

How not to amend a *Criminal Code*

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The Queensland Government's perception of popular sentiment is driving the reform agenda.

In theory, one of codification's great virtues is that a Code may easily be amended in a principled way by the democratically elected legislature in response to changing social needs and expectations. Unlike the cumbersome common law process, codified law's evolution does not depend on the vagaries of legal circumstances and the requisite coincidence of the right case with the right facts before the right court at the right time.¹

In reality, Queensland's efforts to amend its *Criminal Code* over the better part of the last decade (1989–1997) have proved to be quite different. At a time when there exists a commendable desire to unify criminal laws across Australia through the Model Criminal Code exercise, Queensland's frustration is instructive: in an increasingly politicised environment, there are immense difficulties in amending criminal legislation when the reform agenda is driven by government's perception of popular sentiment. Disappointingly, except for one brief period in 1995–1996, the entire political exercise in Queensland has lacked any real commitment to producing a modern Code that would serve the Queensland people well with a substantive vision of criminal justice.

The long road to reform

In 1897, Sir Samuel Griffith, the then Chief Justice of Queensland, produced a draft criminal code for the State of Queensland. The *Criminal Code Act 1899* (Qld) and the *Criminal Code* which appears as the first schedule to it commenced on 1 January 1901. It was undoubtedly a remarkable document for its time and it powerfully influenced the development of Criminal Codes in other Australian States and also abroad.² It has endured surprisingly well, considering that almost a century has passed since its genesis. Of course, the Code has been amended over the years. In 1994, the Office of the Parliamentary Counsel produced a Reprint updating certain structural and phrasing matters (for example, making the Code gender neutral). However, it was not until 1989 that a long overdue, comprehensive revision was attempted and it is in 1989 that our story begins.

As part of the (then) new Labor Government's reform agenda in 1989, Queensland was promised a new *Criminal Code*. In April 1990, a Criminal Code Review Committee, chaired by Mr Rob O'Regan QC, was established to investigate and draft a new Code. Following an Interim Report released in March 1991, the O'Regan Committee produced a detailed Final Report and draft Code in June 1992. Without explanation, the Goss Labor Government chose not to adopt the O'Regan model, and nothing was heard of a 'new Code' until December 1994 when a completely radical draft dispensing entirely with the structure and approach of the Griffith Code and bearing no relationship to the O'Regan recommendations was produced and released for a brief period of public consultation.

This second draft formed the basis of the *Criminal Code 1995* (Act No. 37 1995) introduced into the Queensland Parliament in May 1995

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and assented to on 16 June 1995. The *Criminal Code 1995* was scheduled to commence in July 1996 (to allow for the passage of companion summary offence and police powers legislation). It would be fair to say that, whatever its gestation period, the precipitous passage of the Labor model did nothing to endear the new *Code* to the criminal practitioners in Queensland. Further, in its own right, it was severely criticised by both the legal profession and a range of interest groups as ill-conceived and poorly drafted. Nevertheless, it seemed inevitable that this legislation was to be the new criminal regime in Queensland and, consequently, Law Society seminars were held, University criminal law courses were modified and the completely new provisions of the 1995 Act were studied in an effort to understand their import before the Act commenced.

Then the political events in Queensland of 1995 and 1996 took over. The Mundingburra by-election changed the balance of power in the State and the new Borbidge Coalition Government announced that the 1995 Labor *Code* would be scrapped. In a third major review of the Code, the Borbidge Government established an Advisory Working Group (AWG) in April 1996 ultimately consisting of former Supreme Court Justice, Mr Peter Connolly QC, and two criminal barristers, Ms Julie Dick and Mr Adrian Gundelach. That AWG produced a Report in July 1996 which was released for public consultation for a period lasting until mid-September 1996. The *Criminal Law Amendment Bill 1996* (Bill No. 93 of 1996) was introduced into the Parliament on 4 December 1996, passed with minor amendments on 26 March 1997, and assented to on 3 April 1997. The *Criminal Law Amendment Act* (Act No. 3 of 1997) repealed Labor's *Criminal Code 1995* on the date of its assent. The remainder of its provisions commenced on 1 July 1997.

Finally, the protracted exercise of updating the Griffith *Code* has been concluded and the promise of a contemporary statement of criminal law, designed to serve Queensland and its people, has been realised.³

The resultant amended Code

So, after such a long gestation period what finally is this new vision of Queensland's criminal law? Sadly, the answer is 'pretty much as it was before'. While there has been some limited reform in areas long overdue for attention, there has been no substantial amendment of issues that have been crying out for reform for years — particularly the law of self-defence. The approach has rather been one of tinkering around the edges and, in a number of specific instances, a return to the past in cases where court decisions on the previous *Code* have not been to the Government's liking. Innovative measures seem to have identified themselves to the Government by reason of their potential for good newspaper headlines: for example, implementation of the Coalition's 'Home Invasion' policy; new offences to target particular deficiencies highlighted in cases that received wide media attention (for example, the karate kick of a pregnant woman and the torture of a young boy with a cattle prod); new tough public order type offences such as being in possession of a 'graffiti instrument' and making bomb hoaxes; and, of course, stiffer penalties all around.⁴

On the plus side it could be said that:

- Contrary to the recommendation of the Connolly Committee, there was no return to the original, gender specific, language of the Griffith *Code*.

- The law of sexual assault is somewhat reformed: anal intercourse is now referred to as 'sodomy'; the 'carnal knowledge' definition, the determinant for the rape offence, has been widened to include both vaginal intercourse and sodomy; incest provisions have been reformed; and, finally, the requirements for corroboration warnings have been reformed along modern lines.⁵ However, the common law formulation of the fresh complaint doctrine remains, and a definition of 'consent' has still not been included.
- There has been some modernising of existing offences (for example, many of the offences in Chapter 40, now titled 'Other Fraudulent Practices', have been modernised) and some new, contemporary offences such as s.408D, computer hacking and misuse, and s.321A, bomb hoaxes, have been introduced.
- Certain uncontentious matters that have long been on the reform agenda have finally been enacted (for example, inserting a revised definition of grievous bodily harm to include the loss of a distinct body part or organ and serious disfigurement).⁶
- The repeal of archaic offences and excuses has finally been attended to (for example, s.10, spousal immunity excuse for accessories after the fact; s.33, no conspiracy between husband and wife; s.53, defamation of foreign princes), as has the repeal of sections adequately covered by other legislation (for example, Chapters 18 and 19 offences relating to coins and to posts and telegraphs).
- The age of criminal responsibility in s.29 has been lowered from 15 to 14 in line with most other States, with the onus remaining on the Crown to prove the capacity of a minor aged between 10 and 14.
- Some useful modernisation of the law of compulsion under s.31(1)(d) has occurred in line with the modern common law, widening the excuse to include threats made to persons other than the accused and removing the necessity that the threatener be 'actually present'.
- Property offences were singled out for rationalisation and a strategy implemented to modernise the dishonesty provisions. The s.390 definition of 'things capable of being stolen' has been sensibly tied to an expanded s.1 definition of 'property' which will now include intangible things (previously the subject of s.408C misappropriation only); new categories of aggravated stealing have been added (stealing by looting and stealing firearms); s.408C, previously titled 'Misappropriation of Property', has been completely recast and, together with ss.427, 428 and 429, has been replaced with a new s.408C, renamed 'Fraud'; the housebreaking/burglary offences in Chapter 39, ss.419-422, have been reduced from four to two and a new definition of 'premises' has been added in s.418 (on the down side, most of these newly cast 'home invasion' type offences are punishable by life); the requirement for 'knowledge' in s.433 'receiving' has been replaced with 'reason to believe' (the property has been stolen); and a new s.488 has redefined and simplified the forgery and uttering offences.
- There has been some useful recasting of certain provisions: for example, the s.286 duty of persons in charge of children is now affixed to *all* persons having charge of children under 16, not just parents; s.328A, dangerous driving of a motor vehicle, has replaced the concept of 'drives' with 'operates', the offence is no longer restricted

to *motor* vehicles (now 'vehicles'), extends beyond *public* places, while 'the public' who might be injured now include passengers in a vehicle, whether or not in a public or private place.

- A new Chapter 58A consolidates and simplifies the summary determination of indictable offences. For certain assault-related indictable offences, the election of summary jurisdiction is now solely at the discretion of the prosecution. The circumstances in which a defendant may elect for summary jurisdiction have been altered and the maximum penalty a magistrate can impose has been increased from two to three years. It is interesting to note that recent research conducted by the CJC in Queensland suggests that accused people generally will elect to have cases dealt with on indictment, rather than summarily, as the former will virtually guarantee legal aid.⁷
- A range of other, sensible procedural changes have been effected, many of which resulted from submissions by the DPP: for example, s.568 'joinder of several charges', s.590 'bringing an accused to trial'.
- A new s.592A has been inserted allowing for pre-trial directions and rulings to be given on the conduct of the trial and the admissibility of evidence once an indictment has been presented and prior to the empanelling of the jury. Robertson DCJ speaking at a Law Society Symposium earlier this year observed that it was 'highly desirable that our systems be modified to give the provision a chance to work'.⁸
- While, of course, all the penalties have increased, there has also been a genuine effort made to remove anomalies and strive for consistency between penalties, particularly in relation to sex offences (for example, as between the penalty for carnal knowledge of girls and sodomy of boys under ss.208 and 215; incest offence is now consolidated with one punishment (previously s.222, 'incest by man', and s.223, 'incest by female')).

While it is difficult to quarrel with the desirability of the matters briefly outlined above (with the possible exception of the wholesale increase in penalties), the fundamental fault immediately evident in the Borbidge Government's efforts in this area is the threshold question of why these particular areas were chosen for reform and nothing else? Why modernise s.31(1)(d) compulsion and not self-defence or provocation? Why rationalise the property offences and not the equally diverse offences against the person?⁹ Why bring the corroboration warning into the 20th century and not the doctrine of fresh complaint? The apparently random nature of these choices is further accentuated when one examines the big ticket reform items to which the Government directed its reformist eye.

The big ticket reforms

The home invasion policy

The Coalition's 'Home Invasion' policy, and the types of unlawful conduct it identified, was a continuing theme throughout the AWG report. Not surprising then that, in line with the stated government policy of strengthening the position of householders against home invaders, the issue of the force that may be used in the protection of property was singled out for reform. In addition to the burglary/house-breaking amendments referred to above, s.267, defence of dwelling, has been replaced. While the basic test remains unchanged — a subjective belief in the homeowner, based on

objectively reasonable grounds, that the amount of force used was necessary — the defence has now been:

- extended to cover all dwellings (not just dwelling 'houses');
- widened by deleting the requirement that there be a *breaking* of the dwelling (*entry* alone is sufficient); and
- further extended to permit the use of force to *repel* (as well as prevent) an intruder from *remaining* in (as well as entering) the dwelling.

There has also been an increase in the level of force that may be used to defend other types of property under ss.274-279. Previously there was a limitation on the occupier's use of force that would involve the infliction of bodily harm. The *Code* now allows for the infliction of bodily harm in these cases by substituting 'must not do *grievous* bodily harm' for 'bodily harm' in ss.274-279. These provisions have further been extended to protect a person lawfully assisting the property owner.

The Coalition was also concerned to ensure that a person acquitted by reason of the s.267 defence be 'conclusively deemed to have acted lawfully, thereby avoiding civil liability pursuant to s.6 of the *Criminal Code Act 1899* for any injuries inflicted'.¹⁰ Implementing this policy objective, the AWG had proposed a remarkable new section s.267A, deeming an acquitted homeowner who had relied on s.267 (or any of the related sections) to have acted lawfully and, further, deeming any person in relation to whom a *nolle prosequi* was entered *or* against whom a charge had been withdrawn *or* indeed against whom a charge had never been laid, to also have been acquitted and, consequently, 'conclusively deemed to have acted lawfully'. The ultimate legislative form of this policy objective is, comparatively, quite tame: in the final version a new s.6(1A) and (1B) *Criminal Code Act 1899* has provided that if a person has been found guilty of an indictable offence, whether or not a conviction has been recorded, that person shall have no right of action against any other person for any loss or injury suffered in or in connection with the commission of that indictable offence.

Amend to re-instate the previous law

In three specific cases, the new *Code* has gone back to the past.

- A new s.10A has been introduced to overrule the decision in *Hind and Harwood* (1995) 80 A Crim R 105¹¹ and to return the effect of the complicity sections, ss.7 and 8, to the way the law on common intention had previously stood. As it happens, *Hind and Harwood* was overruled by the High Court in June (prior to the commencement of the amendments) in *R v Barlow* [1997] 144 ALR 410. In this respect, at least, it would seem that the 'common law' process of precedent and appeal has proved as effective as any *Code* amendment (score one for the common law process).
- The pivotal s.23 excuse of accident has been amended to reverse the decision in *Van den Bemd v R* (1994) 179 CLR 137.¹² Once again accused people will be forced to take their victims as they find them in the 'egg shell skull' cases, whatever might have been subjectively intended or foreseen by them or objectively reasonably foreseeable.
- The intoxication defence in s.28 has been rather harshly amended to overcome the decision in *R v Bromage* [1991] 1 Qd R 1.¹³ The defence of insanity will not now be available to an accused who is voluntarily intoxicated

to any extent, regardless of whether that voluntary intoxication has disordered the mind alone or in combination with other substances (in *Bromage*, for example, the psychotic state was caused by the voluntary ingestion of alcohol in combination with an involuntary ingestion of pesticides).

New offences

Two completely new offences have been inserted in direct response to cases that attracted media attention shortly before the passage of the *Code* amendments:

- A young pregnant woman was intentionally kicked in the abdomen. To provide for an appropriate charge in those circumstances, s.313, 'killing unborn child', has now been amended to provide, in s.313(2):

(2) Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime.

Maximum penalty — imprisonment for life.

- In another recent case, a man used a machine capable of producing 600 volts to administer electrical shocks to the toes and legs of his de facto's 5-year-old son. He was convicted of one count of common assault and imprisoned for the maximum 12 months. The Government accepted that, unless the injury amounted to grievous bodily harm, bodily harm or wounding, there was no existing offence that adequately dealt with the deliberate infliction of severe pain and suffering. Consequently, a new offence of torture has been created:

Torture

320A.(1) A person who tortures another person commits a crime.

Maximum penalty — 14 years imprisonment.

(2) In this section —

'torture' means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.

'pain or suffering' includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.

Though the AWG directed some attention to s.313, neither of these amendments was considered by that Committee and, in the absence of any discussion as to their genesis, it is not clear, for example, why the option of including *mental* injury in either or both of grievous *bodily* harm or *bodily* harm was not adopted. One bright thought that occurs is the very real prospect that both of these new offences will be useful additions to the domestic violence armoury: their potential application to the variants of coercive behaviour that constitute domestic violence would seem fairly clear, without any contortion of the legislative language.

As regards other new offences, mention has already been made of the new s.408D, computer hacking and misuse offence (probably long overdue), and of the new s.321A, bomb hoax offences. Less desirable has been another significant addition in the form of s.37C *Vagrants, Gaming and Other Offences Act 1931*: being in possession of a 'graffiti instrument' (defined in s.2 to mean a 'spray-paint can or another applying, scratching or etching implement') without lawful excuse, proof of which is on the defendant. If the circumstances give rise to a reasonable suspicion that the instrument has been used or is intended to be used to commit a 'graffiti offence' (defined to mean the *Code* s.469 'wilful

damage offence', which itself has been expanded with the insertion of two new circumstances of aggravation — 'graffiti' and 'damage to educational institutions'), then the offender is liable to a maximum of 70 penalty units or two years imprisonment. The section empowers the court to order community service work additional to or instead of any other penalty imposed. A cynic would suggest that reform has again been with an eye to newspaper headlines.

Major omissions

Against what has been done, what has not been done should be assessed. In this major update of the 1899 *Code*, it is quite remarkable that no effort was made to modernise or even address the quite deficient state of the Queensland law of self-defence. Though the O'Regan Committee in 1992 drafted a provision replacing ss.271, 272 and 273, and even the Labor 1995 *Code* attempted a somewhat doubtful recast, the AWG gave no attention to ss.271 and 272 nor to s.273 aiding in self-defence, and it has not been amended.

The Queensland self-defence provisions are complex and unwieldy and have been the subject of both judicial and academic criticism for some time. Of further concern is that, as suggested in *R v Kerr* [1976] 1 NZLR 335 at 345¹⁴ referring to corresponding provisions under the *Crimes Act 1961* (NZ), juries must find the provisions quite 'incomprehensible'. At a time when one senses in the High Court a (sensible) desire to see 'a degree of unity of underlying notions' between the Code and the Common law States,¹⁵ it was surely opportune in 1997 to bring the codified law of self-defence into line with the modern common law and for Queensland to attempt a reformulation of self-defence along the simple and workable lines advocated in *Zecevic v DPP* (1987) 162 CLR 645. As O'Regan (one of many) has put it:

Such questions as whether the initial attack was unprovoked or provoked, whether it was major or minor and whether the accused retreated [which] are crucial under ss.271 and 272 . . . complicate an otherwise simple inquiry — whether the accused, in taking the defensive action [s/he] did, acted reasonably?¹⁶

While it is true that such an improvement would score few political points in the media, this matter has truly required reform for a number of years.

It is similarly disappointing that no consideration was given to modernising the law of provocation. Issues arise, for example, as to the necessity for the provocation to take place in the presence of the accused and as to the requirement that the provocative act must be unlawful. Specifically, the O'Regan Committee recommended the abrogation of the requirement for suddenness in response to the provocation offered, referring to the particular restrictiveness of this requirement 'when the parties are of unequal physical power, for example, in circumstances of domestic violence'.¹⁷ While the disqualifying effect of this element of the provocation excuse has diminished over the years, a provision such as, for example, s.23 *Crimes Act 1900* (NSW) which removes the suddenness requirement, has been proven to operate more effectively for the benefit of battered women.¹⁸ Such a modification would also accord with the modern focus of provocation which seems to be more on the requirement that the retaliatory conduct be done under the effect of the relevant provocation, rather than on the artificial requirement that there be a temporal relationship between the two.

Relevant to both self-defence and provocation, the 1997 amendments have included a new s.132B in the *Evidence Act 1977* (Qld), which makes evidence of domestic violence

admissible 'if it is relevant' in relation to offences defined in Chapters 28-30 QCC. Section 132B(2) provides:

Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.

A specific statutory amendment to reinforce the concept that relevant evidence is admissible in a criminal trial is an interesting approach. It remains to be seen how this provision will be interpreted (perhaps as an exception to the hearsay rule), should it be referred to at all.

As has been mentioned, the law of sexual assault was given some attention in the review, for which many will be grateful. The amendments to the s.6 definition of carnal knowledge and s.347 rape offence now provide that non-consensual anal or vaginal intercourse of a man or a woman will constitute rape and that penetration by objects or other body parts will be dealt with under the newly named s.337 offence of 'sexual assault' (previously 'indecent assault'), with some added circumstances of aggravation. However, again the opportunity was missed to make a real contribution to the development of the criminal law, almost determinedly against the reformist trend in other jurisdictions. Still absent from the Queensland Code is a definition of consent, for which other legislative models exist encompassing the notion of free agreement and even providing assistance with jury directions.¹⁹ While Queensland has finally been dragged into the modern era with a new s.632 which sets limits on the giving of a corroboration warning — up until 1 July 1997 the giving of the corroboration warning was still a strict rule of practice in sexual assault cases in Queensland — Queensland retains the common law formulation of the doctrine of fresh complaint, again against the trend of legislative amendment elsewhere.²⁰

Finally, still absent from the Griffith Code, despite its recent overhaul, is any statement of the principles regarding the onus and standard of proof in criminal proceedings. The O'Regan Committee to their credit drafted a new section to fill this 'gap' in the Code, as it was called in Mullen [1938] Qd R 97²¹ and one would have thought that any comprehensive review of the Code would have addressed such a provision.

Conclusion

It is disappointing to say the least that after such a protracted period of review, consultation, drafting and academic and professional effort over a number of years, the *Criminal Law Amendment Act 1997* is what Queenslanders have to show for their time and money. It would be unrealistic to hope that there is any prospect of further substantial amendment in the near future, nor would it seem likely that serious thought will be given to moving towards the MCCOC (Model Criminal Code Officers Committee) document in preference to the existing Queensland Code. A clear indicator in this regard is the fact that, while the 1996 AWG had regard to the O'Regan Committee Report and to the Labor *Criminal Code 1995*, no reference at all was made to MCCOC's extensive review work in the AWG Report. Prospects of furthering the ideal of a greater symmetry between code and common law jurisdictions would seem similarly dismal.

A particularly unpleasant thought that now occurs, given the recent Supreme Court decision effectively disbanding the Connolly-Ryan Commission of Inquiry into the Criminal Justice Commission, is that the potential political fallout from this decision might be another change of government

in Queensland. Would a new Labor Government re-introduce its 1995 *Criminal Code*, which was trashed by the Coalition in the 1997 amendments? If so, the one consolation is, I suppose, that all the work that was done on the 1995 Code would not go to waste! Who'd have a Code?

References

1. For example, see discussion in Goode, M., 'Codification of Australian Criminal Law', (1992) 16 *Crim LJ* 5 esp. pp.14-16.
2. See generally O'Regan, R.S., 'The Migration of the Griffith Code' in R.S. O'Regan (ed.), *New Essays on the Australian Criminal Codes*, Law Book Company, 1988.
3. The new improved Code has already been the subject of further, albeit minor, amendment, by the *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (No. 9 of 1997) passed 2 May 1997, assented to 15 May 1997.
4. While there is still no access to Queensland legislation on the Internet, there is a handy table of increased penalties under the amended Code that may be accessed on the Qld Government web site at http://www.qld.gov.au/depts_agc/justice/penalties.htm
5. See amended s.632 QCC as to effect of which see *Longman v R* (1989) 168 CLR 79 at 85, 90-91.
6. *Overruling Tranby* (1991) 52 A Crim R 228 and legislating the effect of *R v Lobston* [1983] 2 Qd R 270.
7. CJC, 'Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecution, Queensland', Brisbane, CJC, 1995 pp.94-95, the reason for this being obiter in *R v Dietrich* (1992) 177 CLR 292 to the effect that the *Dietrich* principle that safeguards the indigent unrepresented accused does not extend to summary trials (at 336 per Deane J). Cf *Weinell v Fedcheshen*, unreported Supreme Court of SA, Judgment No. 5216, Perry J, 20 September 1995 re summary hearing in the Magistrates Court.
8. Robertson, J., 'Criminal Law Update — Procedural Changes *Criminal Code Bill 1996, Evidence Act 1997*', paper presented at Queensland Law Society Symposium, March 1997.
9. See *Jervis* (1991) 56 A Crim R 374 at 376 per McPherson SPJ: '... the Code over-abounds in particular forms of offences against the person'.
10. 'Report of the Criminal Code Advisory Working Group to the Attorney-General', July 1996, p.40.
11. Cf *R v Jervis* [1993] 1 Qd R 643.
12. Refusing leave to appeal from [1995] 1 Qd R 401 cf *R v Martyr* [1962] Qd R 398 and *Mamote Kulang* (1965) 111 CLR 62.
13. And there have been related amendments to *Mental Health Act 1974* particularly re 'unsoundness of mind'.
14. A view recently endorsed by the Queensland Court of appeal in *Gray v Smith* [1997] 1 Qd R 485 at 490.
15. See *Stingel v R* (1990) 171 CLR 312 at 320.
16. O'Regan, R.S., 'Self-Defence' in R.S. O'Regan (ed.) above, pp.94-5. This observation was repeated in the O'Regan Committee Review: see 'Final Report of the Criminal Code Review Committee to the Attorney-General' (O'Regan Committee), Brisbane, June 1992, p.188.
17. O'Regan Committee, above, p.188.
18. See cases such as *Chhay* (1992) 72 A Crim R 1, *Morabito* (1992) 62 A Crim R 82.
19. See for example *Crimes Act 1958* (Vic.) ss.36, 37 and 38.
20. See for example *Crimes Act 1900* (NSW) s.405B.
21. See the O'Regan draft s.6.