory have adopted the Model Criminal Code, the future of code development in Australia lies with the Benthamite Part 2.2 of Chapter 2 of the Criminal Code (Cth).
10.3. AN AFFIRMATIVE ANSWER TO THE CENTRAL THESIS QUESTION

In answering the central thesis question in the affirmative, it is contended that Criminal Codes in Australia based on the Griffith model are misnamed because they fail the twin criteria developed by Robinson, Cahill and Mohammad above. Despite this shortcoming, it has been further argued that Part 2.2 of Chapter 2 of the Criminal Code (Cth), based as it is on the Model Criminal Code, achieves far greater success against these two criteria. Part 2.2 can be characterised as Benthamite in structure and points the way forward in criminal code design. Part 2.2 is testimony to the proposition that a criminal code which follows a Benthamite model, as opposed to the Griffith Codes, should, in answering one of the questions posed by Dubber and Ferguson, be structured into a General Part and a Special Part.

The reason why Part 2.2 above is to be preferred is twofold. First, the Griffith Codes suffer the fatal flaw, recognised by Dixon CJ in Vallance v The Queen, that the central criminal responsibility section often has little or nothing to say as to the elements of offences. This proved particularly problematic because the central provision, s 13 Criminal Code (Tas), came ab extra restraining the operation of what followed, even though common sense dictated resolution outside of s 13 itself. Ironically, the Griffith Codes would be less problematic if they contained no General Part, like Stephen’s Criminal Code Bill of 1880, and instead totally relied on the common law.

Secondly, Part 2.2 of Chapter 2 of the *Criminal Code* (Cth), by fully addressing the criterion for a central criminal responsibility section set down by Dixon CJ in *Vallance v The Queen*\(^\text{15}\) of comprehensively setting out the elements of offences, demonstrates the strength of a criminal code being structured into a General Part and a Special Part. A comprehensive General Part is a precondition for the legislature clearly exercising the choices available in selecting the fault elements for a specified offence. The requirement for the legislature to select the fault elements (or alternatively to determine an offence should be one of strict liability) is buttressed by the existence of default fault elements. The decisions made by the legislature flow on to the lay reader of the criminal code.

Two examples support this proposition. The flexibility and legislative control following the adoption of Chapter 2 of the *Criminal Code* (Cth), as Part IIAA, can be demonstrated by the newly inserted s 161A *Violent act causing death* in the *Criminal Code* (NT).\(^\text{16}\) This new section has a fault element of intention as regards engaging in conduct involving a violent act (ie, for example, the defendant intended to throw the punch), but for the result of that conduct (the defendant causes the death) strict liability applies. Under s 161A(2), the lay reader can clearly see that there is no fault element for the result of the conduct. Section 161A is put forward as a model of Benthamite style drafting as opposed to the clumsy and obscure s 281 *Unlawful assault causing death* in the *Criminal Code* (WA). Effectively, s 281 creates a strict liability offence, but nothing in the language of the section directly indicates the lack of a fault element to the lay reader.

\(^{15}\) (1961) 108 CLR 56.

\(^{16}\) *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT).
A second example of the ‘new style’ is s 244 Bushfires, which is designated as a Schedule 1 offence under the *Criminal Code* (NT). Section 244 demonstrates how the physical and fault elements in Chapter 2 (or ‘set of interconnecting verbal formulae’) translate into an offence ‘intended to be capable of only one meaning’. Such singularity in meaning is at the heart of a Benthamite Code. The physical and fault elements are clearly stated in subsection (1) where the underlying fault element of recklessness applies. For the purposes of subsection (1)(a), causing a fire is defined in subsection (3). Subsection (2) identifies the circumstances under which subsection (1) does not apply, giving both links to nominated legislation as well as specific examples of the application of such exemptions from criminal responsibility. As such, s 244 not only exemplifies the operation of the working of the *Model Criminal Code* in the form of Chapter 2, but also is in keeping with a comprehensive Benthamite code design incorporating given examples.

The offences of s 241 Damage to property, s 242 Sabotage, and s 243 Arson in the *Criminal Code* (NT), share similar drafting styles to s 244 Bushfires above. Thus, for example, the fault elements for Damage to property are intention or recklessness, as opposed the ‘wilfully and unlawfully’ formula favoured by the Griffith Codes for the equivalent trio of offences.\(^\text{17}\)

The term ‘wilful’ is not defined in the Griffith Codes. However, recklessness has been imported into the meaning of ‘wilful’ for property offences such as arson. In *R v Hayes*,\(^\text{18}\) previous authority in *R v Lockwood: Ex parte A-G (Qld)*\(^\text{19}\) was upheld such

\(^{17}\) See, for example, s 469 Wilful damage, s 469A Sabotage and threatening sabotage, and s 461 Arson of the *Criminal Code* (Qld).


that the accused must either have the actual intention ‘or deliberately have done a willed act, aware at the time of doing the act that the result charged in the indictment [here arson] was a likely consequence of the act and that the accused person did the act regardless of the risk’.  

The point being that the legislature’s failure to define ‘wilful’ has necessitated judicial importation of recklessness, despite the Criminal Code (Qld) not using the fault element of recklessness. The notion that recklessness and wilfulness are analogous is arguable, with a leading academic text suggesting that ‘wilfully’ means inadvertent recklessness: ‘The defendant who without intending the actus reus, takes a reasonable risk of bringing that actus about should not be regarded as having brought it about wilfully’. In any event, given that ‘wilfully and unlawfully’ is a widely used formula in the Griffith Codes, ‘wilfully’ requires statutory definition to clarify the requisite fault element.

The comprehensiveness of the content of Part 2.2 of Chapter 2 of the Criminal Code (Cth) clarifies the nature of the elements of criminal responsibility. The formulaic nature of Part 2.2 of Chapter 2, as applied to offences, has the advantage of being self contained given the definitions of the elements within the Criminal Code. There is no necessity to turn to decided cases, the common law, or explanatory texts. The contrary view, that comprehensive detailed codes are not intelligible to the lay reader, can be met by the argument that the reader can remain within the four corners of the code.

Once the reader has understood the formulaic application of the physical elements

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matched up with the fault elements through a few worked examples or illustrations to use Bentham’s language, replication to any offence is straightforward. Such comprehensiveness is the foundation of a Benthamite criminal code.

Nevertheless, a comprehensive General Part is a necessary but not sufficient condition for a Benthamite criminal code. The code needs to go further and specify the tests that are to be applied. This is merely an extension of the legislature’s selection of the fault elements to the application or working out of the implications, particularly where defences or excuses are involved. Without such an extension, the legislature delegates the task to the judiciary, which defeats the purpose of a code.

Whilst Part 2.2 of Chapter 2 of the *Criminal Code* (Cth) is a comprehensive statement of the elements of an offence, two conclusions can be drawn from recent cases interpreting Chapter 2 such as *R v Saengsai-Or*22 and *The Queen v Wei Tang*.23 The first is that, as would be expected, in the early stages of the Federal Code’s history, judges face challenges in the interpretation of Chapter 2 of the *Criminal Code* (Cth) as it applies to a specific offence (here, respectively, drug importation and possession of a slave). Secondly, Dixon CJ’s dicta in *Vallance* that specific solutions to Code provisions have to be worked out judicially, whilst still valid, carry less weight for the *Criminal Code* (Cth) as Chapter 2, the General Part, informs the Special Part. Leader-Elliott considers that Chapter 2 had ‘emerged unscathed, indeed reinforced, as a consequence of judicial scrutiny by the High Court in *The Queen v Tang* … remarkable for the strict literalism of its interpretation of Part 2.2’ 24

24 Leader-Elliott, above n 98, 205.
However, the weight behind the above two conclusions is tempered when the focus turns to Part 2.3 *Circumstances in which there is no criminal responsibility* where the imprint of the common law is still discernible behind the Code sections like a palimpsest, to paraphrase Windeyer J in another evocative image from *Vallance v The Queen*. Perhaps, in truth, Bentham’s absolute test of ‘no blank spaces’ in a criminal code is unattainable. The English language is too vague to permit the complete fulfillment of Bentham’s test of ‘no blank spaces’, such as where the word ‘reasonable’ is used, which of necessity has to be open to judicial interpretation. Nevertheless, Ashworth is of the view that it is appropriate to seek maximum legislative clarification, giving as examples the inadequacy of the criminal law relating to omissions and attempts. Thus, the second fundamental theme of this thesis has sought to provide a suggested template as to how defences in Part 2.3 could be more explicitly expressed. In so doing, it is contended that it is possible to move far closer to Bentham’s absolute standard for a code than drafters of codes have hitherto achieved.

Lawyers are familiar with the judicial technique of collecting the relevant legal principles of a case, as Wood CJ at CL did in *R v Fuge*, which was discussed in the context of a template for the defence of Honest Claim of Right. Effectively, the design

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27 A. Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74(1) *Modern Law Review* 1. Ashworth emphasises the importance of individuals not being taken by surprise or ambushed by the criminal law.
of the template seeks to explicitly replicate in statutory form this well known judicial approach to deciding a particular case. The main difference is that the statutory selection of the legal principles and tests is explicit and not discretionary or open to individual judicial interpretation. Such statutory selection comes with a parliamentary stamp of approval and legislative scrutiny. The template seeks to avoid a judge having to cover alternative possible interpretations of a section through the commonly adopted mechanism of stating ‘if I am wrong in this’. The template is designed to reinforce the judge’s mission of to ‘impose order over doctrine’. ²⁹

The existing s 9.5 Claim of Right of the Criminal Code (Cth), which is little more than a truncated statement of the common law, is contrasted with a proposed s 9.5 Claim of Right which explicitly draws out the common law tests hidden from the lay reader. The contention is made that a criminal code, as opposed to a criminal statute, mandates the legislature specify what relevant definitions, tests, and exceptions are being adopted as the law. Objectively, for a criminal code, a passable drafting effort to state fully the law selected by the legislature, is preferable to leaving the law in the ether of the common law divorced from the code and invisible to the lay reader.

An example of the need for the legislature to specify an important definition can be found in the doctrine of common purpose and the meaning of ‘probable consequence’ in s 8 of the Criminal Code (Qld). What emerged from the High Court decisions in Darkan v R ³⁰ and The Queen v Keenan ³¹ dealing with the meaning of the words ‘probable consequence’ in s 8, was that the Queensland legislature has effectively

delegated the task to the judiciary, declining numerous opportunities to settle the matter itself.

A further similar example of legislative inertia can be found in the failure to define the critical word ‘substantial’, as in ‘substantial impairment’, by the four Australian legislatures who allow the partial defence to murder of diminished responsibility.\(^{32}\) This is not how a true criminal code should operate. In *R v Lloyd*,\(^{33}\) substantial was held to be less than total but more than trivial or minimal impairment. In Australia, this scale found favour with Hart J in *R v Biess*.\(^{34}\) This is unsatisfactory. If a person says a building or a task is substantially complete then common parlance interprets this as being a considerable amount, well over 50 per cent and nearly finished.\(^{35}\) It is unfortunate that in the absence of a clearer common law definition emerging, legislators have not sought to be more definitive with such a controversial defence on behalf of the community.

One possibility would be to require ‘substantial impairment’ to be adjacent to the totality requirement for the defence of mental impairment, given there must be something significant or salient about the defendant’s mental state to warrant murder being reduced to manslaughter. However, it does illustrate the vagueness of the defence when such a key phrase as ‘substantial impairment’ can be no better defined than lying somewhere between trivial (say 5%) and total (100%) impairment. As discussed in Chapter 1, Fisse has made the significant point that codification tends ‘to

\(^{32}\) See *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (Qld) s 304A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (NT) s 159.

\(^{33}\) [1967] 1 QB 175, 176.

\(^{34}\) [1967] Qd R 470, 475.

\(^{35}\) The Australian Concise Oxford Dictionary (Oxford University Press, 1st ed, 1987) 1063, lists under ‘substantial’: ‘of real importance or value, of considerable amount, opposite of nominal’.
fix the content of the law as at one point in time" and without regular amendments ‘obliges the judiciary either to do increasing violence to its literal terms or else abandon progress’.  

An example of the judiciary doing ‘increasing violence’ to the original terms of a section can be found in Pollock v The Queen, where the High Court stated that: ‘In interpreting the language of s 304 [of the Criminal Code (Qld)] it is permissible to have regard to decisions expounding the concept of “sudden provocation” subsequent to the Code’s enactment.’ Despite s 304 reflecting the common law in the 1833 case of R v Hayward, which the High Court itself acknowledged, the High Court has read into s 304 the current common law test for provocation in Australia as set out in Stingel v The Queen and Masciantonio v The Queen. Whilst it might be objected that the relevant common law should not be frozen in time as it existed when the Criminal Code (Qld) was enacted, to import later developments in the relevant common law in the face of the clear language of the particular code section breaches the golden rule of code interpretation of not looking outside of the code to the common law unless the meaning is either unclear or has a prior technical meaning, and amounts to judicial legislation.

36 Fisse, above n 2, 5.
37 Ibid.
38 [2010] HCA 35.
40 (1833) 6 Car & P 157, 159 (Tindal CJ).
42 (1990) 171 CLR 312.
44 Bank of England v Vagliano Brothers [1891] AC 107, 145 (Lord Herschell). Colvin and McKechnie state that the interpretation of the word ‘provocation’ by the Queensland Court of Appeal in R v Johnson [1964] Qd R 1 is an example of ‘technical’ interpretation. See E. Colvin and J. McKechnie, Criminal Law in Queensland and Western Australia (LexisNexis Butterworths, 6th ed, 2012) 9 [1.20]. ‘The common law meaning (which incorporates a version of the “ordinary person” test) was preferred
An examination of the High Court’s justification for its decision to import the current common law into s 304 underlines the nature of the ‘increasing violence’ of Code interpretation. The High Court appended a footnote (15) in Pollock v The Queen which is reproduced below as an example of a strained interpretation, with the High Court relying on the marginal notes made by Sir Samuel Griffith to his draft code.45

Section 304 of the Code was taken directly from cl 312 of Sir Samuel Griffith's draft code. See Griffith, Draft of a Code of Criminal Law, (1897) at 123. The marginal note to cl 312 refers to ss 58 and 172 of the Criminal Code Bill (Bill 2)46 in House of Commons Parliamentary Papers, (1880), Vol 2 at 1. Section 172 of the Bill provided:

"Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool ..."

Section 172 of the Bill was based on cl 176 of the draft code appended to: United Kingdom, Report of the Royal Commission Appointed to Consider the Law relating to Indictable on the basis that provocation had become a term of art at common law by the time that the Code was enacted’: ibid (396 [15.13]).

46 There are numerous references to ‘Bill of 1880’ in Sir Samuel Griffith’s Draft Criminal Code 1897. The marginal note for s 276 Defence of Provocation, which covers an assault caused by provocation, states ‘Compare Bill of 1880, s 58’. Importantly, s 276 makes specific reference to the ‘ordinary person’. There is no such reference to the ordinary person in s 312 Killing on Provocation, and the marginal note simply reads ‘lb., ss 58, 172’. Significantly, s 312 specifically uses the words ‘but for the provisions of this section’ which prevents the importation of the ‘ordinary person’ test in s 276 into s 312, which in any event is understandable in the context of an assault in 276, compared to s 312 where failure of the partial defence of provocation means death. To reinforce the point, the marginal note to s 298, which deals with Killing of a Human Being Unlawful, reads ‘Common Law’. If Sir Samuel Griffith had intended the developing common law to be imported into s 312 in the form of the ‘reasonable man’ test in R v Welsh (1869) 11 Cox CC 336, 338, it is contended he would have used the marginal note ‘Common Law’. All the indicia support the view that s 312 stood alone in its subjective terms and the ordinary person test only referred to s 276. For a fuller discussion, see A. Hemming, ‘Impermissibly Importing the Common Law into Criminal Codes: Pollock v The Queen’ (2011) 18 James Cook University Law Review 113.
Offences, (1879) [C 2345] ("Report of the Royal Commission") at 100-101. The Commissioners regarded s 176 as reflecting the common law save for the inclusion of insults as capable of amounting to provocation: Report of the Royal Commission at 22, 24-25. Sir Samuel Griffith considered cl 312 of his draft to embody the common law: Griffith, Draft of a Code of Criminal Law, (1897) at xii.

There are three significant observations to be made. First, the Criminal Code Bill 1880 did not pass into law. Secondly, Griffith chose not to adopt the language of s 172 of the Bill in s 304, and in particular ignored the reference to the objective test of ‘to deprive an ordinary person of the power of self-control’. Thirdly, Griffith referred to authority on the law of provocation in the following terms: ‘The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority.’47 The authority referred to here by Griffith is R v Hayward.48

The postscript on s 304 underscores legislative inertia. Pollock v The Queen was decided in 2010. When the Queensland Parliament amended s 304 in 2011,49 the original wording of s 304 was left undisturbed as s 304(1). The legislature thereby missed a golden opportunity to unequivocally insert the current subjective and objective common law tests for provocation into s 304, as other legislatures have done,50 relying instead on High Court authority which in turn is based on a strained historical interpretation of the provision.

Clearly, the two fundamental themes of this thesis are interwoven. The first theme deals with the structural design of a code and the second with the content of a code. It

47 Sir Samuel Griffith, Letter to the Queensland Attorney-General, 29 October 1897, xi.
48 (1833) 6 Car & P 157, 159 (Tindal CJ).
49 Criminal Code and Other Legislation Amendment Act 2011 (Qld).
50 See for example s 158(2) of the Criminal Code (NT).
follows from a proposition which postulates the design of codes is too sparse, that an alternative model is required to be produced for critical appraisal. The templates put forward in each of the Chapters, which use the *Criminal Code* (NT) as the vehicle for analysis, demonstrate the alternative model in a broad cross section of offences and defences.

The actual selection of the content of the templates reflects a consistent pattern underpinned by first, a moral philosophy of requiring individuals to take full responsibility for their actions, and, secondly, a utilitarian public policy view that community safety is more important than the rights of individuals. However, it should be stressed that the actual content is secondary to the conscious exercise of choice by the legislature. Thus, on the question of the treatment of intoxication in relation to criminal responsibility, a utilitarian public policy approach would adopt *Majewski* as a minimum. If, on the other hand, the legislature preferred *O’Connor*, then that is its prerogative. What is fundamental for a criminal code is the need for the legislature to legally address its citizens in a comprehensive and clear ‘voice’. In this sense, any criminal code worthy of the name must possess strong Benthamite code characteristics.

In Chapter 6, the political dimension to the decision to switch Codes in the Northern Territory in 2006 was discussed in the context of the election of a Country Liberal Government in 2012. The Attorney-General of the Northern Territory convened a

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51 Aristotle examined the issue of voluntariness in the context of actions motivated by emotion: ‘It is probably wrong to say that acts due to temper or desire are involuntary; for on this view in the first place the capacity for voluntary action will not extend to any animal other than man, or even to children and secondly, when we act from desire or temper are none of our actions voluntary?’ Aristotle, *The Ethics of Aristotle: the Nicomachean Ethics* (1976) 115.


53 (1980) 146 CLR 64.
Forum on 21 May 2013 which raised the possibility that the Criminal Code (Cth) might be abandoned.\textsuperscript{54} Notes taken at the Forum\textsuperscript{55} suggest that the continued conversion\textsuperscript{56} of offences to the Model Criminal Code format as embodied in Part IIAA ‘was strongly supported by a clear majority of the Forum participants who expressed a view’.\textsuperscript{57} Of significance is the comment that there are two main reasons for the failure of other jurisdictions to adopt the Model Criminal Code: ‘the loss of a century of Griffith Code jurisprudence, and the Model Criminal Code’s unduly formulaic rigidity’.\textsuperscript{58}

The ‘sunk costs’ in the Griffith Codes are acknowledged and represent a powerful restraint on meaningful reform of these Codes. However, even within the Griffith Code architecture, far greater legislative control is possible through the combination of the specification of key definitions, applicable tests and requisite fault elements. Whilst such insertions fall well short of a Benthamite code model, they would improve the Griffith Code score against the Robinson, Cahill and Mohammad scale to evaluate a code’s effectiveness.\textsuperscript{59}

Furthermore, the ‘loss’ of a century of Griffith Code jurisprudence can be readily made up by the growing case law and commentary interpreting Chapter 2 of the Criminal Code (Cth). As Goldflam has pointed out:

\textsuperscript{54} Letter from the Hon. John Elferink, Attorney-General for the Northern Territory to Mr John Lawrence, SC, President of the Northern Territory Bar Association, 17 April 2013.
\textsuperscript{55} R. Goldflam, ‘Which Way, Part IIAA?’, President of the Criminal Lawyers Association of the Northern Territory, 23 May 2013.
\textsuperscript{56} In the 7 years since the enactment of Part IIAA in 2006, only approximately 35 of the estimated 250 offences have been converted.
\textsuperscript{57} Goldflam, above n 55, 1.
\textsuperscript{58} Ibid.
\textsuperscript{59} Robinson, Cahill and Mohammad, above n 3.
The ‘heavy lifting’ involved in drafting, refining, settling and providing scholarly commentary on the relevant principles has been and continues to be undertaken by well-resourced and authoritative interstate law reform bodies, courts, academics and expert practitioners.\(^{60}\)

Commonwealth Code jurisprudence will grow in significance as criminal courts in all Australian jurisdictions administer Federal criminal law. Part IIAA of the *Criminal Code* (NT) has been scrutinised by the Northern Territory Court of Criminal Appeal in cases such as *Ladd v The Queen*\(^{61}\) and *Blacker v The Queen*.\(^{62}\) The arguments that encouraged the Northern Territory to come under the umbrella of the uniform evidence legislation,\(^{63}\) apply equally to the *Model Criminal Code*.

The ‘formulaic rigidity’ of the *Model Criminal Code* is a strength not a weakness, as it forces the legislature to make clear choices, which in the absence of a legislative decision is supplemented by default fault elements. True it is that the *Model Criminal Code* is neither simple nor succinct, but it does represent ‘current best thinking and best practice in this intrinsically difficult area of the law’.\(^{64}\) Leader-Elliott is correct in concluding that Part 2.2 of Chapter 2 of the *Criminal Code* (Cth) had ‘emerged unscathed, indeed reinforced, as a consequence of judicial scrutiny by the High Court in *The Queen v Tang* … remarkable for the strict literalism of its interpretation of Part 2.2’.\(^{65}\) This statement is accurate only for the translation of the *Model Criminal Code* into Part 2.2 of Chapter 2 of the *Criminal Code* (Cth) and the equivalent sections in Part IIAA of the *Criminal Code* (NT). As discussed in Chapter 7 on Murder, Chapter

\(^{60}\) Goldflam, above n 55, 3 (footnotes omitted).
\(^{63}\) Evidence (National Uniform Legislation) Act 2011 (NT).
\(^{64}\) Goldflam, above n 55, 3, stating the view of the Criminal Lawyers Association of the Northern Territory.
8 on Common Purpose, and Chapter 9 on Intoxication, other areas of the Model Criminal Code do not measure up to a Benthamite code model.

10.4. CLOSING REMARKS

This thesis does not aim to write out a complete code, but has sought to demonstrate that codes can be far truer to their intended design than is commonly thought. Consequently, the definition of the word ‘model’ in the title of this thesis refers both to improved drafting design and to the detailed specification of selected legal principles and tests. This has two effects. First, it reduces reliance on secondary material such as second reading speeches. Secondly, it firmly tilts the ‘partnership’ to the legislature (as a true code should) leaving the judiciary to explain the tests to the jury rather than to select which tests are appropriate.

The thesis has taken as its absolute standard Bentham’s test of ‘no blank spaces’, and has given substance to Sir Samuel Griffith’s aim when drafting the Criminal Code (Qld) of making his Code a complete statement of the criminal law. In effect, the thesis has followed in the footsteps of Sir Samuel Griffith and the Model Criminal Code Officers Committee, and stated its objective of identifying a Benthamite comprehensive methodology as a model blueprint for a criminal code in Australia. Such a methodology is desirable to clarify the criminal law by being self contained, and achievable with the developments in criminal law theory.
A Benthamite code is possible in Australia in the context of the weakness of the Griffith Codes and the foundational strength of Part 2.2 of Chapter 2 of the *Criminal Code* (Cth).

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