Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms

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Abstract

This paper mounts three fundamental arguments as to why the *Criminal Code 1899* (Qld), the *Criminal Code 1913* (WA) and the *Criminal Code 1924* (Tas) are anachronisms. For the purpose of this paper, these three Codes are collectively described as the Griffith Codes. The *Criminal Code 1899* (Qld), as the original Griffith Code, is the primary vehicle of analysis, with attention focused on the main criminal responsibility section, s 23, which deals with voluntariness and the 'reasonably foreseeable consequence' test (previously accident).[1] The first argument underlines that s 23 was drafted before the House of Lords decision in *Woolmington v DPP*.[2] 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. The second argument is that the Griffith Codes suffer the fatal flaw recognised by Dixon CJ in *Vallance v The Queen*[3] 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. The third argument turns on the *sub silentio* underlying fault element in the Griffith Codes being negligence,[4]

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[1] Following the passage of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld), s 23(1)(b) has been amended as follows: '(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.' The purpose of the amendment was to omit the term 'accident' and legislatively enshrine the 'reasonably foreseeable consequence' test. The equivalent section in the *Criminal Code 1913* (WA) is s 23B(2) which states that: 'A person is not criminally responsible for an event which occurs by accident.' The equivalent section in the *Criminal Code 1924* (Tas) is s 13(1) which states that: 'No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as in hereafter expressly provided, for an event which occurs by chance.' Dixon CJ described 'an event which occurs by chance', which corresponds to s 23(1)(b) above, as a 'somewhat difficult phrase': *Vallance v The Queen* (1961) 108 CLR 56, 61.

[2] [1935] AC 462 (HL) ('*Woolmington*'). All three Griffith Codes predated *Woolmington*.

[3] (1961) 108 CLR 56, 59 ('*Vallance*').

[4] Professor 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': Paul Fairall,

as the Codes do not recognise recklessness or knowledge as a fault element. By contrast, the *Criminal Code 1995* (Cth), which is based on the *Model Criminal Code*, explicitly adopts recklessness as the underlying and default fault element in the absence of a legislative intention to the contrary, and in addition sets up a regime where no fault elements are required for specified offences if the legislature so decrees. This is more than a difference in drafting convention and goes to the heart of what is meant by a criminal Code. The contention is made that, put together, these three arguments present on overwhelming case for a root and branch reform of the Griffith Codes and the abandonment of s 23 altogether (s 13(1) in the *Criminal Code 1924* (Tas)).

The goal of the paper is therefore not doctrinal, but leads to a recommendation for a major overhaul by bringing the Griffith Codes in line with the *Criminal Code 1995* (Cth). The challenges would be to re-educate a legal profession steeped in the Griffith tradition, and to manage the period of transition, although guidance could be taken from the Australian Capital Territory (ACT) and the Northern Territory (NT) who have already taken the decision to adopt the *Criminal Code 1995* (Cth).

The pragmatic or realistic reader may object that if the judiciary and legislatures in Queensland, Western Australia and Tasmania have ironed out the inadequacies in their respective Codes, then why do the arguments mounted in this paper matter? The answer to this important question has multiple facets. At one level it can be argued that Australia should, like Canada, have a single Criminal Code which should be infused with the developments in criminal law theory post the 19th century, as represented by the United States (US) Model Penal Code and the *Model Criminal Code*. At another level, 'the ironing out' of the inadequacies of the Griffith Codes is illusory, because every example of judicial inventiveness or legislative inertia weakens the foundation of the Code until it is overrun with judicial interpretation[5] and the 'wilderness of single instances'.[6]

Review of Aspects of the Criminal Code of the Northern Territory, Adelaide University, March 2004, 41.

[5] Despite the alleged purpose of a Code being to define criminal responsibility in clear terms to a lay reader without recourse to cases, the latest edition of *Carter's Criminal Law of Queensland* runs to 2943 pages: M J Shanahan, P E Smith, and S Ryan, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 18th ed, 2011).

[6] 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.'

I INTRODUCTION

> Law, says the judge as he looks down his nose,
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> Speaking clearly and most severely,
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> Law is as I've told you before,
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> Law is as you know I suppose,
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> Law is but let me explain it once more,
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> Law is The Law.[7]

Auden may be stating a truism in his poem above that 'Law is The Law', but the hidden question is where to find it. The purpose of a Code is to obviate the need to examine a myriad of cases to discover the law and a citizen's exposure to criminal responsibility. The golden rule of Code interpretation is one of not looking outside of the Code to the common law unless the meaning is either unclear or has a prior technical meaning.[8] However, this paper contends that in reality the courts, with the concurrence of the legislature, are infusing the common law into the Griffith Codes despite the stated intention of codification being the replacement of 'all existing law and becom[ing] the sole source of the law on the particular topic'.[9]

In *Widgee Shire Council v Bonney*[10] 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 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

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[7] W H Auden, 'Law, Like Love' (1939). Bentham disliked judge-made law because it was unwritten, uncertain and retrospective. 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 Alan Norrie, *Crime, Reason and History* (Cambridge University Press, 2001) 19.

[8] *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 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].

[9] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) [8.8].

[10] (1907) 4 CLR 997, 981.

on the scope and meaning of s 23, can hardly be called well settled or well understood'.[11] 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.[12]

On Griffith's comment concerning the exact meaning of mens rea, as Lord Hailsham has astutely observed: '[t]he 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.'[13] 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) of the *Criminal Code 1899* (Qld), a person is liable for murder where they unlawfully kill another with intent to kill or with intent to cause grievous bodily harm. Dixon J in *R v Mullen*[14] stated in relation to the decision of the House of Lords in *Woolmington*:[15]

> The *Criminal Code of Queensland* does not, in my opinion, contain any sufficient expression of intention[16] to exclude the application of the rule[17] 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.[18] 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.

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[11] M R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 160.
[12] Ibid 159.
[13] *DPP v Morgan* [1976] AC 182 (HL), 213.
[14] (1938) 59 CLR 124, 136 ('*Mullen*'). 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.
[15] [1935] AC 462 (HL).
[16] 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 *Mullen*, 128 stated: 'The mental element in the crime of wilful murder is expressed in Queensland by the reference to intention which has been quoted (s 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.'
[17] The 'rule' refers to the Crown having to prove in a murder case the malice of the accused.
[18] This is a reference to Sir Michael Foster, *Foster's Crown Law* (1762) 255.

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). The better view is that mens rea is an essential element of an offence unless expressly excluded,[19] 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.

The significant ramifications of the seeming inability of law reformers to recommend the removal of s 23 of the *Criminal Code 1899* (Qld)[20] and s 23 of the *Criminal Code 1913* (WA),[21] appears to have been overlooked by criminal law scholars, notwithstanding Windeyer J's insightful observation back in 1964 in *Mamote-Kulang v The Queen*,[22] just two years after the publication of the US Model Penal Code in 1962. Windeyer J was discussing s 23 of the *Criminal Code 1899* (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.

II SECTION 23 CRIMINAL CODE (QLD)

> 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.[23]

A *Woolmington v DPP*

Cases involving guns allegedly going off by accident provide fertile ground to highlight the implicit intermingling of subjective (intention for murder) and objective tests (reasonably foreseeable consequence test), of which the watershed case of *Woolmington*[24] is perhaps the best known example. Woolmington, who was estranged from his wife, stole a shotgun

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[19] *Lim Chin Aik v The Queen* (1963) AC 160, 173 (JCPC).
[20] Queensland Law Reform Commission ('QLRC'), *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (September 2008).
[21] See Law Reform Commission of Western Australia ('LRCWA'), *Review of the Law of Homicide*, Final Report, Project No 97 (2007).
[22] (1964) 111 CLR 62, 76. The 'more modern approach' is adopted in Chapter 2 of the *Criminal Code 1995* (Cth).
[23] Comments by D G Sturgess, *Criminal Code 1983* (NT) Seminar Transcript, October 1983, Darwin, 16.
[24] [1935] AC 462.

and cartridges from his employer, sawed off the barrel, threw it in a brook, and then bicycled over to his mother-in-law's house where he shot and killed his wife. Woolmington was charged with the wilful murder of his wife. Woolmington's version of events was that he did not intend to kill his wife, but rather he wanted her to return to him; to show his wife he was serious he threatened to kill himself if she did not come back to the marital home. By accident, the gun went off shooting his wife in the heart.

The trial judge directed the jury that the 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.[25]

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

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. 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.[26]

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 negate that possibility beyond reasonable doubt. 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. As Gummow

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[25] Sir Michael Foster, above n 18, 255.
[26] *Woolmington*, 481.

and Heydon JJ 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'.[27]

This begs the question, if in Griffith's own words above 'it is never necessary to have recourse to the old doctrine of mens rea' and s 23 no longer operates under its original onus of proof assumption, then how is a court to construe the reasonably foreseeable consequence test in s 23(1)(b) in conjunction with intention for murder in s 302(1)(a*) Criminal Code 1899* (Qld)? This pits the objective test in s 23(1)(b) against the subjective test in s 302(1)(a). Under the original Griffith Code design, framed when the law was understood to be as stated in *Foster's Crown Law* (1762), the answer was simple: the defendant had to prove accident on the balance of probabilities. *Woolmington* changed the fundamental basis of the principal criminal responsibility section in the Griffith Code.

The obvious solution to *Woolmington* for the Griffith Code is to revise s 23 or remove it completely. This has not happened, with the result that the courts have had to deal with a very confusing interaction between various sections of the Griffith Code, which is the complete opposite to the point of having a code at all. For example, how to 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 factual scenario in *Stevens v The Queen*[28] where the High Court split three to two on whether a substantial miscarriage of justice occurred as a result of the trial judge's failure to give directions on accident under the then s 23(1)(b) of the *Criminal Code 1899* (Qld).

In *Stevens*, Gleeson CJ and Heydon J, who were in the minority, would have dismissed the appeal against conviction for murder. The main bone of contention was Helman J's decision not to direct the jury on accident under the then s 23(1)(b) of the *Criminal Code 1899* (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:

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[27] (2004) 219 CLR 43, 54 [31] ('*WJI*'). Gummow and Heydon JJ exampled *Woolmington* regarding 'the placement of the burden respecting issues of accident or provocation in the trial of a murder indictment', citing *Mullen*, 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 *Woolmington v. Director of Public Prosecutions* declares that at common law such a rule or principle no longer exists.'

[28] (2005) 227 CLR 319 ('*Stevens*').

> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
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> (a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that occurs by accident.[29]

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'.[30] This led to consideration of the test of criminal responsibility under s 23.[31]

> In *R v Van Den Bemd*[32] this Court accepted the statement of the Queensland Court of Appeal[33] 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*.[34]

Hence, 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[35] to kill given the Crown's case that there was no mishap) in that an ordinary person could not reasonably have foreseen it. Gleeson CJ and Heydon J cited *Murray v The Queen*[36] as framing the question for decision whether s 23 was engaged as whether:

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[29] See above n 1 for the amended s 23(1)(b). The amended section merely substitutes the reasonably foreseeable consequence test for the word 'accident'. This was done to avoid confusion in the public's mind as to the meaning of 'accident' in s 23(1)(b).
[30] *Stevens*, 326 [17].
[31] Ibid.
[32] (1994) 179 CLR 137.
[33] *R v Van Den Bemd* [1995] 1 Qd R 401, 405.
[34] (2002) 211 CLR 193, 208 [43] ('*Murray*').
[35] 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'.
[36] *Murray*, 207-208 [41] (Gummow and Hayne JJ).

> 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.[37]

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 gave 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.[38] McHugh J then continued with the following observation.[39]

> 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*[40] 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'.[41]

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 death was not caused by accident'.[42] However, with respect, 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

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[37] *Stevens*, 327 [18].
[38] Ibid 331 [29].
[39] Ibid 331 [30].
[40] *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'.
[41] *Green v The Queen* (1971) 126 CLR 28, 33 (Barwick CJ, McTiernan and Owen JJ).
[42] *Stevens*, 331 [30].

established'.[43] 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'.[44] 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'.[45] For present purposes, the relevant portion of Callinan J's 'model' direction is as follows:

> 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.[46]

With great respect to the three judges constituting the majority in *Stevens*, the running together of subjective and objective tests is unhelpful and confusing. This paper contends that the joint judgment of the minority is to be preferred: s 23 is only relevant where there is 'an issue separate from the issue about the intention with which the appellant acted'.[47] However, while the minority's approach in *Stevens* does not muddy the waters between subjective and objective tests, the minority did accept the objective test under *R v Van Den Bemd*[48] when s 23 was relevant. The jurisprudence in *Stevens* is important because it applies to three Australian jurisdictions: Queensland, Western Australia and Tasmania.[49]

This two-step judicial 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*.[50] 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

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[43] *Stevens*, 346 [80], citing R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, (LexisNexis Butterworths, 6th ed, 2004) 139.
[44] *Stevens*, 346 [81].
[45] Ibid 371 [162].
[46] Ibid 370-371 [160].
[47] Ibid 327 [18].
[48] (1994) 179 CLR 137.
[49] See s 23B(2) *Criminal Code 1902* (WA); s 13(1) *Criminal Code 1924* (Tas).
[50] [1935] AC 462.

Criminal Code 1899 (Qld) is negligence, with its attendant objective test of the standard of the ordinary person.

As mentioned earlier, the Queensland Government has recently amended s 23(1)(b) as follows:[51]

> (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.

The purpose of the amendment was to omit the term 'accident' and legislatively enshrine the 'reasonably foreseeable consequence' test. As discussed earlier, the word 'accident' (a random unexpected act) does not convey the meaning under s 23(1)(b) which is an unintended, unforeseen and unforeseeable event. With respect, the amendment is mere window dressing. The real issue remains the continued presence of s 23(1)(b) in the *Criminal Code 1899* (Qld), which was based on the Queensland Law Reform Commission's ('QLRC') recommendation that s 23(1)(b) should be retained.[52] The Commission considered that the current excuse of accident embodied a flexible test of foreseeability (the foreseeability of death as an outcome of the defendant's intentional act provides the necessary fault element) and is consequently capable of adapting to reflect changes in community perceptions. 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.[53] 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'.[54]

Bearing in mind Windeyer J's comments in *Mamote-Kulang v The Queen*[55] 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, it is useful to compare and contrast the respective treatments of voluntariness in the Griffith Code and the *Criminal Code 1995* (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
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> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for (a) an

[51] *Criminal Code and Other Legislation Amendment Act 2011* (Qld).
[52] QLRC, above n 20, 9.
[53] Ibid 184.
[54] Ibid 184-185.
[55] (1964) 111 CLR 62, 76. See above n 22.

> act or omission that occurs independently of the exercise of a person's will.

The *Criminal Code 1995* (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
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> (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;
> (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 1899* (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 *R v Kusu*,[56] 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.

[56] [1981] Qd R 136 ('*Kusu*').

Mention of intoxication leads to a further example. The effect of s 28(3) of the *Criminal Code 1899* (Qld) is to introduce the distinction between offences of specific and basic intent[57] as per *DPP v Majewski*.[58] When Griffith drafted his Code no concession was made in practice to an intoxicated accused until the watershed case of *DPP v Beard*.[59] Taken together and just fifteen years apart, *Beard*[60] and *Woolmington*[61] 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. Over two hundred years ago, Bentham was alert to the need to make allowance for the alterations to a code without inconvenience, noting that 'no system of laws will ever, it is probable, be altogether perfect'.[62] The strength of a Code based 'upon a regular and measured plan'[63] was that alterations 'would give less disturbance to it'.[64]

Turning to the specific impact of legislative inertia, a passive or deferential approach by the legislature, both to the 'historic' Code and to judicial decisions embedded by precedent, has led to an ad hoc focus on the 'crime du jour'. Robinson has identified the predilection of politicians to overreact to public concerns over a particular type of crime by enacting a new offence when an existing provision could have sufficed to mount a prosecution.[65]

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 perceptively 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

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[57] 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.

[58] [1977] AC 443 (HOL). For similar sections see s 28(3) *Criminal Code 1902* (WA); s 17(2) *Criminal Code 1924* (Tas); s 31 *Criminal Code 2002* (ACT); s 8.2 *Criminal Code 1995* (Cth); s 43AS *Criminal Code 1983* (NT); *s 428C Crimes Act 1900* (NSW).

[59] [1920] AC 479 ('*Beard*').

[60] Ibid.

[61] [1935] AC 462.

[62] Jeremy Bentham in H L A Hart (ed), *Of Laws in General* (Athlone Press, 1970) 236.

[63] Ibid.

[64] Ibid.

[65] Paul Robinson, 'Codification, Re-codification and the American Model Penal Code', (Paper presented at International Conference on Codification of the Substantive Criminal Law, Dublin, 22 November 2003) 6.

> the last 100 years and no doubt that would have happened in Victoria too.[66]

Taylor argues the same outcome would have applied to particular offences, and examples 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*'.[67]

B *Vallance v The Queen*

Turning now to the critical question of the success of 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 1924* (Tas) in *Vallance*.[68] 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.[69]

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) which was derived from s 23 of the *Criminal Code 1899* (Qld) in the following terms.

> 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.[70]

Dixon CJ continued in similar vein by deriding the introductory part of the Code for containing:

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[66] Greg Taylor, 'The Victorian Criminal Code' (2004) 29 *University of Queensland Law Journal* 170, 202.
[67] Ibid citing *Crimes Act 1958* (Vic) Pt 1 Div 2.
[68] (1961) 108 CLR 56.
[69] Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28, 29.
[70] *Vallance*, 58.

> 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.[71]

By this Dixon CJ meant that such abstractions of doctrine were not to be interpreted as general deductions from specific instances that followed but came '*ab extra* and speak upon the footing that they will restrain the operation of what follows'.[72]

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), which 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.[73]

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 1899* (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.[74]

Such a trenchant statement amounts to an exocet missile directed at the very heart of a code's objective to be a complete statement of the law ('no blank spaces')[75] and to minimise the need for judge-made law.

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[71] Ibid.
[72] Ibid.
[73] Ibid 60.
[74] Ibid 61. Two good examples of provisions being worked out judicially can be seen in the interaction between s 31 of the *Criminal Code 1983* (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) 199 CLR 387, [69] Callinan J held that the express reference to intent in s 162(1)(a) meant that s 31 of the *Criminal Code 1983* (NT) had no role to play as all the mental elements were set out in s 162(1)(a). In the second example, in *WJI*, [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 essentially Dixon CJ's argument was that '[section] 13(1) was an unnecessary irrelevance'.[76] This seems a little wide but certainly accurate for the type of offences that Dixon CJ identified such as fraud, personation, sexual offences, receiving et al. 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.[77]

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 Teh78 [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.[79]

The learned author 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.[80]

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[81]

by virtue of 2.2 *Application* which states that Chapter 2 applies to all offences against this Code. The learned author unfavourably compares Griffith's Queensland Code where he describes the general principles as having been vitiated as a result of 'their subordination to the local

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[75] Bentham, above n 62, 246.
[76] Leader-Elliott, above n 69, 30.
[77] Ibid.
[78] (1985) 157 CLR 523.
[79] Leader-Elliott, above n 69, 29.
[80] Ibid 31.
[81] Ian Leader-Elliott, 'The Australian Criminal Code: Time for Some Changes' (2009) 37(2) *Federal Law Review* 205, 210.

particularities of the substantive offences'.[82] 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 a substantial improvement on the Griffith Codes.

There is another relevant aspect that divided the High Court in *Vallance*:[83] the meaning of the word 'act' in s 13(1) *Criminal Code 1924* (Tas) which in turn was derived from s 23 *Criminal Code 1899* (Qld). Dixon CJ took a broad view of 'act'.

> When therefore s 13(1) says that no person shall be criminally responsible … for an act unless it is voluntary and intentional it appears to me to be saying negatively that there shall be no guilt unless all acts of the accused forming the ingredients of the crime are voluntary and intentional. It is the punishable act or acts to which the words appear to me to refer. In the case of unlawful wounding the punishable act is the wounding.[84]

By contrast, Kitto J took a narrow view of 'act'.

> In my opinion, s 13(1) is framed with a recognition that there is a distinction to be drawn between, on the one hand, a bodily action performed by a person, entailing criminal responsibility … and, on the other hand, something eventuating in consequence of the action and attracting a criminal responsibility which the action otherwise would not have produced. When s 13(1) speaks of an act being voluntary and intentional, before turning to the event and speaking of that as not occurring by chance, it seems to me to be addressing itself only to the question whether a person charged acted of his own free will and by decision, before asking whether that which eventuated from his act was a merely chance result.[85]

Mindful of this division of authority, when it came time to draft the *Criminal Code 1983* (NT),

> [s] 31[86] was drafted to overcome the problems of interpretation which had arisen from other Code provisions by applying the same test regardless of

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[82] Ibid.
[83] (1961) 108 CLR 56.
[84] *Vallance*, 60.
[85] Ibid 65.
[86] Section 31 was the revised equivalent of s 23 and read as follows: '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.'

> whether the matter in question was an 'act, omission or event', thereby making it unnecessary to distinguish between the 'act'[87] and the 'event'.[88]

In *WJI*,[89] the High Court endorsed Dixon CJ's broad view of the word 'act'. Kirby J having noted that 'act, omission or event' is a compendious phrase and that the word 'act' was not limited to bodily movement, added that this specific elaboration in the *Criminal Code 1983* (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.[90]

The High Court took a similarly broad view in *Murray v The Queen*[91] in holding that there was no need for the trial judge to direct the jury on the operation of s 23(1)(a) of the *Criminal Code 1899* (Qld). Essentially, the majority followed Windeyer J in *Ryan*[92] who held that a 'reflex action' was a mere excuse when someone has a loaded, cocked rifle levelled at another and the trigger is pressed in response to a sudden threat being 'a consequence probable and foreseeable of a conscious apprehension of danger and in that sense a voluntary act'. In *Murray*,[93] Gummow and Hayne JJ identified the relevant act as the act of discharging the loaded shotgun which involved steps that could not be described as an unwilled act, as 'there is no basis for concluding that the set of movements, taken as a whole, was not willed'.

The architect of the *Criminal Code 1983* (NT) stated that s 31 was an attempt 'to set down… in different language exactly what Sir Samuel Griffith attempts to set down in his s 23 [of the *Criminal Code 1899* (Qld)]'.[94] However, s 31 represents a radical departure from s 23, and indeed one academic commentator has suggested that s 31 could perhaps be redrafted in line with 'the more careworn [than the *Criminal Code 1995* (Cth)] but now reasonably well-understood s 23 of the Griffith Code'.[95] While the 'different language' utilised in s 31 may have been misguided, it was at least a recognition back in 1983 that s 23 is better described as tired and outdated than 'careworn'.

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[87] Section 1 of the *Criminal Code 1983* (NT) defines 'act' as meaning a deed alleged to have been done that is not limited to bodily movement.
[88] Andrew Hemming, 'A Tour de Force, a Faux Pas or a Coup de Grace? A Rejoinder to Criminal Responsibility under Section 31 of the Criminal Code (NT)' (2002) 26(6) *Criminal Law Journal* 344, 345.
[89] (2004) 219 CLR 43.
[90] *WJI*, 70 [85] quoting *Vallance*, 61.
[91] (2002) 211 CLR 193 ('*Murray*').
[92] (1967) 121 CLR 205, 245.
[93] At [53].
[94] Sturgess, above n 23.
[95] Fairall, above n 4, 15.

Following the High Court's decision in *WJI*[96] the Attorney-General announced the Northern Territory Government's 'intention to … overhaul the major criminal responsibility provision in s 31 of the *Criminal Code* (NT)'.[97] Gray has stated that this proposal has 'been publicly cited as a response to the High Court's decision in *Director of Public Prosecutions (NT) v WJI*'.[98] With the adoption of the criminal responsibility sections in Chapter 2 of the *Criminal Code 1995* (Cth) in Part IIAA of the *Criminal Code 1983* (NT) in 2005,[99] the Northern Territory Government wisely turned not to s 23 of the Griffith Code to replace s 31, but to the *Criminal Code 1995* (Cth) and followed the path taken by the ACT in 2002.[100]

III UNDERLYING FAULT ELEMENT OF NEGLIGENCE

> And always the loud angry crowd,
>
> Very angry and very loud,
>
> Law is We,
>
> And always the soft idiot softly Me.[101]

Auden uses the word 'crowd' to denote the voice of the politically powerful as opposed to the vulnerable individual faced with all the resources of the state arrayed against him or her. 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.

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[96] (2004) 219 CLR 43.

[97] Stephen Gray, 'The State of things in the Territory: Literalism, Principle and Policy in Northern Territory Criminal Law' (2005) 29 *Criminal Law Journal* 37, 37, quoting 'Drink, Drugs not an Excuse', *Northern Territory News*, (Darwin) 25 October 2004.

[98] Ibid.

[99] *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). Since 20 December 2006, the *Criminal Code 1983* (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 1995* (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 6 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 Pt VII, Div 6 Criminal damage.

[100] *Criminal Code 2002* (ACT).

[101] Auden, above n 7.

As mentioned earlier, the *sub silentio* underlying fault element in the Griffith Code is negligence,[102] given the Griffith Code does not recognise recklessness[103] or knowledge[104] as a fault element. Colvin has also observed that under the Griffith Codes negligence is the general threshold of criminal responsibility:

> Under the *Criminal Codes* of Queensland, Western Australia, Tasmania and the Northern Territory, there are general tests for criminal responsibility which are objective in character. These general tests are contained in sections providing for the defence of mistake of fact in relation to circumstances and for the defence of accident or chance in relation to consequences. A mistake of fact must generally be reasonable if it is to provide a defence under these *Codes*, even for a serious offence. In addition, the test for a defence of accident or chance is that the event must have been not only unforeseen but also objectively foreseeable. The general threshold of criminal responsibility is therefore negligence: unreasonable mistakes are negligent mistakes and unjustifiably risking foreseeable harms is negligent conduct. This threshold applies to the range of basic offences against the person. 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.[105]

By contrast, the *Criminal Code 1995* (Cth), which is based on the *Model Criminal Code*, explicitly adopts recklessness as the underlying and default fault element in the absence of a legislative intention to the contrary.[106] This paper contends that the absence of both knowledge and recklessness as fault elements in the Griffith Code leaves a major gap in mens rea divisions, with only intention at the top of the fault liability

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[102] Fairall, above n 4. See also *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.'

[103] Goode, above n 11, 159, has pointed out that, 'the Griffith Codes did not, and do not, deal with the (for them) entirely novel idea of recklessness'. Section 5.4 of the *Criminal Code 1995* (Cth) defines recklessness such that it combines subjective awareness of a substantial risk with it an objective lack of justification to take the risk: '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.'

[104] Under s 5.3 of the *Criminal Code 1995* (Cth) a person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the normal course of events.

[105] E Colvin, 'Ordinary and Reasonable People: the Design of Objective Tests of Criminal Responsibility' (2001) 27 *Monash University Law Review* 197, 198-199 (citations omitted).

[106] Section 5.6(2) of the *Criminal Code 1995* (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.'

staircase jumping down to negligence at the bottom, one stair 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 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 *Criminal Code 1995* (Cth).

The responses to the above objections lie partly in the earlier discussion of *Woolmington*[107] and *Vallance*,[108] 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 also judicially applied to the duty-imposing provisions of the Griffith Code in the absence of any indication to the contrary in the Griffith 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',[109] with respect, 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.

It seems reasonable to contend that such failures mark a major limitation in a Criminal Code. Whatever the drafting limitations that can be levelled at the *Criminal Code 1995* (Cth), the absence of detailed definitions of physical and fault elements in Part 2.2 and how they are to be applied to offences is not among such limitations. In developing the discussion of negligence in the Griffith Code, it is helpful to consider the structure of the *Criminal Code 1995* (Cth).

The most important component of Chapter 2 of the *Criminal Code 1995* (Cth) is Part 2.2 which covers the elements of an offence. The formula[110]

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[107] [1935] AC 462 (HL).
[108] (1961) 108 CLR 56.
[109] Letter from Sir Samuel Griffith to the Queensland Attorney-General, 29 October 1897, x.
[110] See *Regina v JS* [2007] NSWCCA 38 (10 September 2004) ('*Regina*') [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,

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).[111] Physical elements can be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct happens. Fault elements can be intention, knowledge, recklessness or negligence all of which are defined. For example, the definition of negligence in s 5.5 is based closely on *Nydam*.[112]

These four fault elements reflect Lord Hailsham's observation 'that mens rea means a number of quite different things in relation to different crimes'.[113] Griffith CJ's comment that 'it is never necessary to have recourse to the old doctrine of mens rea'[114] in the *Criminal Code 1899* (Qld), begs the question how is the relevant fault element for a particular offence to be determined given the negative manner in which s 23(1) is expressed? This is the difficulty identified by Dixon CJ in *Vallance*[115] and opens a Pandora's Box[116] of judicial interpretation.

Support for this contention can be found in the remarks of another former Chief Justice of Australia commenting on the history of the general principles of the *Criminal Code 1899* (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'.[117] For example, Colvin and McKechnie[118] argue that

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expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage.'

[111] See *Regina*, [152] (Spigelman CJ). '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).'

[112] *Nydam v The Queen* [1977] VR 430 ('*Nydam*'). 'Such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and such a high risk that the physical element exists or will exist.'

[113] *DPP v Morgan* [1976] AC 182 (HL), 213.

[114] *Widgee Shire Council v Bonney* (1907) 4 CLR 997, 981.

[115] (1961) 108 CLR 56.

[116] Pandora's box is a Greek myth in which Hope alone remained when by its rash opening all other blessings were lost to (or all ills were let loose upon) mankind: *The Concise Oxford Dictionary* (7th ed, 1984) 739.

[117] Sir Harry Gibbs, 'Queensland Criminal Code: From Italy to Zanzibar' (2003) 77 *Australian Law Journal* 232, 236.

[118] Colvin and McKechnie, above n 8, 76 [4.36].

> [i]t is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions[119] of the [Queensland and Western Australia] Codes.

However, the learned authors noted that the High Court in *Callaghan v R*[120] 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.[121]

In *Callaghan v The Queen*,[122] the High Court determined that the then s 291A of the *Criminal Code 1913* (WA), which dealt with the crime of failure to use reasonable care and take reasonable precautions thereby causing death, fell within the qualifications of s 23 relating to negligent acts and omissions and therefore must be taken to be read that the fact that an event causing death occurs independently of the accused's will or by accident can afford no excuse. The question for determination was what degree of negligence was applicable to the offence under s 291A, which the High Court said must be approached from the context of it being an offence in a criminal code 'involving grave moral guilt':[123]

> Without in any way denying the difficulties created by the text of the *Criminal Code*, we think it would be wrong to suppose that it was intended by the Code to make the degree of negligence punishable as manslaughter as low as the standard of fault sufficient to give rise to civil liability.[124]

In coming to this conclusion, the High Court had embarked on a long journey of authority which interestingly included this observation below on the antecedents of the Griffith Codes, which dispels the notion that Griffith's Code was anything more than plagiarism of Stephen's English Criminal Code Bill and explains why the High Court put such store on Stephen's *History of Criminal Law* (1883)[125] and his judgment in *R v. Doherty*.[126]

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[119] The duty-imposing provisions relating to the preservation of human life can be found in Chapter 27, ss 285-290, and include s 286 Duty of person who has care of a child, s 288 Duty of persons doing dangerous acts, s 289 Duty of persons in charge of dangerous things and s 290 Duty to do certain acts.
[120] (1952) 87 CLR 115 ('*Callaghan*').
[121] Colvin and McKechnie, above n 118, citing inter alia *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).
[122] (1952) 87 CLR 115.
[123] *Callaghan*, 124 (Dixon CJ, Webb, Fullagar and Kitto JJ).
[124] Ibid.
[125] James Fitzjames Stephen, *History of the Criminal Law of England* (Macmillan and Co, 1883).
[126] (1887) 16 Cox 306.

> The English Criminal Code Bill the subject of the report of the Royal Commission of 1879 cd. 2345 was founded upon the work of Sir James Fitzjames Stephen. In the Australian and New Zealand criminal codes, *though largely based upon the English Criminal Code Bill*, some variations from its provisions occur in the treatment of homicide. But it is interesting to compare the provisions of the English Criminal Code Bill. Indeed a better understanding of the treatment of the whole subject in the various codes may be obtained from doing so [emphasis added].[127]

For present purposes, attention will be focused on the part of the judgment that dealt with the equivalent sections of the *Criminal Code 1899* (Qld).

> In Queensland in *R v Scarth* (1945) QSR 38, a majority of the Supreme Court, Macrossan SPJ and Stanley J, on the corresponding provisions of the *Criminal Code 1899* (Qld) decided that the expressions 'reasonable care' and 'reasonable precautions' should be given a well-established meaning which, in their Honours' view, they possessed in Criminal Law and that the distinction between criminal and civil negligence should be maintained. Philp J dissented on the ground that 'reasonable care' had been used for many years as defining the duty the breach of which supports a civil action for negligence, whereas the corresponding breach of duty required to support at common law a charge of manslaughter has been described by such epithets as 'culpable', 'gross', 'criminal'. In the Supreme Court of New Zealand the same interpretation as that adopted by Philp J had already been placed upon the provisions of the Code with reference to manslaughter by negligence: *R v Dawe* (1911) 30 NZLR 673 ; *R. v. Storey* (1931) NZLR 417.[128]

Thus, given negligence is the *sub silentio* underlying fault element in the *Criminal Code 1899* (Qld), combined with the absence of a definition of negligence[129] to make sense of s 23(1) containing the qualification of 'subject to the express provisions of this Code relating to negligent acts and omissions' on voluntariness and accident, has led to 'judicial legislation' to interpret how s 23 is supposed to interact with the duty-imposing provisions of the *Code*. Australian courts have determined that in a case involving, for example, the s 289 duty of persons in charge of dangerous things, there can be no resort to s 23 in that no defence is open

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[127] *Callaghan*, 122 (Dixon CJ, Webb, Fullagar and Kitto JJ).
[128] Ibid 121.
[129] The blurring between recklessness and negligence at common law can be traced from Lord Atkin's judgment in *Andrews v Director of Public Prosecutions* [1937] AC 576, 583, where His Lordship in discussing the high degree of negligence required to be proved for manslaughter stated that 'probably of all the epithets that can be applied "reckless" most nearly covers the case'. For a more recent example, see *R v BBD* (2006) QCA 441 [50], a case concerning s 328 of the *Criminal Code 1899* (Qld) which covers negligent acts causing harm, where P McMurdo J said in relation to the Queensland Supreme and District Courts Benchbook that 'it is unnecessary and undesirable to add recklessness, as if it were a separate element of the offence'.

under s 23.[130] The net result is legislative paralysis with s 23 seen as a shibboleth rather than an anachronism left behind by the developments in criminal law theory since the emergence of the US Model Penal Code in 1962 upon which the *Model Criminal Code* is based.

To illustrate the point in relation to the flexibility and legislative control following the adoption of Chapter 2 of the *Criminal Code 1995* (Cth), set out below is the new proposed s 161A *Violent act causing death* under the *Criminal Code 1983* (NT),[131] designed to deal with killings that have resulted from so called 'one-punch' assaults, which have bedeviled s 23(1)(b) of the *Criminal Code 1899* (Qld).[132] This new section has a fault element of intention as regards engaging in conduct involving a violent act (for example, the defendant intended to throw the punch), but for the result of that conduct (the defendant causes the death) strict liability applies. This section will be a Schedule 1 offence and therefore Part IIAA applies. To be clear, the new section is not being used here as an argument to eliminate s 23 per se or to be the fallback offence if Crown decides not to prosecute for manslaughter, but is an illustration of legislative choice under the nomenclature of Part 2.2 of the *Criminal Code 1995* (Cth).

> 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).
>
> (3) The defendant is criminally responsible for the crime even if the other person consented to the conduct mentioned in subsection (1)(a).

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[130] See *Evgeniou v The Queen* (1964) 37 ALJR 508; *Jackson and Hodgetts v The Queen* (1989) 44 A Crim R 320.

[131] Criminal Code Amendment (Violent Act Causing Death) Bill 2012 (NT).

[132] The equivalent section in the *Criminal Code 1902* (WA) is s 23B(2). Western Australia has addressed the issue by introducing s 281 'Unlawful assault causing death' into the *Criminal Code 1902* (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.'

> (4) However, the defendant is not criminally responsible for the crime if:
>
> (a) the conduct involving the violent act is engaged in by the defendant:
>
> (i) for the purpose of benefiting the other person; or
>
> (ii) as part of a socially acceptable function or activity; and
>
> (b) having regard to the purpose, function or activity mentioned in paragraph (a), the conduct was reasonable.
>
> (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.*

By making the proposed s 161A effectively an offence of strict liability, given the provision of s 43AN Strict liability, the primary defence for a s 161A offence would be under s 43AX Mistake of fact – strict liability.[133] So any person who intentionally punched another and the punch caused that other's death would be liable under s 161A, unless he or she was under a mistaken but reasonable belief about facts and had those facts existed the conduct would not have constituted an offence. 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,[134] 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. Unlike in Western Australia, the proposed s 161A is not an alternative verdict to murder or manslaughter and carries a potential term of imprisonment of 16 years compared with 10 years in Western Australia.[135]

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[133] Under s 43AN(2) of the *Criminal Code 1983* (NT) strict liability is defined as where there are no fault elements for that particular physical element and the defence of mistake of fact under s 43AX is available. Section 43 AX 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. See s 6.1 Strict liability and s 9.2 Mistake of fact (strict liability) for the identical sections of the *Criminal Code 1995* (Cth).

[134] *Nydam*. The test in *Nydam* is followed in s 43AL Negligence of the *Criminal Code 1983* (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.' See above n 105 for the identical s 5.5 of the *Criminal Code 1995* (Cth).

[135] Heenan J thoroughly discusses s 281 of the *Criminal Code 1913* (WA) in *Western Australia v JWRL [No 4]* [2009] WASC 392 (11 December 2009).

Once difficult and dated sections such as s 23 *Criminal Code 1899* (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 1995* (Cth), 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'[136] and repealing the section would have ramifications well beyond manslaughter.

While it is true to say that the QLRC was concerned that a new offence of unlawful assault causing death 'could become the norm in assault cases where death ensues … [and] could have the effect that manslaughter is not charged when it would normally be the appropriate charge',[137] 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[138] and the proposed new s 341.[139] However, the Commission did concede that such a proposed new section 'would remove the artificiality of a prosecution for assault occasioning bodily harm when a death had in fact occurred'.[140] The Commission also acknowledged[141] that the Law Reform Commission of Ireland had recommended just such a new offence

> which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label … [r]ecognising the sanctity of life by marking the death may be of benefit to the victim's family in dealing with their grief.[142]

Clearly, the arguments that persuaded the QLRC not to recommend a new offence of unlawful assault causing death did not resonate with the West Australian Government when it introduced 281 of the *Criminal Code 1913* (WA). Consequently, it may be objected, how does the argument that Part 2.2 of the *Criminal Code 1995* (Cth) provides greater flexibility

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[136] QLRC, above n 20, 184.
[137] Ibid 204. There is some limited empirical support (contested by the DPP who claimed that his office always charged a person with the most serious offence available on the evidence) for such a view following the introduction in 2008 of s 281 of the *Criminal Code 1913* (WA) in a study of 12 completed one-punch convictions: D Emerson, 'One-punch Killers had Form: Study', *The West Australian* (online) 16 August 2012 <http://au.news.yahoo.com/thewest/a/-/newshome/14561675/one-punch-killers-had-form-study/>.
[138] Sections 302 Murder; 303 Manslaughter; 320 Grievous bodily harm; 335 Common assault; 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.
[139] QLRC, above n 20, 203.
[140] Ibid 205.
[141] Ibid 108-109.
[142] Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) [5.03] – [5.36].

and legislative control sit with the fact that s 281 above was introduced into the *Criminal Code 1913* (WA), despite the existence of a provision similar to s 23 of the *Criminal Code 1899* (Qld)? The answer lies in the obsession of the legislature with the 'crime du jour' rather than with regular updating of a criminal code.

Ironically, the QLRC was right to be concerned with the impact of a new offence of unlawful assault causing death (the 'crime du jour' in this instance) on the architecture of the *Criminal Code 1899* (Qld). However, in recommending the retention of s 23, the Commission lacked vision and ignored the *Model Criminal Code* and Chapter 2 of the *Criminal Code 1995* (Cth) as an example to follow.

The real difficulty with s 23 in both the Queensland and WA Codes is that, as demonstrated in Stevens,[143] the section was drafted before the House of Lords decision in Woolmington,[144] and 'the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood'.[145]

The unsatisfactory two-step process between the subjective test for murder under s 302(1)(a) and the objective test for accident under s 23(1)(b) of the *Criminal Code 1899* (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.[146]

Notwithstanding that the residual fault element in the *Criminal Code 1995* (Cth) is recklessness, one step up on the fault staircase of criminal

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[143] (2005) 227 CLR 319.
[144] [1935] AC 462.
[145] Goode, see above n 11.
[146] Major reform will be hard to achieve such is Griffith's enduring legal legacy in Queensland. Goode, above n 11, has documented Queensland's withdrawal from the *Model Criminal Code* project which he attributes to lack of political will and the recalcitrant attitude of the then Queensland Supreme Court to the general principles of Chapter 2 of the *Criminal Code 1995* (Cth). Other academic commentators appear content to point out that 'many parts of the *Criminal Code 1899* (Qld), especially its general principles, remain poorly developed or outdated': (Andreas Schloenhardt, *Queensland Criminal Law* (Oxford, 2nd ed, 2011) 31), or to draw attention to anomalies relating to long redundant provisions and the need to amend a penal code to reflect changing community attitudes such as the self defence provisions: (G Mackenzie, 'An Enduring Influence: Sir Samuel Griffith and his Contribution to Criminal Justice in Queensland' (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 53, 61); without fully embracing the fundamental reform needed to drag a code based on 19th century notions of criminal responsibility into the 21st century.

liability than negligence, and that 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 in favour of the general principles and the definitions of concepts in Chapter 2 of the *Criminal Code 1995* (Cth) is, it is contended, the way forward.

IV CONCLUSION

> Others say, Law is our Fate;
>
> Others say, Law is our State;
>
> Others say, others say
>
> Law is no more,
>
> Law has gone away.[147]

Auden wrote his poem in 1939 shortly after the outbreak of the Second World War, when it seemed to Europeans that the law, as represented by the 1919 Treaty of Versailles, was worthless. In the context of this paper, 'Law has gone away' is taken to mean that the criminal law, as contained in the Griffith Codes, has over a period of a century become invisible to lay readers, the proper audience for a Code, because the imprint of the common law is still very much discernible behind the Code sections like a palimpsest, to paraphrase Windeyer J in an evocative image from *Vallance*.[148]

Despite romantic notions to the contrary,[149] the influences on Griffith of Zardinelli's Italian Code and Field's New York Code of 1881[150] were

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[147] Auden, above n 7.

[148] A palimpsest is a manuscript page from a scroll or book that has been scraped off and used again. Windeyer J in *Vallance*, 76, famously commented that 'we cannot interpret its general provisions [*Criminal Code 1924* (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'.

[149] Alberto 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 146, 30, citing Gibbs, above n 117, 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, s 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'.

[150] Sanford Kadish, 'Codifiers of the Criminal Law: Wechsler's Predecessors' (1978) 78 *Columbia Law Review* 1098, 1137, dismisses Field's Code as 'a tame treatment of the existing law'.

negligible.[151] The plain fact is that Griffith took Stephen's cautious narrow English Draft Code of 1880[152] and made sure he met Cockburn's criticism relating to the absence of defences,[153] but in so doing Griffith merely restated the common law.[154] 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',[155] could equally well apply to Griffith's Code. The key difference was that Griffith bestrode Queensland like a legal and political Leviathan.[156] Once Griffith's Code was on the Queensland statute books,[157] WA followed suit in 1902 (revised in 1913) and Tasmania in 1924.

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[151] Barry 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, 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.'

[152] 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 1899* (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 1899* (Qld) is discussed in relation to ss 71 and 72 of Stephen's Draft Code of 1879.

[153] Letter from Sir Alexander Cockburn, the Lord Chief Justice of England, 12 June 1879, containing comments and suggestions in relation to the Criminal Code (Indictable Offences) Bill, published by the House of Commons, 16 June 1879, 14.

[154] See for example s 24(1) Mistake of fact, which Dixon J said stated 'the common law with complete accuracy' in *Thomas v The Queen* (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, in *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 *Pacino v The Queen* (1998) 105 A Crim R 309 a different, broader interpretation was taken.

[155] Cockburn, above n 153, 1-2.

[156] In the Bible a leviathan is a sea monster, but the allusion here is to the 'Leviathan' written by Thomas Hobbes in 1651 and in particular to the etching for the book's famous frontispiece by Abraham Bosse.

[157] 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':

In concluding this paper on the three Griffith Codes, it is contended that they are not really Codes at all but a narrow restatement of the common law heavily based on Stephen's Code. The longevity of the Griffith Codes is testimony to the flexibility of the common law which pervades them, the ingenuity of judges in interpreting them, and the inertia of the legislature in failing to reform them.

R. O'Regan, 'Law Reform and Politics' (1996) 14 *Australian Bar Review* 1, 1, cited in Schloenhardt, above n 146, 29.