WHY BENTHAM'S VISION OF A COMPREHENSIVE CRIMINAL CODE REMAINS VIABLE AND DESIRABLE AS THE MODEL DESIGN FOR A CODE

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Abstract

This article contends that Bentham's vision of a comprehensive criminal code that displaces the common law and minimises the scope for judicial interpretation is both viable and desirable today. The argument is made that Chapter 2 of the *Criminal Code 1995* (Cth) points the way forward and that the original Griffith Codes[1] are not codes at all, but sparsely written restatements of the common law. To be a true code, the relevant law needs to be spelt out in detail for each offence and defence, with offences conforming to the general part of the code, unlike the Griffith Codes whose central criminal responsibility section was demolished by Dixon CJ in *Vallance v The Queen.*[2] Bentham identified the characterisation problem nearly two hundred years before modern element analysis emerged in the form of the United States *Model Penal Code* in 1962. The conventional wisdom, that Blackstone and the adaptability of the common law triumphed over Bentham's grand scheme of codification, is challenged now that criminal law theory has developed sufficiently to put Bentham's vision into practice.

I OVERVIEW

The central argument of this article is that Bentham's vision of a comprehensive criminal code has become more relevant in

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1 The Griffith Codes refer to the *Criminal Code 1899* (Qld), the *Criminal Code 1913* (WA), *the Criminal Code 1924* (Tas) and the *Criminal Code 1983* (NT). For the purpose of this article, a reference to the *Griffith Code* means the original code, namely, the *Criminal Code 1899* (Qld), whilst a reference to the *Griffith Codes* encompasses all the codes descended from Griffith's code in Queensland.

2 (1961) 108 CLR 56, 58, 61.

Australia with the development of modern element analysis and the promulgation of the *Criminal Code 1995* (Cth). This argument is supported by the contention, by way of examples, that it is possible to draft specific code provisions that minimise the need to import the common law into the code without creating a minefield of judicial interpretation. Bentham's view that the legislature should dominate the judiciary in specifying the content and appropriate tests to be adopted is championed, ahead of the current practice in Australia of a loose partnership between the legislature and the judiciary, with the legislature effectively delegating statutory construction to the judiciary. Such delegation, it is contended, is compounded by a combination on the one hand of legislative inertia to regular updating of the code, and on the other by knee-jerk reactions to the 'crime du jour' sparked by media coverage of a particular case.

The article commences with a summary of Bentham's plan for codification, and then contrasts Bentham's view with that of his great contemporary, Blackstone. The conventional view that Blackstone's support for the organic development of the common law has triumphed over Bentham's comprehensive code vision is challenged in that it is argued Bentham's time may finally have come. The second part then addresses the problems of internal consistency of a code versus the ambiguities of the English language, and a code fixing the law at one point in time. It is contended that Chapter 2 of the *Criminal Code 1995* (Cth) provides the foundation for avoiding ambiguities of language, which this article then seeks to build upon. The irony that legislative inertia has frozen the Griffith Codes in Australia in 19th century notions of criminal responsibility, thereby requiring the judiciary to infuse the Griffith Codes with the organic development of the common law, at the expense of regular code review, is highlighted.

The third part considers how legal history has treated Bentham's plan for codification, covering the English code experience in the 19th century, the *Criminal Codes* in India, Canada and Australia in the 19th century, and, more recently, the American *Model Penal Code* and Australian *Model Criminal Code* in the 20th century. The lens of legal history is utilised to rebut the viewpoint that the more detailed and illustrative a code, the more vulnerable it is to a statutory quagmire. Conversely, the argument is made that the 20th century developments in element analysis and criminal law theory allow a legislature to deliver Bentham's vision of a comprehensive criminal code.

II Bentham's Plan Of Codification

A *Introduction*

In discussing Chapter 2 of the *Criminal Code 1995* (Cth), Leader-Elliott labelled the Code as taking 'a Benthamite view of its provisions' in that 'Chapter 2 enables the legislature to reclaim from courts the authority to define the grounds of criminal liability'.[3] In the preface of a book on the Indian *Penal Code* (1860), Macaulay's Code was described as coming 'closest to Bentham's ambitious conception of comprehensive codification – one that was designed to displace the common law entirely and characterised by the principles of lucidity and accessibility of provisions, and consistency of expression and application'.[4]

Bentham was no admirer of either the common law or the judiciary. For Bentham, codification was a 'plan of the complete body of laws supposing it to be constructed *ab origine*'[5] thereby restraining the 'licentiousness of interpretation'[6] by the judiciary, which in turn resulted 'from the want of amplitude or discrimination in the views of the legislator'.[7] Indeed, in Bentham's mind the legislator 'would need no interpreter [but] would be himself his own and sole interpreter'.[8] However, Bentham was also alert to the need to make allowance for the alterations to the code without inconvenience, noting that 'no system of laws will ever, it is probable, be altogether perfect'.[9] The strength of a code based 'upon a regular and measured plan'[10] was that alterations 'would give less disturbance to it'.[11]

As Leader-Elliott observed, Bentham 'saw the relationship between legislature and courts as one of conflict'.[12] Bentham was seeking to achieve 'a degree of comprehension and steadiness … given to the views of the legislator as to render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary'.[13] Bentham's plan was that 'a man need but open the book in order to inform himself

3 Ian Leader-Elliott, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon' (2006) 9 *Buffalo Criminal Law Review* 391, 391.
4 W Chan, B Wright, and S Yeo, *Codification, Macaulay and the Indian Penal Code* (Ashgate, 2011) vii.
5 Jeremy Bentham, *Of Laws in General* (HLA Hart, ed, Athlone Press, 1970) 232.
6 Ibid.
7 Ibid 239.
8 Ibid 232-233.
9 Ibid 236.
10 Ibid.
11 Ibid.
12 Leader-Elliott, above n 3, 393.
13 Bentham, above n 5, 240.

what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency'.[14]

Chapter 2 of the *Criminal Code 1995* (Cth) is titled 'General Principles of Criminal Responsibility'. Section 2.1 defines the purpose of the Chapter as 'to codify the general principles of criminal responsibility under laws of the Commonwealth' going on to state that '[i]t contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created'. This article examines whether these general principles, which are more particularly defined in the *Criminal Code 1995* (Cth) than in the Griffith Code and represents the best effort in Australian criminal codes to be comprehensive, can be usefully expanded by including far more detail and nominating specific tests.

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.[15] However, this article contends that in reality the courts, with the concurrence of the legislature, are infusing the common law into Criminal Codes, despite the stated intention of codification being the replacement of 'all existing law' to become 'the sole source of the law on the particular topic'.[16] In support of the proper approach to code interpretation, there is the well known passage in *Brennan v The King* that the language of a code 'should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law'.[17] Furthermore, despite the alleged purpose of a Code being to define criminal responsibility in clear terms to a lay reader without recourse to cases,[18] the latest edition of *Carter's Criminal Law of Queensland* runs to 2,934 pages.[19] Academic textbook

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14 Ibid.

15 *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: E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 2008) 10. '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': at 15.10, 338.

16 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) [8.8].

17 (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

18 In his famous letter to the Attorney-General of Queensland, Griffith wrote of 'the honour to transmit herewith a Draft of a Code dealing with the *whole subject* of the Criminal Law of Queensland': Sir Samuel Griffith, Letter to the Queensland Attorney-General, 29 October 1897, iii (emphasis added).

19 MJ Shanahan et al, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 19th ed, 2013).

authors on Criminal Codes typically only discuss code interpretation by the courts in passing.[20] Simply labeling a criminal statute as a 'code' does not necessarily mean it is one as judged by accepted criteria for a criminal code.

B *Blackstone versus Bentham*

In contrast to Bentham's conflict model, Blackstone, a contemporary of Bentham's, whilst being 'aware of the potential for conflict between courts and legislature',[21] envisaged the general relationship as 'one of harmony'[22] as illustrated in the extract below from the *Commentaries* on statutory interpretation.

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law …[23]

Blackstone also identified the critically important issue of the inability of a legislature to foresee all types of cases that may fall within or outside a certain section of an Act.

> In general law all cases cannot be foreseen; or if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted.[24]

Here, Blackstone's focus was upon the practical need for judicial discretion to interpret legislation in the absence of an all seeing legislative eye for the future. However, in order for the legal system to function expeditiously, it was necessary for the courts to use that discretion in accordance with the 'signs' exhibited in the legislation. Effectively, Blackstone put his finger on the core of the curial-legislative partnership: the legislature cannot anticipate every case and is constrained by practical considerations such as time, whilst Australian courts accept the supremacy of Parliament and the need to interpret legislation in the spirit of its purpose. Nevertheless, this article argues that

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20 See for example RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 7th ed, 2008) 7, 8 [1.19 – 1.22] who discusses this important issue.

21 Richard Posner, 'Blackstone and Bentham' (1976) 19 *Journal of Law and Economics* 569, 586.

22 Ibid.

23 William Blackstone, *Commentaries on the Laws of England* (1768), Book I, 59, cited by Posner, above n 21, 586.

24 Ibid, Book III, 430-431, cited by Posner, above n 21, 586. Cf Bentham, above n 13.

modern element analysis combined with regular updating of codes can reduce the importation of the common law into codes to a minimum.

Underpinning Blackstone's harmonious view of the relationship between the judiciary and the legislature was the coupling of 'enthusiasm for common law rulemaking with scepticism about the use of statutes to effect legal reform'.[25] In a passage that follows an opinion that popular assemblies would find the work of beginning legislation afresh too Herculean a task, Blackstone attacks the notion that statute could fundamentally alter the common law. This argument would resonate in the century following Blackstone's death in 1780 as the debate over codification of criminal laws intensified.

> But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish settlements), will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead?[26]

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

> Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice …[27]

As Posner has noted, Blackstone's *Commentaries* portray 'the body of laws as the outcome of an evolutionary process … which had produced a complex, intricately reticulated system'.[28] In this, Blackstone opposed Bentham's advocacy of wholesale statutory reform of the criminal law by emphasising 'both the capacity of the common law to reform and the high incidence of legislative miscarriage'.[29] Posner classifies the *Commentaries* as 'a paean to the virtues of incrementalism'.[30] The merit of an approach that emphasises continuity over change has found support in the criticism of 'judicial solvents' by two members of the High Court.

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25 Posner, above n 21, 594.
26 Blackstone, above n 23, Book III, 267.
27 Blackstone, above n 23, Book III, 268.
28 Posner, above n 21, 596.
29 Ibid.
30 Ibid 604.

> Judges have no authority to invent legal doctrine that distorts or does not extend legal rules and principles … It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem.[31]

In this sense, Blackstone's construction of a 'concept of common law adjudication that gave judges latitude for substantive law reform',[32] has been replaced by the work of Law Reform Commissions operating on specific references from the legislature which is more in keeping with Bentham's view of the dominance of the legislator over the judiciary.

The fundamental difference in approach between Blackstone and Bentham is reflected in their study, or lack of it, into the operation of the system of English law. For Blackstone, his study of an actual functioning social system, 'revealed a system of enormous intricacy, having impressive survival and growth characteristics'.[33] By comparison, Bentham 'never studied systematically any social or legal institution'[34] rather '[h]e deduced optimal institutions from the greatest-happiness principle and then tried to work out the details of their implementation'.[35]

Bentham's lack of empirical analysis of English law leaves him open to the criticism that his 'no blank spaces' view of codification was insufficiently grounded in the practical realities of a court-based system of administering justice. When disciples of Bentham came to implement his grand design in draft codes in the 19th century (discussed in the next part of this article) such codes varied in their resemblance to a restatement of the common law. However, leaving aside the development of statute law, the question remains whether after such detailed study of the actual workings of the criminal law, as exemplified by the US *Model Penal Code* and the Australian *Model Criminal Code*, Bentham's model design for a code remains desirable and achievable.

One aspect of the achievability question concerns the nature of language. Posner argues that for Bentham the 'intellectual confusion [of the legislature] was rooted in linguistic imprecision'.[36] To this end, Bentham sought to purify language 'of ambiguity, to increase its

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31 *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

32 Posner, above n 21, 583.

33 Ibid 598.

34 Ibid.

35 Ibid. Bentham applied deductive reasoning to his code design by starting with the general and ending with the specific, whereas the approach of the bar and the bench is to apply inductive reasoning by moving from the specific to the general.

36 Ibid 595.

transparency'[37] which in turn is underpinned by Bentham's confidence in the power of human reasoning 'to decide any question of policy *de novo*, without benefit of authority, consensus, precedent, etc'.[38] Such an optimistic view of human intellect is not shared by Blackstone who considered 'that the individual human being's reasoning power is highly limited and should be exercised with humility and self-distrust'.[39] Blackstone's view sits strangely with his confidence in the exercise of judicial creativity and 'reliance on legal fictions as the agency of legal reform'.[40] The modern reliance on Law Reform Commissions is testimony to legislative preference for collective reasoning and the avoidance of a 'wilderness of single instances'.[41]

Given Blackstone was elected in 1758 to the first chair in English law at Oxford University, and that his reputation is based on his *Commentaries on the Laws of England* (published in four volumes between 1765 and 1769), it is hardly surprising that Blackstone should view judges as 'the depositaries of the laws, the living oracles'.[42] Bentham, on the other hand, disliked judge-made law because it was unwritten, uncertain and retrospective.[43] Such a divide has continued down the centuries as '[c]odification has always had as its object the exertion of control over the interpretive discretion of courts'.[44]

Mention also needs to be made of the disagreement between Blackstone and Bentham over 'natural' as opposed to 'positive' law. Hart has observed that Bentham's 'insistence that the foundations of a legal system are properly described in the morally neutral terms of a general habit of obedience'[45] signalled the ascent of the positivist tradition in

37 Ibid 602.

38 Ibid 603.

39 Ibid, citing Blackstone above n 23, Book I, 70.

40 Ibid, 584, citing Blackstone above n 23, Book I, 70.

41 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.'

42 Blackstone, above n 23, Book I, 69, cited by Posner, above n 21, 582.

43 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, 2001) 19.

44 Leader-Elliott, above n 3, 403, citing Dubber's description of the object of codification as an attempt to restrict the 'wriggling room [for] ingenious judges'. See Markus Dubber, *Criminal Law: Model Penal Code* (Foundation Press, 2002) 10.

45 HLA Hart, 'Bentham and the United States of America' (1976) 19 *Journal of Law and Economics* 547, 547.

England over 'consistency with divinely inspired and sanctioned natural law'[46] favoured by Blackstone as the criterion of law. Writing in 1976, Hart further suggested that 'utilitarianism is on the defensive, if not on the run, in the face of theories of justice which in many ways resemble the doctrine of the inalienable rights of man'.[47]

Ten years after Hart penned the above comments, Dworkin wrote his influential *Law's Empire*[48] in which he takes an interpretive, rather than a positivist, approach to law and morality consistent with a community's moral principles such as justice and fairness. For Dworkin, a judge correctly intervenes when preserving principles which uphold individual rights, but wrongly intervenes on matters of policy. Leaving aside the difficult distinction between policy and principle, it is not clear that in the 21st century utilitarianism remains on the defensive.

Since September 11, 2001 and the increasing threat of terrorism, governments have rejected the 'rights trump utility' argument, as evidenced in Australia by the *Anti-Terrorism Act (No 2) 2005* (Cth). This legislation, inter alia, allows for 'control orders' that allow for the overt close monitoring of terrorist suspects who pose a risk to the community; a police preventative detention regime that allows detention for up to 48 hours without charge; and a regime of stop, question, search and seize powers exercisable at airports and other Commonwealth places. Utility and positivism it would seem remain centre stage in the modern State's legal armoury.[49]

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

46 Posner, above n 21, 605.

47 Hart, above n 45, 547, citing Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974); and John Rawls, *A Theory of Justice* (Harvard University Press, 1971). Hart also cites Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057, in which Dworkin contends that for every hard case there is one right answer based on the community's obligation to treat its members with integrity.

48 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

49 For example, Richard Posner has dismissed as 'profoundly mistaken' concerns that national security measures taken in the wake of 9/11/2001 by the United States would erode civil liberties. Richard Posner, 'Security Versus Liberty' (December 2001) 288 *The Atlantic Monthly* 46 - 48, cited by David O'Brien, 'Reflections on Courts and Civil Liberties in Times of Crisis' (2003) 3 *Journal of the Institute of Justice and International Studies* 11, 11.

gained modern legitimacy and codification failed domestically'.[50] However, codification was deemed appropriate for British colonies and dominions especially those in crisis or where sovereignty was under challenge such as India and Canada.

> Codification enhanced the effectiveness and legitimacy of British rule in India where the Mutiny [1857] helped ensure the Indian Penal Code's enactment [1860]. In Canada, concerns about the effectiveness of the new Dominion's sovereignty, the challenges of post-colonial nation-building, and the events of the 1880s [1885 North-West Rebellion] made codification a legislative priority [1892].[51]

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

> Few law reformers have enjoyed comparable advantages. He was successively Attorney- General, Premier, and Chief Justice of the Supreme Court of Queensland. The Code was drafted during his term as Chief Justice. He presided over the Royal Commission that scrutinised its provisions and as Acting Governor of the State exercised the Royal Prerogative to give it legal effect. Subsequently, as Chief Justice of the High Court of Australia, he presided over the first appellate decisions on the meaning of its provisions.[52]

By comparison with the position in England, 'Stephen's cautious approach began with a treatise, *A General View of the Criminal Law of England* (1863), moved to a digest, *A Digest of the Criminal Law* (1877), and then on to a narrow code that retained common law' [1880].[53] Wright has described Stephen as 'favouring pragmatism to conceptual abstraction, and [who] saw judicial discretion as inevitable and desirable'.[54] Yet, even this modest code, in which 'defences were left to the common law and a minimal general part did not attempt to define liability',[55] failed to pass into law largely because of judicial

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50 Barry Wright, 'Renovate or Rebuild? Treatises, Digests and Criminal Law Codification', in Markus Dubber and Angela Fernandez (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart, 2012) 181, 200. However, as Wright notes (185) Bentham's criticism was that 'Blackstone's defence of judicial power, based on the incredible claim that judges exercised little discretion around common law rules, and his neglect and suspicion of legislation were nonsense', citing *inter alia* J.H. Langbein, 'Blackstone on Judging' in W. Prest (ed), *Blackstone and His Commentaries: Biography, Law, History* (Oxford, Hart Publishing, 2009), 65.

51 Ibid.

52 Leader-Elliott, above n 3, 394-395, footnote 12. At the time Griffith's Code was enacted in 1899 it did not dominate the news, being overshadowed by the Boer War and Federation.

53 Wright, above n 50, 201.

54 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, 43.

55 Ibid.

opposition led by Lord Chief Justice Cockburn and the fall of the Disraeli conservative government in 1880. As Smith has observed 'the centrepiece of explicit judicial antagonism, as before, was the expectation that codification would remove the valuable flexibility of the common law'.[56] In this regard, little has changed since the defeat of the Stephen code in 1880. The Law Commission of England and Wales began work on a criminal code in 1968 but 'did not come nearly as close to success [as Stephen's code], its 1989 draft languished as a low legislative priority and was abandoned in 2008'.[57]

The reasons why some criminal codes were adopted and others rejected within the English common law tradition are more fully explored in later parts. The purpose of the analysis is to support the position taken in this article of Bentham's continuing relevance to criminal code design.

In concluding this section on Blackstone and Bentham, it is instructive to examine Wright's conclusion on the intertwining between the two legal schools of thought.

> Legal scholars allied to the common law continued Blackstone's renovation, developed the academic discipline and the positivist heirs to Bentham wanted in on this action … Codes and treatises were important nineteenth-century forms of legal literature in the British common-law world, and while they may have been at odds at inception, a complex and dynamic relationship developed between them.[58]

For Australia, with its mosaic of code and common law jurisdictions, the reference above to a complex and dynamic relationship is particularly pertinent, especially with a High Court seeking to promote consistency where possible. While England[59] and Scotland[60] may be lost causes

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56 KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 1988) 77.

57 Wright, above n 50, 196.

58 Ibid 200-201.

59 'In the Annual Report of the Law Commission for England and Wales for 2010, it was formally announced that what was once one of its core aspirations was to be dropped, namely the preparation of a criminal code … [W]e must reconcile ourselves for the indefinite future to the current jumble of statutes, delegated legislation, and case law that constitutes English substantive criminal law … What will not happen is any attempt to structure and systematise this body of law on a holistic basis. That can only be done by creating a criminal code.' A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 4th ed, 2010) Preface.

60 *A Draft Criminal Code for Scotland with Commentary* (2003) has languished in favour of a continuing preference for the flexibility of the common law. See Timothy Jones, 'Towards a Good and Complete Criminal Code for Scotland' (2005) 68(3) *Modern Law Review* 448.

as far as codification is concerned (the jury is still out on Ireland[61] although history is against a common law country adopting a criminal code outside of the 19th century), the same does not apply to Australia with the *Criminal Code 1995* (Cth) applying to all federal offences. Furthermore, Chapter 2 was the product of the *Model Criminal Code* and serves as a benchmark for all other Australian jurisdictions contemplating criminal law reform.

Consequently, the question being posed is whether Bentham's time has finally come in so far as the type of comprehensive code he envisaged is now possible with the development of criminal law theory to match his grand design. The irony in Australia is that reference to code States and common law States masks the fact that because the original *Griffith Code* in Queensland was essentially a restatement of the common law, only the *Criminal Code 1995* (Cth) can be said to resemble a code in the generally understood wider meaning of the term. This means that an opportunity exists to take codes to a higher level of comprehensiveness using Chapter 2 of the *Criminal Code 1995* (Cth) as the starting point to analyse whether Bentham's 'no blank spaces' is achievable and desirable - in effect, whether in Australia in the 21st century Bentham might finally triumph over his 18th century nemesis Blackstone. Leader-Elliott has suggested that Chapter 2 holds 'the promise, and the threat, of more transparent communication between legislature and courts'.[62]

C *Ambiguities of Language and Fixing the Law at One Point in Time*

1 *Internal Consistency versus Ambiguities of Language*

Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient with the practice that 'inevitable ambiguities of language make this impossible'.[63] This article contends that such a view is valid for the Griffith Code, but less so for Chapter 2 of the *Criminal Code 1995* (Cth), and could potentially be largely overcome by more detailed drafting. Fisse continues by making the significant point that codification tends 'to fix the content of the law as at one point in time'[64] and without regular amendments 'obliges the judiciary either to do increasing violence to its literal terms or else

61 Section 167 of the *Criminal Justice Act 2006* (Ireland) established the Criminal Law Codification Advisory Committee, with s 168(1) stating that 'the function of the Committee shall be to oversee the development of a programme for the codification of the criminal law'.

62 Leader-Elliott, above n 3, 404.

63 Brent Fisse, *Criminal Law* (The Law Book Company Limited, 1990) 4.

64 Ibid 5.

abandon progress'.[65] Fisse also makes the observation in discussing the need for codes to be regularly revised 'that in this matter the Australian code States have been neglectful, for none of the three codes has been properly revised since inception'.[66] Australian code experience would therefore strongly suggest that Bentham was prescient in anticipating the need for a criminal code to be regularly updated in order to retain internal consistency and minimise judicial interpretation.

The High Court of Australia has recently referred to this problem in *PGA v The Queen*[67] in stating that '[t]he attempted abstraction and statement of doctrine in provisions of a code by means of propositions which do not represent generalised deductions from particular instances in the case law occasions difficulty when the common law later is shown to be to different effect'.[68]

Bentham not only foresaw the need for amendments but correctly predicted the dangers of *ad hoc* alterations to a carefully constructed code. Bentham referred to one criterion for a code depending 'upon the facility with which the several parts of it may be altered and repaired, taken to pieces, and put together'.[69] Bentham could have been describing the above situation in Australia as identified by Fisse above:

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

Bentham was describing individual criminal law statutes in 18th century England. However, as this article contends that there is essentially little difference between code and non-code states in Australia, Bentham's observation is equally pertinent to the mosaic of a code interspersed with the common law. For example, Gani et al has differentiated

65 Ibid, citing inter alia The Queen v *Kusu* [1981] Qd R 136 (limited relevance of evidence of intoxication to deny mental element of offence under s 28 *Criminal Code* (Qld); cf *O'Connor* (1980) 146 CLR 64); *Stuart v The Queen* (1974) 134 CLR 426 (objective test of liability for complicity in relation to probable consequences of enterprises; cf *Johns v The Queen* (1980) 143 CLR 108).

66 Ibid 5-6. The three code States referred to are Queensland, Western Australia and Tasmania.

67 [2012] HCA 21.

68 *PGA v The Queen* [2012] HCA 21 [5] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) citing *Murray v The Queen* (2002) 211 CLR 193, 206-207 [40]; *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43, 53-54 [30] - [31].

69 Bentham, above n 5, 236.

70 Ibid.

between (a) codification as per the *Griffith Code* [*Criminal Code 1899* (Qld)] or the *Model Criminal Code* which the learned authors define as a 'complete statement of the law[71] on the particular issue with which it deals'[72] and (b) codification of an 'area of law within the context of a larger statute'[73] for instance by 'covering the field on a discrete subject'[74] as exemplified by the law of self-defence within the *Crimes Act 1900* (NSW). Matters are further muddied when the common law is specifically excluded from one area of the criminal law but not others within the same statute, as exemplified by s 428H of the *Crimes Act 1900* (NSW) which states that: 'The common law relating to the effect of intoxication on criminal liability is abolished.'

There is a certain irony that the adoption of a criminal code by a State of Australia leaves many areas of the law frozen in time and form. As Taylor 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 the last 100 years and no doubt that would have happened in Victoria too.'[75] Taylor argues the same outcome would have applied to particular offences, and refers to the law of theft as an example. On the one hand, had the Victorian Code passed into law it would have simplified the common law it replaced, whilst '[o]n the other hand, it is unlikely that Victoria would have adopted a version of the English *Theft Act 1968*'.[76]

As to ambiguities of language, Posner has suggested that for Bentham language 'is valuable in proportion as it conveys precisely and unambiguously the ideas that the speaker or writer desires to communicate'.[77] In this context, it will be recalled that in *Widgee Shire Council v Bonney*[78] Griffith CJ famously observed that 'under the criminal law of Queensland, as defined in the *Criminal Code*, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which was the subject of much discussion'. However, the replacement test in s 23 of whether the act or omission occurred

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71 Citing here Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Butterworths, 5th ed, 2001) [8.7], [1.20].

72 Miriam Gani, S Corcoran and S Bottomley 'Codifying the Criminal Law: Implications for Interpretation' (2005) 29 *Criminal Law Journal* 264, 267.

73 Ibid.

74 Ibid.

75 Greg Taylor, 'The Victorian Criminal Code' (2004) 29 *University of Queensland Law Journal* 170, 202.

76 Ibid, citing *Crimes Act 1958* (Vic) pt 1 div 2.

77 Posner, above n 21, 602.

78 (1907) 4 CLR 997, 981.

independently of the person's will or is an event that occurs by accident, described by Goode in terms of 'the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood'.[79] Furthermore, as Goode has noted 'whether or not the terms "actus reus" and "mens rea have been used in the *Griffith Code*, equivalent concepts have been widely employed in a variety of guises'.[80]

In contrast, Chapter 2 of the *Criminal Code 1995* (Cth) which deals with the general principles of criminal responsibility, 'is a significant departure from the Australian common law of crimes and existing Australian criminal codes'.[81] Leader-Elliott has argued, with some justification at least for offences, that as opposed to the general provisions of the *Griffith Cod*e and its descendants,[82] 'Chapter 2 provides a comprehensive articulation of the elements of criminal liability'.[83] More significantly in terms of the central theme of this article, Chapter 2 'is a legislative formulary that goes much further than its predecessors in enabling parliament to avoid ambiguity in stating the relationship between the physical and fault elements of offences'.[84] Leader-Elliott considers this a predictable outcome given the developments in criminal law theory since Griffith sought to codify the general principles of criminal responsibility at the end of the nineteenth century, with Chapter 2 being 'an adaptation of article 2 of the American Model Penal Code'.[85]

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

> The O'Regan review was scarcely fundamental. It was in large part a tidying up and modernising exercise which did not examine the foundational structure of the Griffith Code in any meaningful way. Not one of the O'Regan recommendations was enacted.[86]

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79 MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 160.

80 Ibid 159.

81 Leader-Elliott, above n 3, 396.

82 See, above n 1. The Griffith Code refers to the *Criminal Code 1899* (Qld), and the descendants are *the Criminal Code 1913* (WA), *Criminal Code 1924* (Tas), and the *Criminal Code 1983* (NT).

83 Leader-Elliott, above n 3, 396.

84 Ibid.

85 Ibid, 397.

86 Goode, above n 79, 165.

What followed was a redraft of the entire criminal code enacted as the *Criminal Code 1995* (Qld) which 'paid no attention to the MCCOC project'.[87] A change of State Government meant that the 1995 Code failed to come into operation. A further review, which also ignored the MCCOC reports, produced the *Criminal Law Amendment Act 1997* (Qld). Goode concludes that '[t]hree superficial but supposedly major reviews of a *Criminal Code* … produced what can only be described as a mouse'.[88]

The above short history of recent failed attempts to fundamentally reform the *Criminal Code 1899* (Qld) and to ignore developments in criminal law theory in America and Australia, is testimony to the entrenched support in the legal profession in Queensland for the comfort of the status quo. One can juxtapose the judicial opposition to the introduction of codification in the 19th century with judicial opposition to reforming a code over a hundred years old. For example, Goode has highlighted the critical remarks of Justice Thomas of the Supreme Court of Queensland in relation to the physical and fault elements adopted by the MCCOC and incorporated into Chapter 2 of the *Criminal Code 1995* (Cth) as 'mere unreasoned abuse'.[89]

Essentially, given that Chapter 2 adopts recklessness as the underlying fault element in the absence of a legislative intention to the contrary, Leader-Elliott summarises Chapter 2 'as nothing more than a formalisation of legislative grammar that provides an implicit manual of instructions for legislators'.[90] Thus, the primary audience is neither the courts nor the general public, but the legislature. The implicit strength of Chapter 2 is that it 'equips the legislator with an array of techniques to compel courts to impose strict or absolute liability, to require defendants in criminal cases to prove their innocence or to abrogate other fundamental presumptions and principles of the common law'.[91] The net result of an increase in clarity flowing from the provisions of Chapter 2 is 'a more democratically responsive relationship between legislature, electorate, and courts',[92] which Bentham would have readily endorsed.

Leader-Elliott 'accepts the spirit of Bentham's insistence that the object of codification is to enable the legislature to express its intentions in

87 Ibid.

88 Ibid.

89 Ibid 159, citing 'Model Criminal Code, Judge Fears Potential for Disaster' (June 1995) *Australian Lawyer* 12-13.

90 Leader-Elliott, above n 3, 399.

91 Ibid 400. Leader-Elliott cites the codification of the law against the illicit manufacture and trafficking of controlled drugs in Ch 9, Pt 9.1 of the *Criminal Code 1995* (Cth) as providing numerous examples of these legislative techniques in action.

92 Ibid 402.

a way that reduces the need or temptation for courts to engage in … "licentious" interpretation of criminal statutes'.[93] A similarly critical view is taken by Robinson regarding 'the improper manipulation of legislative handiwork in judicial interpretive practice'.[94]

Further support can be found in the remarks of a former Chief Justice of Australia commenting on the history of the general principles of the *Criminal Code 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'.[95] For example, Colvin and McKechnie[96] argue that '[i]t is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions of the [Queensland and Western Australia] Codes'. However, the learned authors noted that the High Court in *Callaghan v R*[97] 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'.[98]

Nevertheless, the Queensland legislature would appear to be comfortable with such a liberal use of common law doctrine, which in turn suggests that Bentham's view that the relationship between the legislature and the judiciary was one of conflict is misplaced in modern times. The relationship is better described as one of power-sharing. For example, s 304 of the *Criminal Code* (Qld), which covers the partial defence to murder of provocation, has been judicially interpreted in line with the development of the common law. Thus, in *Pollock v The Queen*,[99] the High Court stated that '[i]n interpreting the language

93 Ibid 393.

94 Ibid citing Paul H Robinson, *Structure and Function in Criminal Law* (Oxford University Press, 1997) 50. Inadequate definition of the conduct element in the American *Model Penal Code* results, in Robinson's view, in opportunities for courts 'to manipulate improperly a defendant's liability by altering the content of the categories "conduct", "result", and "circumstance", thereby altering the applicable culpability requirement'.

95 Rt Hon Sir Harry Gibbs, 'Queensland Criminal Code: From Italy to Zanzibar' (2003) 77 *Australian Law Journal* 232, 236. Wright, above n 54, 54, notes that Burbidge and Sedgewick, the drafters of the Canadian Criminal Code (1892) 'agreed with Stephen's view of the impossibility of excluding the common law'.

96 Colvin and McKechnie, above n 15, 64 [4.34].

97 (1952) 87 CLR 115.

98 Colvin and McKechnie, above n 96, citing inter alia *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

99 [2010] HCA 35.

of s 304 it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment'.[100]

Section 304 was substantially amended in 2011.[101] The amendments to s 304 leave the original section intact as s 304(1). The explanatory notes merely assume an objective test based on past judicial interpretation of developments in the common law being read into s 304, rather than specifically incorporating an objective test. The effect of the amendments is to restrict the partial defence in two ways: firstly, by limiting its scope through the exclusion of provocation based on words alone other than in exceptional circumstances, and for domestic relationships where the deceased sought to end or change the relationship; and, secondly, by reversing the onus of proof. Thus, the elements of the defence are unchanged in s 304(1) as Griffith's original language is retained.

This would clearly suggest that the legislature was sufficiently satisfied with the judicial interpretation of the original s 304 to deem amendment unnecessary, leading to the conclusion that the relationship between the judiciary and the legislature is not one of conflict today, contrary to Bentham's view of the legal world in the late 18th and early 19th centuries. Although, as Leader-Elliott has pointed out, in the United States such academic writers as Robinson have identified 'the breakdown of communication between legislature and courts in jurisdictions that have adopted versions of the US *Model Penal Code*'.[102]

Then, again, on closer examination, Fisse's point concerning Australian code States being neglectful of revising their codes may be closer to the mark. Arguably, the 'satisfaction' of the legislature with past judicial interpretation of s 304 is in reality inertia, with the 2011 amendments representing a minimalist position. Certainly, when the judiciary has drawn the attention of the Queensland legislature to perceived deficiencies in the *Criminal Code* (Qld), these pleas have been largely ignored.

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100 *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ). Cf Andrew Hemming, 'Impermissibly Importing the Common Law into Criminal Codes: *Pollock v The Queen*' (2011) 18 *James Cook University Law Review* 113.

101 See *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

102 Leader-Elliott, above n 3, 451, footnote 172, citing Robinson, above n 94, 41: 'Dulled by generations of offence analysis, courts ignore general code provisions that, together with offence definitions, define every objective and culpability element required for liability. They continue to define unstated culpability requirements according to their own view of public policy interests. The result is that in nearly every criminal case in the United States the statement of the law defining the offence charged suffers a significant risk of inaccuracy.'

For example, the self-defence provisions in the *Criminal Code* (Qld) are unique in Australia in distinguishing between self-defence against an unprovoked assault (s 271) and self-defence against a provoked attack (s 272). Where a disputed factual scenario involves a sequence of events the judge may be required to direct the jury on both of the above self-defence sections with attendant complexities and difficulties. In *R v Young*,[103] McPherson JA noted that '[i]t is impossible to avoid the impression that these provisions, which were copied from the English draft Bill of 1880, are in urgent need of simplification'. The pertinence of McPherson JA's remarks was reinforced two years later in *R v Wilmot*[104] where on appeal a conviction for murder was set aside and a re-trial ordered based on the trial judge's misdirection to the jury as to self-defence and whether the case fell to be decided under s 271 or s 272.

In the eight years that have passed since McPherson JA made his *obiter* observation, no legislative effort has been made to address the complexities of self-defence in Queensland. His Honour was adding judicial weight to previous academic criticism of the self-defence provisions. For as, Kift, writing in 2001 had already pointed out, '[i]n the past decade in Queensland, there have been no less than four substantial reviews of the *Criminal Code 1899* (Qld), none of which succeeded in forcing amendment of the substantive law of self-defence'.[105] Thus, Fisse's 1990 criticism of code neglect by the legislature remains valid and underscores Bentham's foresight in calling for regular alterations to the penal code. Of course, Bentham was referring to updating a code that commenced as a true code and not merely as a restatement of the common law. Herein, may lie the key to the longevity of the Griffith Code and the legal profession's attachment (borne of familiarity) to such a 'Clayton's' Code whose name belies its content.

2 *Legislative Inertia*

The legislative inertia factor, following the major effort of adopting a criminal code, is relevant from both a broad and a specific impact perspective on code development in Australia. Starting with the broad perspective, at the time Bentham was writing about codification, a major debate was unfolding in Germany as to the merits of codification. The two main protagonists were Professor Thibaut of the University of Heidelberg, the leader of the philosophical school that supported a natural law position based on moderate rationalism, and Professor von Savigny of the University of Berlin, the leader of the historical

103 [2004] QCA 84 [15].
104 [2006] QCA 91.
105 Sally Kift, 'Contemporary Comment' (2001) 25 *Criminal Law Journal* 28, 28.

school of jurisprudence. In 1814, Thibaut published a plan for a single unifying code[106] which 'assumed that all that was necessary for successful codification was to set up a drafting committee of jurists and practitioners, and for the sovereign to enact the draft it produced'.[107]

Savigny's response[108] was 'that a people's law cannot be made by a drafting committee, but must grow from a people's experience and character'.[109] Savigny particularly addressed the difficulty of a code containing by anticipation the capacity to decide all types of future cases:

> This has been often conceived, as if it were possible and advantageous to obtain, by experience, a perfect knowledge of the particular cases, and then to decide each by a corresponding provision of the code. But whoever has considered law-cases attentively, will see at a glance that this undertaking must fail, because there are positively no limits to the varieties of actual combinations of circumstances.[110]

Savigny was essentially expounding the virtues of the organic common law, contending that '[l]aw is not the product of an autonomous craft but only one aspect of social life',[111] an argument later taken up by opponents of codification in England. For present purposes, the significance of the Thibaut/Savigny debate for Australian codes (here the Griffith Codes) is that the sparsely written sections of Australian codes, which largely simply restated the common law of the 19th century,[112] in the absence of legislative intervention to update the codes, have necessitated judicial invention. Such judicial invention has led to the insertion into the codes

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106 A Thibaut, 'Uber die Notwendigkeit eines allgemeinen burgerlichen Rechts fur Deutschland' in *Civilistische Abhandlungen* [English – '*On the Need for a Civil Code for Germany*'] (1814) 404 .

107 Julius Stone, *Social Dimensions of Law and Justice* (Maitland Publications Pty Ltd, Sydney, 1966) 94.

108 K. von Savigny, *Vom Beruf unsrer Zeit fur Gesetzgebung und Rechtswissenchaft* [English – '*Of the Vocation of Our Age for Legislation and Jurisprudence*'] (1814).

109 Stone, above n 107, 94.

110 K von Savigny, '*Of the Vocation of Our Age for Legislation and Jurisprudence*', translated by Abraham Hayward (originally published Littlewood and Co, London 1831, this edition The Lawbook Exchange, Ltd, New Jersey, 2002) 38. Blackstone, above n 24, had made the same point nearly fifty years earlier.

111 Stone, above n 107, 95. Stone suggests that '[f]rom the transient debate with Thibaut emerged a formulation, admittedly a crude one, of sociological jurisprudence'.

112 Leader-Elliott, above n 3, 395, has observed in relation to Griffith's Queensland Code that: 'The central provisions of his draft were taken from the Italian Criminal Code [citing 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)], though Griffith believed that his translation expressed the common law.' For a generous appreciation of Griffith's Code, see Wright, above n 54, 39, who suggests that 'unlike the Canadian code, Griffith's effort reflects a comprehensive conception of codification originally promoted by Jeremy Bentham'. However, Wright does acknowledge that 'the vast majority of provisions were founded on English criminal law and colonial amendments to that law' (57).

of the organic development of the common law. For example, in *Pollock v The Queen*, the High Court endorsed Queensland Court of Appeal authority on s 304 (Provocation), whereby '[j]udges of the Supreme Court of Queensland have for many years interpreted the provision by reference to the common law'.[113]

Schloenhardt has described the *Criminal Code 1899* (Qld) as reflecting 'very strongly Australia's common law tradition',[114] going on to state that 'Griffith's principal intention was to reproduce (not change) the common law by way of codification'.[115] Griffith himself described codification as merely meaning 'the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed',[116] and that he had 'endeavoured to include all the rules of the unwritten common law which are relevant to the question of criminal responsibility'.[117]

Furthermore, the extensive use of the underlying fault element of negligence in the Griffith Code, with its benchmark of the ordinary person, reflects changing community standards.[118] Consequently, the historical or sociological school of jurisprudence represented by Savigny, is accommodated within Australian codes by virtue of the dependence of these codes on judicial interpretation which is in turn informed by the development of the common law.[119] Such a position can be supported by the observation of Colvin and McKechnie that

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113 *Pollock v The Queen* [2010] HCA 35 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Herlihy* [1956] St R Qd 18; *R v Young* [1957] St R Qd 599; *R v Johnson* [1964] Qd R 1; *R v Callope* [1965] Qd R 456; *Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] QCA 81; [2001] 1 Qd R 56.

114 Andreas Schloenhardt, *Queensland Criminal Law* (Oxford, 2011) vi.

115 Ibid, 30.

116 Sir Samuel Griffith, above n 18, v.

117 Ibid, iii.

118 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, *Review of Aspects of the Criminal Code of the Northern Territory*, March 2004, 41.

119 Ehrlich has tempered Savigny's fear for the development of the common law by pointing out that codes have been judicially adjusted by the pressure of social change. 'The development of the living social law as well as of the art and science of drawing up legal documents and of judicial decision continues the even tenor of its way … As soon as life has caught up with the Code, juristic science begins to function with renewed vigour.': Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1936) 433 – 434.

'[t]he jurisprudential difference between the common law and the code traditions is perhaps best regarded as one of emphasis rather than of kind'.[120] The learned authors point out that in common law jurisdictions while the criminal law is essentially statute based,[121] this legislation 'leaves many gaps to be filled by the invocation of common law rules and principles'.[122] At the same time, neither are Australian criminal codes exhaustive or comprehensive as 'some gaps still remain which have to be filled by reference to the common law'[123] compounded by 'the inherent vagueness of statutory language [which] presents problems of interpretation, in the resolution of which reference is often made to the common law'.[124]

To illustrate the point that the fault line between code and statute based jurisdictions is largely illusory in terms of the need for judicial interpretation and the invocation of the common law, two High Court cases can be examined. The first case is *Stevens v The Queen*,[125] where the main bone of contention was the trial judge's decision not to direct the jury on the availability of accident under s 23(1)(b) of the *Criminal Code 1899* (Qld). In the second case, *CTM v The Queen*,[126] the issue rested on the availability of the defence of mistake of fact under the *Crimes Act 1900* (NSW).

In *Stevens v The Queen*,[127] a murder case hinging on the intention of the defendant who claimed he was trying to prevent the deceased from committing suicide when he seized the gun, the High Court split 3-2 as to whether the jury should have been directed to an event which occurred by accident under the then s 23(1)(b) of the *Criminal Code 1899* (Qld).[128] The majority, comprising McHugh, Kirby and Callinan JJ, in separate judgments, held a direction under s 23 was necessary, and therefore an objective test for accident was appropriate in that an ordinary person could not reasonably have foreseen it (as opposed to

120 Colvin and McKechnie, above n 15, 7 [1.12].

121 See *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic) and *Criminal Law Consolidation Act 1935* (SA).

122 Colvin and McKechnie, above n 15, 7 [1.12].

123 Ibid.

124 Ibid.

125 (2005) 227 CLR 319.

126 *CTM v The Queen* (2008) 236 CLR 440.

127 (2005) 227 CLR 319.

128 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 subjective test for intention[129] to kill given the Crown's case that there was no mishap). Thus, under the test for s 23 in the context of a murder trial, the majority of the High Court appears to move seamlessly between subjective and objective tests.

By contrast, the minority, Gleeson CJ and Heydon J, whilst accepting the objective test under *R v Van Den Bemd*[130] when s 23 was relevant, cited *Murray v The Queen*[131] as framing the question for decision whether s 23 was engaged as whether 'there [was] an issue for the jury about whether there was an unwilled act, or an event occurring by accident, that was an issue separate from the issue about the intention with which the appellant acted'.[132] 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.[133]

This two step process between the subjective test for murder and the objective test for accident, when s 23 is relevant, would appear to be inevitable given that s 23 was drafted before the House of Lords decision in *Woolmington v DPP*.[134] 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 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'.[135] The failure to substantively amend s 23, the principal

129 In Queensland, under s 302(1)(a) *Criminal Code* (Qld) a person is liable for murder where they unlawfully kill another with intent to kill or with intent to cause grievous bodily harm. The *Criminal Code* (Qld) does not define the word 'intention'. In *Bruce Henry Willmot* (1985) 18 A Crim R 42, 46, Connolly J was of the view that there is 'no ambiguity about the expression ['intent'] as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language'. So much for no recourse to *mens rea* in the Griffith Code: see *Widgee Shire Council v Bonney* (1907) 4 CLR 997, 981 (Griffith CJ), above n 78; Goode, above n 79.

130 (1994) 179 CLR 137. The test is whether death was such an unlikely consequence of a willed act of the accused that an ordinary person could not reasonably have foreseen it.

131 (2002) 211 CLR 193, 207-208 [41] (Gummow and Hayne JJ).

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

133 Ibid.

134 [1935] AC 462 (HL).

135 (2004) 219 CLR 43, 54 [31]. Gummow and Heydon JJ exampled *Woolmington v DPP* regarding 'the placement of the burden respecting issues of accident or provocation in the trial of a murder indictment', citing *R v Mullen* (1938) 59 CLR 124, 136, where Dixon J stated that: '[O]nce the jury are satisfied beyond reasonable doubt that the prisoner brought about the deceased's death, then that he did so accidentally is a defence or 'excuse' which must be made out to their reasonable satisfaction. The decision of the House of Lords in *Woolmington v. Director of Public Prosecutions* declares that at common law such a rule or principle no longer exists.'

section dealing with criminal responsibility in the Griffith Code, since the decision in *Woolmington* was handed down in 1935, is further testimony to judges filling in the gaps in the face of legislative inertia. Bentham would be rightly appalled.

The difficulties of statutory interpretation in the face of legislative silence are further exemplified by the case of *CTM v The Queen*.[136] The High Court was required to consider s 66C(3) of the *Crimes Act 1900* (NSW) which deals with the offence of sexual intercourse with a minor. Before the Act was amended in 2003 it provided a defence to heterosexual acts with under-age people if the offender reasonably believed that the child to whom the charge related was aged at least 16, and provided that the child was at least 14 and had consented to the sexual activity. After the 2003 amendments, the Act said nothing expressly about mistake as to age. The majority held that the defence of honest and reasonable mistake applied to s 66C, in applying the reasoning of Cave J in *R v Tolson*[137] concerning the relationship between the courts and Parliament. The High Court majority stated that the common law principle of mistake of fact reflected fundamental values of criminal responsibility and '[t]he courts should expect that, if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication'.[138] By contrast, Heydon J who dissented on this point, following an extensive history of the relevant legislation, concluded that the pattern 'points strongly towards reading the legislation creating the offences of sexual intercourse below specified ages as excluding the *Proudman v Dayman*[139] principle'.[140]

Thus, effectively, the majority asserted that the common law was embedded in the *Crimes Act 1900* (NSW) unless specifically excluded

136 *CTM v The Queen* (2008) 236 CLR 440.

137 (1889) 23 QBD 168, 182: 'But such a result [the enactment by the legislature ousting the defence of reasonable mistake] seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.'

138 *CTM v The Queen* (2008) 236 CLR 440, 456 (Gleeson CJ, Gummow, Crennan and Kiefel JJ). The majority [at 445] also pointed to s 24 Mistake of fact *Criminal Code 1899* (Qld) and Dixon J's comment in *Thomas v The King* 59 CLR 279, 305-306 that s 24 reflected the common law with complete accuracy.

139 (1941) 67 CLR 536.

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

by Parliament. The same observation can be made for the *Griffith Code* given the sparse language adopted, the wholesale importation of Stephen's Draft English Code of 1880,[141] and Griffith's intention to reproduce the common law.[142]

Section 24(1) of the Criminal Code 1899 (Qld) deals with mistake of fact as follows:

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

Sitting behind these sparse lines is a body of common law contained in numerous cases invisible to the lay reader. The High Court's concerns over the abrogation of fundamental principles of criminal responsibility expressed above in *CTM v The Que*en in the context of the *Crimes Act (1900)* NSW are equally applicable to s 24(1) of the *Criminal Code 1899* (Qld). The need for the Parliament to make its intentions plain is even more pressing in the case of a Code, and goes to the heart of Bentham's notion of a Code.

Waller and Williams have argued that '[o]nce the Code is enacted, the law must so to speak, stand still until Parliament decides to vary it',[143] contending that the legislature is more likely 'to rectify what it regards as an error in the course of common law development than modify the provisions of a Code to which it has given birth after much effort'.[144] There is some substance to the claim, although there are two important qualifications to be made. First, the High Court favours a meaning 'which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions [and] as between such jurisdictions and the general principle in the common law obtaining elsewhere'.[145] Secondly, the courts retain the authority to interpret statutory provisions. For example, in construing s 271(2) of the *Criminal Code* (Qld), which deals with self-defence against an unprovoked attack, the High Court in *Marvey v The Queen*[146] endorsed previous Queensland Court of Appeal

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141 Wright, above n 54, 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.'

142 Schloenhardt, above n 114 and n 115.

143 Louis Waller and CR Williams, *Criminal Law: Texts and Cases* (Lexis Nexus, Sydney, 2009) [1.39].

144 Ibid.

145 *The Queen v Barlow* (1997) 188 CLR 1, 32 (Kirby J).

146 (1977) 138 CLR 645.

authority[147] that 'made the law in this State the same as the common law declared in *Zecevic v DPP (Vic)*'.[148]

Thus, the broad impact of legislative inertia in code States in Australia is that the Thibaut/Savigny debate has been overtaken by events, because legislative reluctance to regularly update codes has meant that the organic development of the common law has infused code development and interpretation. Bentham would be disappointed to learn that effectively the common law operates in tandem with codes in Australia, and that the legislature has failed to stamp an exclusive imprint on the codes. The Thibaut/Savigny debate was premised on the assumption that a code would be rules based, whereas the reality for Australia code States is that broad principles drawn from the common law are enshrined in the codes, with the judiciary filling in the 'gaps' whilst a passive legislature appears to only intervene when prodded by specific public concerns and media campaigns.[149] Taylor has colourfully described the political system in these terms:

> The system we have rewards politicians for winning votes. It does not reward them for getting through codifications, but for enacting popular measures that interest the general public and make a difference to everyday life outside the courts.[150]

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

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147 *R v Muratovic* [1967] Qd R 15.

148 *R v Wilmot* [2006] QCA 91 [33] (Jerrard JA) citing *Zecevic v DPP (Vic)* (1987) 162 CLR 645. In *R v Muratovic* [1967] Qd R 15, the Queensland Court of Appeal had split 2 to 1 on the meaning of the expression 'otherwise preserve the person defended from death or grevious bodily harm' in s 271(2). Hart J, who was in dissent, listed four possible constructions of 'otherwise' (28-29). The selection of one of those alternatives by the majority happened to be consistent with the common law declared twenty years later in *Zecevic v DPP (Vic)* (1987) 162 CLR 645, which in turn had overturned previous High Court of Australia authority in *Viro v The Queen* (1987) 162 CLR 645.

149 Schloenhardt, above n 114, vi, has a more charitable view: 'Since the enactment of the *Criminal Code* (Qld) in 1899 the Code has seen more than 140 amendments and has changed in many aspects and facets – often leading the way in codification and law reform, but sometimes falling behind developments elsewhere.'

150 Taylor, above n 75, 203.

Turning then to the specific impact of legislative inertia, such a passive or deferential approach by the legislature, both to the 'historic' code and to judicial decisions embedded by precedent, has led to an 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.[151]

In Australia, the legislative response to a 'crime du jour' can take different paths depending on the code jurisdiction, as exemplified by the public concerns over the so-called 'one-punch' assaults causing death. Western Australia has addressed the issue by introducing s 281 (Unlawful assault causing death) into the *Criminal Code 1913* (WA) in 2008,[152] which requires neither intention nor foresight (effectively a strict liability offence), without the legislature actually specifying strict liability as would be the case under the *Criminal Code 1995* (Cth), yet carries a possible ten year prison term. Section 281 is an alternative offence to both murder (s 279) and manslaughter (s 280). The Attorney-General described the new offence, in terms Bentham would have endorsed as part of the business of government to punish and reward, as reinforcing 'community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour'.[153]

Conversely, Queensland declined to introduce a new section of unlawful assault occasioning death, based on a recommendation against such a section from the Queensland Law Reform Commission.[154] The Commission was concerned that 'the introduction of an offence of unlawful assault occasioning death could have the effect that manslaughter is not charged when it would normally be the appropriate charge'.[155] However, the Commission appeared to be most concerned with such an offence's relationship with the overall structure and policy

151 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.

152 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.'

153 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Mr James McGinty, Attorney-General).

154 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (September 2008), 9 [10.7].

155 Ibid 204 [10.86].

of the Code, which is testimony to the difficulties of grafting on the 'crime du jour' without regular reviews of the Code.

Bentham would have agreed with Professor Ferguson that whilst there is little to prevent a criminal code being amended 'to include overlapping or indeed superfluous offences, but having a well structured code at the outset, with clear offence provisions, may well make this less of a problem'.[156] Although, the reverse situation can apply where a reluctance to restructure, as with replacing s 23, the main criminal responsibility section of the *Criminal Code* (Qld) and the *Criminal Code* (WA) which deals with voluntariness and the excuse of accident, can lead to possible new offences not being introduced because to do so is perceived to require a succession of other amendments. For example, in 2008 the Queensland Law Reform Commission recommended that s 23(1)(b) should be retained as the Commission was apparently unable to envisage any other alternative but the repeal of s 23(1)(b) pointing out this would have far reaching consequences because accident applies generally to criminal offences and not just to manslaughter.[157] 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'.[158]

The Commission's approach underscores Fisse's observation that codification tends 'to fix the content of the law as at one point in time'.[159] Leader-Elliott has suggested that for the *Griffith Code* even by the mid 20th century 'the general principles were an anachronism, and their subsequent history of judicial reinterpretation … has been one of continuing fruitless dissension'.[160]

D *Summary*

This part of the article commenced with an examination of Bentham's plan of codification, and contrasted Bentham's 'science of legislation' with that of his arch rival, Blackstone, who favoured the organic development of the common law. The difficulties that Blackstone in England and Savigny in Germany identified with codification of the criminal law, were addressed from two particular perspectives. First, the ambiguity of language was considered. There is an inherent ambiguity

156 Pamela Ferguson, 'Constructing a Criminal Code' (2009) 20 *Criminal Law Forum* 139, 160.
157 Queensland Law Reform Commission, above n 154, 184 [10.3].
158 Ibid 185 [10.5].
159 Fisse, above n 63, 5.
160 Leader-Elliott, above n 3, 396.

in language, and legal drafting attempts to be more precise by providing more detail open up the possibility of further complications. Greater detail may lead to even more discretion in judicial interpretation than the interpretation of sparse criminal code sections with 'gaps'. Such a view was met by the argument that the developments in criminal law theory in the 20th century, have meant that the legislature can avoid such ambiguity by specifying the exact relationship between physical and fault elements in a formulaic manner.

Secondly, the reality of legislative inertia, specifically in the context of the Griffith Codes in Australia, was examined. The fact that the original *Griffith Code*, the *Criminal Code 1899* (Qld), strongly reflects the common law has led to two outcomes. In the first place, the organic development of the common law has been infused into code interpretation, thereby reducing the great divide that Blackstone and Savigny envisioned if codification replaced the common law. In the second place, the fundamental inadequacies in the *Griffith Codes*, arising both from developments in the common law and code design defects, have not been remedied. These inadequacies focus on the change in the onus of proof for the defence of accident post *Woolmington*, and the failure to specifically link s 23 of the *Criminal Code 1899* (Qld), the principal section dealing with criminal responsibility, to the elements of offences.

Dixon CJ's well known criticism in *Vallance v The Queen* of s 13(1) of the *Criminal Code 1924* (Tas), which was derived from s 23 of the *Criminal Code 1899* (Qld), is pertinent here in 'that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially'.[161] The Griffith Codes suffer the fatal flaw recognised by Dixon CJ in *Vallance v The Queen*[162] that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences. This was problematic because the central provision of the Tasmanian Code (s 13) came '*ab extra*' restraining the operation of what followed, even though common sense dictated resolution outside of s 13 itself.

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

161 *Vallance v The Queen* (1961) 108 CLR 56, 61.
162 (1961) 108 CLR 56, 59.

because 'common sense rather suggests that guilt will depend on definitions that in point of fact will fall outside the philosophy of s 13(1) [and] to turn over the sections of the Code is enough to show how large a number of crimes that are to the elements of which s 13(1) can have little or nothing to say'.[163]

More recently, the above observations of Dixon CJ have been taken up by members of the High Court. In *Murray v The Queen*,[164] Gaudron J noted that '[w]hen regard is had to the different approaches taken to the act causing death in *Ryan*,[165] the wisdom of what was said by Dixon CJ in *Vallance*[166] becomes apparent'. As Gaudron J further observed, the definition of murder in s 302(1) of the *Criminal Code 1899* (Qld) 'contains no provision permitting a person to be convicted of murder simply for an act done with reckless indifference'[167] as the Griffith Code does not recognise recklessness as a fault element. A similar approach was adopted by Gummow and Heydon JJ in *DPP (NT) v WJI*,[168] who commented that 'in relating the general to the specific portions of the Code,[169] there is a risk that the requisite intent which has to be proved may be distorted'.

The significant ramifications of the seeming inability of law reformers to recommend the removal of s 23 of the *Criminal Code 1899* (Qld) and s 23 of the *Criminal Code 1913* (WA),[170] appears to have been overlooked by criminal law scholars, notwithstanding Windeyer J's insightful observation back in 1964 in *Mamote-Kulang v The Queen*; 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

163 *Vallance v The Queen* (1961) 108 CLR 56, 60.

164 (2002) 211 CLR 193, 198 [12]. Murray admitted to having pointed the gun at the deceased with the intention of frightening him, but denied have deliberately pulled the trigger.

165 (1967) 121 CLR 205. Ryan had pointed a loaded and cocked rifle at a service attendant, and while still pointing the rifle with one hand, tried to tie the attendant up with the other. According to the accused, the attendant made a sudden movement and the accused's finger pressed the trigger in a reflex action without any intention to do so on his part.

166 (1961) 108 CLR 56, 61.

167 *Murray v The Queen* (2002) 211 CLR 193, 199 [15].

168 (2004) 219 CLR 43, 54 [31]. The case dealt with the interaction between s 31 (the equivalent of s 23 in the Griffith Code) and s 192(3) sexual intercourse without consent of the *Criminal Code 1983* (NT).

169 The case concerned the *Criminal Code 1983* (NT) but as Gummow and Heydon JJ note at 50 [16] '[t]he Code has apparent affinities with the Griffith Code'.

170 See Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007).

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*, 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.'[171]

This article seeks to remedy that deficiency by building on a comment made by Gummow and Heydon JJ in *DPP (NT) v WJI*.[172]

> What then is to be seen in the framing of Australian Codes is an application to statutory schemes of what has been described as 'top-down reasoning',[173] whereby general principle is imposed by a particular theory rather than derived from decisions upon particular instances.

The argument being advanced is consistent both with the architecture of Chapter 2 of the *Criminal Code 1995* (Cth) with its interconnecting formulae and Bentham's concept of 'no blank spaces'. The formulaic nature of Part 2.2 dealing with physical and fault elements marks a major break with the architecture of the Griffith Code, and avoids the criticism of Dixon CJ of the difficulty 'in the use in the introductory part of the Code of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do'.[174]

In the next part of the article, Leader-Elliott's observation that 'the more articulate the structure of a code, the more vulnerable it becomes to criticism on the ground of incoherence or inconsistency'[175] will be examined through the lens of legal history.

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171 (1964) 111 CLR 62, 76 (emphasis added). The 'more modern approach' is adopted in Chapter 2 of the *Criminal Code 1995* (Cth). One of the problems with s 23 of the *Criminal Code 1899* (Qld) is avoided by s 4.2(1) in Chapter 2 whereby 'conduct can only be a physical element if it is voluntary'. Then, in s 4.2(3) examples of conduct that is not voluntary are given. Bentham would have approved of the use of such examples for clarification. Furthermore, s 4.2(6) states that 'evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary', thereby avoiding the need for judicial interpretation in the Griffith Code of the relationship between s 23 and s 28 (which deals with intoxication). In cases such as *The Queen v Kusu* [1981] Qd R 136, the courts have stated that where intoxication leads to a state of automatism, there can be no reliance on s 23(1)(a) which requires an act or omission to be accompanied by an exercise of the will.

172 (2004) 219 CLR 43, 53-54 [30].

173 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) CLR 516, 544-545 [72]-[74].

174 *Vallance v The Queen* (1961) 108 CLR 56, 58.

175 Leader-Elliott, above n 3, 452.

III How Has Legal History Treated Bentham's Plan Of Codification?

Mr Peel is for consolidation in contradistinction to codification; I for codification in contradistinction to consolidation.[176]

A *The Royal Commission on the Criminal Law (1833-1845) and the English Criminal Code Bill (1880)*

Bentham died in 1832, and a year later Henry Brougham, the Lord Chancellor, established a Royal Commission on the Criminal Law with broad terms of reference and which produced eight reports between 1833 and 1845.[177] Farmer has argued that an understanding of Bentham's theory of legislation 'makes explicit many of the broader political assumptions that guided the commissioners and allows us to understand the precise nature of their codification project'.[178] In Farmer's view, the main achievement of the commissioners, whose work was never enacted, 'was that they succeeded in putting the new science of legislation at the centre of the modern understanding of the criminal law'.[179]

Such a view has been challenged by Michael Lobban, who has posed the question 'how far the commissioners were informed by Benthamic ideas and what they understood their task to be'.[180] Lobban's answer, following an examination of the views of the commissioners, was that both Henry Ker (who with Thomas Starkie was the principal author of the commission's reports) and Brougham 'talked of "codes" in a sense far removed from Bentham's *pannomion*'.[181] Ker himself 'stated that his plans to digest the law aimed at "nothing more than an authenticated exposition of the actual law … whereas a new Code would lead to

176 *Works of Jeremy Bentham* 10 (Bowring ed, 1843) 595. Sir Robert Peel became Home Secretary in 1822 and later Prime Minister after Bentham's death. Peel reformed the criminal law by reducing the number of offences punishable by death and consolidated the number of criminal law statutes such as the *Larceny Act 1827* and the *Offences against the Person Act 1828*.

177 Wright, above n 54, 43 has relevantly observed: 'Henry Brougham, whose famous 1828 speech on the urgency of law reform paid tribute to Bentham, became Lord Chancellor with the fall of Wellington's administration and the political ascendancy of the Whigs. Brougham made codification a matter of official policy when he launched his Criminal Law Royal Commission in 1833.'

178 Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18(2) *Law and History Review* 397, 403.

179 Ibid 424.

180 Michael Lobban, 'How Benthamic Was the Criminal Law Commission?' (2000) 18(2) *Law and History Review* 427, 427.

181 Ibid 429. A pannomion is a complete utilitarian code of law.

endless difficulties"[182]… [and] was clearly aimed against the kind of codification associated with Bentham and his acolytes'.[183] In similar vein, the current work on a draft criminal code for Ireland refers to the technique of codification in these prosaic terms: 'Unlike its more exotic cognates, the model of codification employed in the current draft is essentially a form of enhanced restatement.'[184]

The reason that underpins Ker's position is essentially pragmatic: judicial opposition to codification and to the repeal of the common law.[185] The same hostility was evidenced by Lord Chief Justice Cockburn in 1880 in response to James Stephen's draft English Criminal Code Bill.[186] Lobban concluded that 'given the experimental and haphazard nature of much nineteenth-century legislation'[187] judicial resistance to repeal of the common law was unsurprising, whilst conceding that 'the commissioners played a key role in developing a modern criminal jurisprudence'.[188]

However, Farmer goes further by arguing that the systematic approach adopted by the commissioners 'was founded on the command of the legislator … [marking] a distinct moment in the transition to a modern law founded on legislation rather than common law adjudication'.[189] Mark Dubber has a different perspective stressing that 'the political significance of codification reveals itself as a process of constant legitimation'.[190] Dubber continues by noting that the common law's concern for individual justice at the expense of systematic justice 'helped to obscure punishment's identity as a weapon in the coercive arsenal of the state',[191] which returns the focus to Bentham's insistence that defining penal norms 'required legitimation insofar as it caused pain'.[192]

182 Brougham MS 11608 (9 September 1843).
183 Lobban, above n 180, 429.
184 Irish Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (31 May 2010) Doc. No: DC/04, 4 [7].
185 Lobban, above n 180, 430-432.
186 Cockburn LCJ 'Chief Justice Cockburn's Second Letter on the Criminal Code' (1880) *The Law Journal* 184.
187 Lobban, above n 180, 432.
188 Ibid.
189 Farmer, above n 178, 423.
190 Markus Dubber, 'The Historical Analysis of Criminal Codes' (2000) 18(2) *Law and History Review* 433, 436.
191 Ibid 439.
192 Ibid.

In practical terms, '[a] quarter century of endeavours to codify the law had ended, ignominiously, in a legislative consolidation of existing anomalies',[193] with Stephen categorising the consolidation of English criminal law statutes in 1861 as 'a sort of imperfect Penal Code in respect of all the common offences'.[194] Leader-Elliott has argued that such codification attempts 'foundered, in part, on the intractable problem of reducing common law principles of criminal responsibility to statutory form'.[195] On this view, the failure of codification in nineteenth century England goes beyond judicial resistance because 'codification of the general principles of criminal responsibility was never likely and probably impossible, at that time'.[196] Leader-Elliott has contended that it was not until the publication of the American *Model Penal Code* in 1962 'that a theory of criminal fault adequate for the purposes of codification was to emerge'.[197]

There is considerable merit in this argument but it underplays the significance of the fall of the Disraeli conservative government in 1880 and judicial opposition to codification. James Fitzjames Stephen came to his commission of drafting the English Criminal Code Bill (1880) extremely well qualified for the task. Stephen had continued the work of codification in India (1869-1872), had drafted the English Homicide Law Amendment Bill (1874), had produced a Digest of the Criminal Law (1877), and had drafted the Criminal Code (Indictable Offences) Bill (1878).[198] Unlike Bentham, Stephen was no radical but rather 'a profound conservative in politics and a social Darwinian in morals'.[199] Furthermore, Stephen did not share Bentham's disdain for the judiciary, not finding 'law-making by judges, the great Benthamite *bete noir*, to be a serious problem',[200] even acknowledging that judicial 'discretion was sometimes desirable'.[201]

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193 Leader-Elliott, above n 3, 392,

194 Ibid, citing James Fitzjames Stephen, *A General View of the Criminal Law of England* (2nd ed, 1890) 52.

195 Ibid.

196 Ibid 394, citing KJM. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800 – 1957* (1998) 372. 'Fundamental questions, right down to the function of fault in a criminal justice system, remained almost totally judicially unaddressed; most basically, whether the doctrine's function was to underpin individual justice, fairness and personal desert or demarcate actors whose conduct was subject to choice and calculation and, thereby, open to deterrence …'.

197 Ibid.

198 Sanford Kadish, 'Codifiers of the Criminal Law: Wechsler's Predecessors' (1978) 78 *Columbia Law Review* 1098, 1122.

199 Ibid.

200 Ibid 1127.

201 Ibid.

> Common law offences were eliminated because parliamentary responsiveness sufficed to deal with newly developed evils, but all common law defences were retained – to restate them in statutory terms would have frozen their shape since judges would have had to apply them 'according to their words', while to have left them as common law defences would have kept them fluid because judges would be able to apply them 'according to [their] substance'.[202]

Kadish has identified three circumstances which combined gave Stephen's Draft Code its character and distinguished it from Macaulay's *Indian Penal Code* (to be discussed in the next section): 'the Code was meant for Victorian England [not the colonies], that the codification movement had matured, and Stephen's cast of mind.'[203] In this context, maturing of the Benthamite codification spirit refers to 'growing old … [and] growing up as well'.[204] Stephen summarised the rationale of the 1879 Draft Code[205] as 'the reduction of the criminal law of England, written and unwritten, into one code'.[206] Nevertheless, Kadish argues that Stephen's Code 'was a significant achievement … cosmos to chaos … drew together, systematised and pruned the English law, not radically but still not trivially, and made of it a more manageable whole'.[207]

Why then did Stephen's Code fail? Stephen was no outsider like Bentham but more in the tradition of Blackstone with his accommodation of the common law into his 1879 Draft Code. Kadish

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202 Ibid, citing the Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) 10.

203 Ibid 1125. By 'cast of mind', Kadish was referring to Stephen's pragmatism and recognition that statute consolidation dominated English criminal law reform in the 19th century.

204 Ibid 1123. Kadish, at footnote 199, examples John Austin, one of Bentham's most significant disciples who was appointed as one of the original members of the Royal Commission on the Criminal Law (1833-1845) before resigning after the production of the Second Report, and who had a more modest view of codification than his mentor. 'He [Austin] did not favour a *beau ideal* of all possible codes, preferring a code based on existing law; he did not think it important that the average reader be able to understand and know the code's provisions; and he thought the arguments against judge-made law exaggerated.'

205 The Criminal Code (Indictable Offences) Bill (1878) was not enacted but led to the appointment of a Royal Commission in 1879 to consider the law relating to indictable offences. The Commission consisted of three High Court judges – Lord Blackburn (Chairman), Lush and Barry JJ – and Stephen, who became a judge during the Commission's deliberations. The outcome was the Royal Commissioners' Draft Code of 1879 'which was primarily the work of Stephen'. See M Friedland, 'RSWright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law' (1981) 1 *Oxford Journal of Legal Studies* 307, 307, citing JF Stephen, *A History of the Criminal Law of England* (London, 1883) Vol. III, 349: 'By far the greater part of the Code and of the Report was my own composition.'

206 Kadish, above n 198, 1126, citing the Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) 5.

207 Ibid 1128.

has suggested that '[g]iven the strong conservative influences of the period, so large a piece of criminal law reform was too much for Parliament to bite off and too important to be swallowed whole'.[208] Wright is more pragmatic:

> A final version went to Parliament in early 1880 but all momentum was lost with Cockburn's not unexpected hostile intervention and parliamentary preoccupation with the Irish question, and the bill died with the fall of the government.[209] Stephen's cautious middle course and narrow code failed to satisfy the defenders of the common law. The Lord Chief Justice declared, disingenuously, that the proposal was inconsistent with the idea of codification and that no code was better than a half-baked one.[210]

It is a moot point whether Lord Chief Justice Cockburn's opposition would have been sufficient to block the Criminal Code Bill (1880) had the Disraeli government not fallen.[211] Cockburn died on 20 November 1880 some seven months after publication of his second letter criticising the Criminal Code Bill (1880).[212] Interestingly, Cockburn's opposition to the Criminal Code (Indictable Offences) Bill (1879) expressed in his first letter to the Attorney-General,[213] did not prevent the presentation of the Criminal Code Bill (1880) before Parliament. Furthermore, the 1880 Bill had the imprimatur of three judges of the High Court who had sat on the 1879 Royal Commission considering the law relating to indictable offences.

Of more importance for present purposes is the nature of Cockburn's opposition expressed in both of his letters to the Attorney-General. These letters are significant not only to help explain the fate of the Stephen Code in England, but because they impacted on the reaction of Gowan

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208 Ibid 1130.

209 In the 1880 general election in Britain, the Liberals under Gladstone ousted the Conservatives led by Disraeli. The Liberals secured a large majority after a campaign (often referred to as the Midlothian campaign as Midlothian was Gladstone's seat in Parliament and his speeches to constituents were widely reported) based on attacking the allegedly immoral foreign policy of the Disraeli government in supporting the Ottoman Empire. See Trevor Lloyd, *The General Election of 1880* (Oxford University Press, 1968) 142; Mark Rathbone, 'Gladstone, Disraeli and the Bulgarian Horrors', *History Review* (December, 2004).

210 Wright, above n 50, 195, citing Smith, above n 196, 143-150; Smith above n 56, 78-82. 'Smith also notes Home and Lord Chancellor's office reservations as the profession contended with new procedures under the Judicature Acts which left little appetite for further big change.'

211 The 1880 general election was conducted between 31 March and 27 April 1880.

212 Cockburn LCJ, above n 186. Cockburn's second letter to the Attorney-General is dated 7 February 1880 and was published by the Law Journal on 10 April 1880.

213 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.

in Canada[214] and Griffith[215] in Australia. In the first letter, Cockburn addresses the work of the Royal Commissioners. After assuring the Attorney-General that he approaches the subject 'in no hostile spirit'[216] and has long been 'a firm believer in, not only the expediency and possibility, but also in the coming necessity of codification',[217] Cockburn goes on to reveal his true colours.

> We have to thank the Commissioners for having collected abundant materials for a complete and perfect code. But I cannot concur in thinking that they have as yet presented us with such a code; and I am bound to say that in my opinion a great deal remains to be done to make the present code a complete and perfect exposition, or a definitive settlement of the criminal law. Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisos, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated.[218]

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

> The main purpose of a codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes, which are still to remain in force, but are not embodied in it.[219]

Objectively, this criticism is overstated. Codification is hardly 'utterly defeated' if a staged process of absorption of other statutes into the

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214 See Wright, above n 54, 53. 'Judge Gowan also advised [John Thompson, the Canadian Justice Minister on codification], but perhaps his most noteworthy "contribution" was to remove a book from the Parliamentary Library that contained the hostile criticism of Lord Chief Justice Cockburn and others of the English Draft Code.'

215 Griffith, above n 18, iv. In his letter to the Queensland Attorney-General in 1897, Sir Samuel Griffith observed that the work of the English Commissioners, who prepared the Draft Code of Criminal Law upon which the 1880 Bill was based, 'did not, however, escape severe criticism, especially from Sir Alexander Cockburn, then Lord Chief Justice of England, who pointed out some serious defects in the Draft Code as prepared by the Commissioners'.

216 Cockburn LCJ, above n 213, 1.

217 Ibid.

218 Ibid 1-2.

219 Ibid 6.

code is adopted. Indeed, arguably this is the more responsible course, given the pragmatic constraints on parliamentary time and the legal resources necessary to draft the legislation, leaving aside the need for the police and the courts to absorb the changes. For example, when the Northern Territory incorporated Chapter 2 of the *Criminal Code 1995* (Cth) into the *Criminal Code 1983* (NT) as Part IIAA in 2006,[220] only selected offences against the person were placed in Schedule 1 and only offences in Schedule 1 applied to Part IIAA.[221] Furthermore, under the Commonwealth regime, Chapter 2 of the *Criminal Code 1995* (Cth) is the reference point for criminal responsibility for other Commonwealth statutes such as the *Customs Act 1901* (Cth).[222]

The adoption by the Northern Territory of an incremental approach to switching codes is not necessarily to be preferred, more recognising the practical difficulties of a wholesale change in criminal code on a specific date. The fact that Stephen's Bill left some statutes in force was not a fatal weakness. However, if the Bill had passed, it would have been the thin edge of the wedge in the eyes of common law opponents.

The second criticism relates to Part III, section 19 which essentially leaves defences to the common law except to the extent they are altered or inconsistent with the Code. This provision might have been expected to meet with the approval of supporters of the organic nature of the common law. However, Cockburn once again takes the purist view of a code.

> Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worthwhile to codify at all, whatever forms a material part of the law should find its place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether unwritten or written.[223]

Stephen admitted that the Code was not independent of the common law, but denied this meant it was untenable as a comprehensive code.[224]

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220 *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT).

221 Section 43AA, *Criminal Code 1983* (NT).

222 For example, in *R v Saengsai-Or* [2004] NSWCCA 108 (19 August 2004), the appellant appealed against his conviction under s 233B(1)(b) *Customs Act 1901* (Cth) of importing into Australia a trafficable quantity of heroin concealed in two bottles of brandy. Bell J considered that the physical element of the offence created by s 233B(1)(b) was one of conduct: the act of importing into Australia any prohibited import to which the section applies. Her Honour found at [72] that 'in respect of this physical element, which consists only of conduct, the provisions of s 5.6(1) of the *Criminal Code* apply. Intention is the fault element'. Significantly, as the above analysis demonstrates, the *Criminal Code 1995* (Cth) avoids the criticism of s 23 of the Griffith Code made by Dixon CJ in *Vallance v The Queen* (1961) 108 CLR 56, 61.

223 Cockburn LCJ, above n 213, 14.

224 Smith, above n 56, 80.

Stephen argued that 'it was not inconsistent to remove ill-defined common law offences whilst retaining common law defensive principles of justification and excuse'.[225] Stephen also responded to Savigny's notion that law is found not made through a process of evolving national consciousness. Stephen pointed out that 'codification did not arrest the law's development and ... much of the so-called "elasticity" [of the common law] was far from elastic in nature and bound the judiciary as tightly as any statute'.[226]

Cockburn's second letter to the Attorney-General followed up his earlier criticisms, this time focusing on 'the defects which appear to me to exist in the second main division of it [the proposed Criminal Code] – namely, that which contains the substantive penal law'.[227] This letter is more technical and Cockburn's main thrust is the observation that there is 'something anomalous and inconsistent in the varying manner in which the definition of offences occurs in the Code'.[228] Much of the letter is devoted to the appropriate definition for such offences as treason, assaults on the Queen, inciting mutiny, unlawful assembly, unlawful drilling, prize fights, sedition, piracy, offences affecting the administration of justice and the maintenance of public order, indecent acts, and offences against public morality. Cockburn also suggests that offences should 'be classed under a twofold division – I Offences against the public; II Offences against individuals'.[229]

There is little of substance in Cockburn's second letter to deflect passage of the Criminal Code Bill (1880). Cockburn's main criticisms are contained in his first letter (1879) which did not deter the Disraeli government from bringing forward the legislation in 1880 based on the work of the Royal Commissioners. Indeed, as the Bill also enjoyed the support of the Law Times and the Trade Union Congress (whose working class membership had good reason to dislike the common law), Horder has suggested that 'the Bill was set fair to be one of the major pieces of legislation in the 1880 session'.[230] However, when the Disraeli Government fell in April 1880, 'there was subsequently said to be no time to re-introduce it'.[231] It would seem then that Taylor's

225 Ibid.

226 Ibid 82. Smith cites Maitland as describing Savigny as the 'man who is nervously afraid lest a code should impede the beautiful processes of natural growth': at 82.

227 Cockburn LCJ, above n 186, 184.

228 Ibid.

229 Ibid 208.

230 Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press, 2012) 14.

231 Ibid.

observations as to why the State of Victoria's attempt at codification in 1905 was unsuccessful, may be pertinent to explain the failure of the Stephen Code in 1880.

> Rather than being entrusted to a committee that could have conducted a detailed review and reported to Parliament on the Code, it was simply dumped into Parliament's lap. It was, apparently, expected that Parliament would have sufficient enthusiasm, energy and specialist knowledge to be willing and able to take it from there. This was a wildly over-optimistic assessment of the interest that Parliament could be expected to show in the subject … By the time a politician of more than usual talent and perspicacity, Eggleston A-G, had recognised that Parliament could not be expected to deal in detail with a Code, it was too late; the political process swept him out of office soon afterwards.[232]

Yet, even this explanation of the need to build broad cross party support to overcome the political election cycle may be inadequate, in the absence of a codification champion with a foot in both the political and judicial camps. It is perhaps not widely known that the Queensland Government referred Griffith's draft Code of Criminal Law to a Royal Commission which was chaired by Sir Samuel Griffith himself. The Commissioners, who were largely drawn from the judiciary,[233] went through the draft Code section by section.[234]

> Griffith's draft code was largely preserved in the 1899 Royal Commission recommendations that were adopted by the government. The code bill introduced by Attorney-General Rutledge[235] passed in less than five weeks with a broad degree of cross-party support.[236]

Griffith undoubtedly took account of Cockburn's criticisms,[237] but as noted above Griffith possessed unique advantages as a law reformer.[238] Neither did Griffith's Code face the vagaries of the political cycle that had worked against Stephen's Code in 1880 with the fall of the Disraeli government, the Victorian Code with the fall of the Bent government in 1909, and the revised Queensland Code in 1995 with the fall of the Goss government.

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232 Taylor, above n 75, 203.

233 There were eleven commissioners including Griffith, five of whom sat as judges of the Supreme Court, three judges of the District Court, a Crown Solicitor, a Crown prosecutor, and a former Attorney-General.

234 *Report of the Royal Commission on A Code of Criminal Law* (1899) Queensland Government Printer, Brisbane.

235 Rutledge had been a member of the Royal Commission, as well as a member of Griffith's cabinet when Griffith was Premier, and was a close personal friend of Griffith.

236 Wright, above n 54, 63.

237 Griffith, above n 18, iv and vi. For example, Cockburn had criticised Stephen for not including defences and instead leaving them to the common law. Griffith took heed of the omission and specifically included defences in his draft code.

238 Leader-Elliott, above n 52.

What conclusions can be drawn from the English dalliance with codification from 1833 to 1880? There are two countervailing forces that appear to leave supporters of codification with little room for manoeuvre. On the one hand, a consistent hallmark is judicial opposition. On the other hand, modest statutory reform of the criminal law that commenced with Peel's Acts in 1827 and culminated in the consolidation of English criminal law statutes in 1861, reduced both the need and Parliamentary appetite for wholesale reform in codification. However, as will be discussed in the next part, the same cannot be said for British Dominions and Colonies. Faced with different pressures, the Colonial Office actively encouraged codification.[239]

B *Criminal Codes in India, Canada and Australia in the 19th Century*

1 *Macaulay and the Indian Penal Code*

> *That the Indian Penal Code is founded on the English Criminal Law is true only in the sense in which it might be contended that without a Blackstone to excite his critical faculty we might never have had a Bentham.*[240]

While the English criminal law Commissioners were labouring over their task between 1833 and 1845,[241] Thomas Macaulay drafted a proposed Penal Code for India. Macaulay was man of affairs like Stephen, and had been appointed to the Supreme Council of India, later becoming Chairman of the Indian Law Commission in 1834. As Kadish has noted, the Commission's task 'was to prepare "a code of laws common (as far as may be) to the whole people of India" … Thus was Macaulay provided with a key role in a plan for the comprehensive codification of laws for India'.[242]

In the same manner as Stephen shouldered the main burden of the writing of the Royal Commissioners' Draft Code of 1879, so too for a variety of reasons including illness '[v]irtually the entire burden of drafting the Code, therefore, fell on Macaulay'[243] which he completed

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239 Friedland, above n 205, 307, has noted that in 1870 Mr RS Wright 'was asked by the Colonial Office to draft a criminal code for Jamaica which could serve as a model for all of the colonies'.

240 S Vesey-Fitzgerald, 'Bentham and the Indian Codes', in G Keeton and G Schwarzenberger (eds) *Jeremy Bentham and the Law* (Stevens, 1948) 222, 227.

241 Wright, above n 50, 189, has noted that when Macaulay started to write his Code in 1835 'he wrote to [James] Mill expressing the hope it would inspire codification at home as Brougham's commissioners grappled with the continuing chaotic state of English law', citing a letter from Macaulay to Mill, 24 August 1835 in J Clive, *Macaulay: the Shaping of the Historian* (Harvard University Press, 1987) 436-438.

242 Kadish, above n 198, 1107, citing Public Dispatch of 10 December 1834.

243 Ibid 1108.

between 1835 and 1837. Kadish has identified three aspects of Macaulay's character and beliefs that 'affected the style and substance of his Code'[244] namely, his utilitarianism, his Whig politics,[245] and his practical expediency.

> Macaulay was a utilitarian in the Benthamite tradition … He shared fully the premises of the tradition with respect to the unacceptability of judge-made law; the desirability of a root-and-branch legislative remaking of the law responding to what it ought to be, judged by the utility ethic … he departed from those implications of the Benthamite creed that favoured a large role for the state in redressing social evils and dislocations. Comprehensive codification in the style of Bentham he favoured fully, but only to render the administration of law more efficient and rational, not to restructure society … Macaulay was not a man of speculative, philosophical bent … as a politician he was hard headed, pragmatic, and expedient.[246]

The above summary of Macaulay begs the question: what was Macaulay trying to achieve with his Indian Penal Code (IPC)? Kadish suggests that Macaulay was seeking to modernise the Indian criminal law 'but not a modernisation which involved the transplanting of English law',[247] rather a major rewriting 'rooted in the universal science of jurisprudence'.[248] Wright has argued that '[t]he IPC is a comprehensive presentation of criminal law, a taxonomy that precludes the common law, and very different in form from existing British legislation'.[249] Wright based this assessment on Macaulay's aim (following Bentham's prescription) of 'a systematic and exhaustive statement of criminal harms and attendant prohibitions, liability standards and penalties (maximums) expressed precisely and consistently … within a rationally organised and self-contained legislative whole'.[250]

As discussed earlier, Bentham had particular views about the style of a code which in practice are difficult to combine.[251] Kadish has usefully drawn out the similarities and differences in approach between Bentham and Macaulay. For Bentham, '[t]he code should speak in the

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244 Ibid.

245 The Whigs were the forerunners of the Liberal party, heavily influenced by the ideas of John Locke and Adam Smith, who supported the supremacy of Parliament, the extension of the franchise, the reduction of Crown patronage, and the interests of merchants and bankers.

246 Kadish, above n 198, 1108.

247 Ibid 1111.

248 Ibid, citing Eric Stokes, *The English Utilitarians and India* (Oxford University Press, 1959) 227: 'To neglect this universality of outlook, this cast of mind that was of the 18th century *philosophe*, is to lose the historical atmosphere in which the Code took shape.'

249 Wright, above n 50, 190.

250 Ibid, citing Stokes, above n 248, 230.

251 Fisse, above n 63.

language of command and yet integrate statements of reasons to serve both as a means for popular accountability of the legislature and for greater understanding by the citizen of why he should comply'.[252] For Macaulay, '[t]he language should be clear, brief, and simple for ready understanding even by the less sophisticated, yet it should draw lines between the permitted and the prohibited with such elegant precision as to leave no room for judicial lawmaking'.[253]

Macaulay's pragmatism led to him not following Bentham's prescription of integrating statements of reasons within the body of the code. Macaulay did provide a set of *Notes* for the benefit of the legislature,[254] but as Stokes has observed the omission of reasons was to simplify the process of obtaining legislative consensus.[255] Given that Macaulay's Penal Code was not enacted until 1860[256] following the Indian Mutiny,[257] due to 'the great dead weight power of governmental and administrative inertia',[258] such an omission appears fully justified.

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

> In the first place the leading idea to be laid down is stated in the most explicit and pointed form that can be devised. Then such expressions in it as are not regarded as being sufficiently explicit are made the subject of definite explanations. This is followed by equally definite exceptions … and in order to set the whole in the clearest possible light the matter thus explained and qualified is illustrated by a number of concrete cases.[259]

The purpose behind the illustrations was to neatly combine statute with legislative case law such that 'the Code will be at once a statute book and a collection of decided cases … cases decided not by judges but by the legislature'.[260] Stephen recognised the value of the illustrations 'but believed they would be unacceptable to the English

252 Kadish, above n 198, 1111, citing Jeremy Bentham, 'Codification Proposal', in *Works of Jeremy Bentham* 4, above n 176, 543-545.

253 Ibid, citing *A Penal Code Prepared by the Indian Law Commissioners* (1838) v.

254 Ibid iv.

255 Stokes, above n 248, 199-200.

256 Act XLV of 1860.

257 Stephen, above n 205, 299, has suggested the delay reflected a resistance to replace native with European institutions: 'It appeared in every way the safer course to alter and interfere as little as possible.'

258 KJM Smith, 'Macaulay's Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making' in W.M. Gordon and TD Fergus (eds), *Legal History in the Making* (Hambledon, 1991) 160.

259 Ibid 302-303, cited by Kadish, above n 198, 1112.

260 Kadish, above n 198, 1112-1113, citing *A Penal Code Prepared by the Indian Law Commissioners* (1838) v.

Parliament and English judges'.[261] Stephen's tribute to Macaulay's Code is pertinent to the argument being made in this article: 'After twenty years' use it is still true that anyone who wants to know what the criminal law of India is has only to read the Penal Code with a common use of memory and attention.'[262]

These illustrations are still to be found in the IPC. For example, in s 300 which deals with murder, four illustrations are listed which cover intention; knowledge that Z (always the victim) is labouring under a disease that a blow is likely to cause death; an intention to wound sufficient to cause death in the ordinary course of nature; and A (always the accused) without excuse fires a loaded cannon into a group of people and kills one of them. These illustrations have been well received in India, with no less a figure than Pollock extolling their virtues 'as an instrument of new constructive power, enabling the legislature to combine the good points of statute-law and case-law … while avoiding all their respective drawbacks'.[263]

For present purposes, the key point is that the illustrations achieve two of Bentham's objectives for a code: clarity and legislative control. The illustrations, in conjunction with the listed exceptions and provisos (for example, in the case of murder in s 300 of the IPC, the circumstances under which the defence of provocation is available),[264] point the way towards an explicit Benthamite statement of the law without the common law cases sitting invisible behind the sparse words of the statute. Significantly, Queensland has produced a Benchbook[265] which provides guidance to judges on how to interpret each section of the *Criminal Code 1899* (Qld) through the use of decided cases. The very existence of the Benchbook refutes Griffith's proud boast that he had

261 Ibid 1113, footnote 117, citing Stephen, above n 205, 304. Stephen's view may have been influenced by Brougham's commissioners who in their 4th Report of 1839, Command No 168, xvi, rejected the idea of illustrations essentially saying if the illustration fell within the rule it was redundant and if the illustration was needed for clarification then the rule needed revision.

262 Ibid, citing Stephen, above n 205, 322.

263 F Pollock, *A Digest of the Law of Partnership* (4th ed, 1888) iv, cited by Kadish, above n 198, 1113.

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

265 Department of Justice and Attorney-General, *Supreme and District Court Benchbook* (Queensland: The Department, 2008).

'endeavoured to include all the rules of the unwritten common law which are relevant to the question of criminal responsibility'.[266] The reality is that the *Griffith Code* is designed around broad statements of common law principles with the common law rules invisible to the lay reader. A true Benthamite code would include both the principles and the rules in the body of the code. Thus, the next step for a comprehensive code design is the explicit classification of the relevant fault element for a particular offence.[267]

In this context, Kadish has importantly singled out Macaulay's treatment of *mens rea* questions, regretting that 'so enlightened and clear-headed an approach to the definition of crimes had so little effect on later statutory and judicial law-making in the criminal law'.[268] As Wright has observed, '[t]he Macaulay and Stephen codes are very different, the former aspiring to break decisively from the common law, the latter seeking accommodation with it'.[269] One reason for such an accommodation in England was 'after the demise of Brougham's commissioners [1845], codifiers proceeded with much more caution'.[270] Another reason was '[t]hat judicial opposition frustrated attempts to restart the project after the early 1850s and Charles Greaves's 1861 consolidation merely updated Peel's earlier reforms'.[271]

In dealing with *mens rea*, Macaulay's formula for negligence – an act 'so rash or negligent as to indicate a want of due regard for human life'[272] – was supplemented with 'a higher standard of culpability, awareness of the danger'[273] which explicitly used knowledge as the fault element such as selling food 'knowing the same to be noxious'.[274] Wright has noted that Macaulay did not define principles of liability in a general part 'but there is consistent attention to fault requirements and terms, emphasis on subjective standards, with occasional use of lesser standards of rashness (the Macaulayan term for recklessness) and negligence'.[275]

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266 Griffith, above n 18, iii.

267 The judgement of Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523, which deconstructs the concept of *mens rea*, was the precursor, along with U.S. Model Penal Code, of the element analysis in the Model Criminal Code and, subsequently, Chapter 2 of the *Criminal Code 1995* (Cth).

268 Kadish, above n 198, 1120.

269 Wright, above n 50, 183.

270 Ibid 193.

271 Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' in Chan et al, above n 4, 30.

272 *A Penal Code Prepared by the Indian Law Commissioners* (1838) 35.

273 Kadish, above n 198, 1120.

274 *A Penal Code Prepared by the Indian Law Commissioners* (1838) 34.

275 Wright, above n 50, 190.

Given that Macaulay, like Bentham, was anticipating modern element analysis, there is merit in Wright's observation that many of the qualities of his Code 'remain as progressive law reform aims in the 21st century'.[276] Therefore, as Macaulay was able to construct a utilitarian code underpinned by clarity and analysis back in 1837 that has stood the test of time, with the IPC remaining the law in India, how much more possible is it to produce a Benthamite code in the 21st century given the advances in criminal law theory?

2 *Macdonald and the Canadian Criminal Code*

In a nutshell, the history of Canada's *Criminal Code* (1892) is one of John A Macdonald, the first Prime Minister of Canada, ably assisted by John Thompson, the Justice Minister, picking up Stephen's Code and passing it into law for the whole of Canada in the wake of the North-West Rebellion of 1885.[277] Macdonald was a leading figure during Canada's confederation debates that led to the passage of the *British North America Act 1867*, who 'pushed hard to allocate jurisdiction over criminal law to the proposed federal government'.[278] There were a variety of reasons for Macdonald's position ranging from the US civil war where decentralised State rights over criminal law was 'perceived as a contributing factor',[279] to security concerns given 'American aggression during the War of 1812 followed by politically motivated raids by American residents'[280] in 1838 and 1866. In light of potential threats to national defence, 'no opposition to federal law jurisdiction appears in the confederation debates records'.[281]

Having secured federal jurisdiction for criminal law in 1867, Macdonald adopted the expedient course of turning 'to Greaves's English Criminal Law Consolidation Acts, 1861, suitably amended, as the basis for the Dominion's criminal law'.[282] Unlike in England, 'the idea of codification was frequently raised and seldom encountered professional criticism',[283] so when by the 1880s there was widespread 'criticism

276 Ibid 187.

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

278 Wright, above n 54, 50.

279 Ibid.

280 Ibid.

281 Ibid, citing Peter Waite (ed), *The Confederation Debates in the Province of Canada* (2nd ed, 2006) 24-25.

282 Ibid 51.

283 Ibid, citing Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989) 70.

of the state of Canadian criminal law … the 1885 crisis mobilised the political will for codification, making it a legislative priority'.[284]

The obvious place to turn for an 'off the shelf' code was Stephen's Code of 1880. John Thompson, the Justice Minister, introduced the codification bill in 1891 and it passed into law in 1892, with discussion centred on public order offences. As Wright has observed '[c]onceptually the bill fully embraced Stephen's approach to codification and closely resembles the 1880 bill in organisation',[285] with 40 per cent taken from Stephen and 60 per cent taken primarily from the 1886 Canadian Revised Statutes.[286] In keeping with Canada's nation-securing objectives, 'prominent and comprehensive provisions relating to political offences and national security measures'[287] were introduced into the 1892 Code. Thus, in Canada, codification 'went far beyond more effective crime control reform'.[288] More particularly for the purposes of this article, 'codification did not detract from the authority of the bar and bench, rather, it facilitated professional power'.[289]

In sum, Canada, unlike Australia, with the chaotic US example on its doorstep, realised the dangers of decentralising the criminal law, and within a federal model pragmatically in 1892 adopted the narrow, common law infused Stephen Code design of 1880 (209 sections) with little dissent. As will be further discussed in the next part, Queensland effectively achieved the same outcome by adopting Stephen's Code and the common law (175 explicit references), but for reasons more associated with Griffith's unique position than reasons of nation-building, however much Griffith's admirers might believe he created a unique code.

The historical assessment of Stephen's Code has not been favourable. Writing in 1958, Mackay described Canada's new 1892 Code as almost immediately requiring the legislature 'to go to work with scissors and paste'[290] on an annual basis until it 'began to resemble a patchwork quilt'.[291] A Royal Commission to Revise the Criminal Code was appointed in 1949 which duly reported in 1954. After the vicissitudes

284 Ibid.
285 Ibid 53, noting in footnote 46 that 'the first six titles were the same'.
286 Ibid, citing Brown, above n 283, 34-35.
287 Ibid 54.
288 Ibid 55.
289 Ibid.
290 RS Mackay, 'Some Reflections on the New Canadian Criminal Code' (1957-1958) 12 *University of Toronto Law Journal* 206, 206.
291 Ibid.

of the political process, the new draft Code became effective in 1955. Mackay's analysis is that 'not very much'[292] was achieved largely because the Commission was appointed to revise the existing Code and not create a new one. Mackay's view was that a 'thorough house-cleaning'[293] was required with particular attention to the 'definitions of the substantive law'.[294] More importantly, this house-cleaning required 'a close and critical scrutiny of the validity of some of the basic premises upon which the Code is founded'.[295] As the Griffith Code is similarly based on the Stephen draft Code, Mackay's examination of the Canadian Code (1892) is equally applicable to the Queensland Code of 1899.

3 *Griffith and the Queensland Criminal Code*

> *It must seem strange to the ordinary mind that in the present stage of civilisation a great branch of the law, by which everyone is bound, and which is understood to be definitely known and settled, should not be reduced to writing in such a form that any intelligent person able to read can ascertain what it is.*[296]

This article contends that Griffith failed his own test above as evidenced by the existence of the Queensland Benchbook.[297] The reference to the reduction to a form that any intelligent person can understand the code is a Benthamite standard. Given that Griffith essentially reproduced the common law,[298] it is little wonder that the common law leaks through the Griffith code like a colander,[299] with the necessity of a Benchbook for judges to interpret the Code through decided cases outside of the Code itself. Griffith ended his letter to the Attorney-General with the hope that 'the enactment of a Code of Criminal Law is both desirable and feasible'.[300] This article supports such an aspiration against Bentham's standard, but argues that Griffith's Code is merely a statute encompassing the common law dressed up as a Code.

A far more favourable assessment of Griffith's Code has been given by Wright who has lauded Griffith's Code as marking a 'departure from the Stephen Code … and ranks with the Macaulay and Wright [Jamaica

292 Ibid 207.
293 Ibid.
294 Ibid.
295 Ibid.
296 Griffith, above n 18, iv.
297 See above n 265.
298 Schloenhardt, above n 114 and n 115.
299 See also s 8 *Criminal Code 1924* (Tas) which provides that the common law relating to defences remains in force unless specifically altered by the Code.
300 Griffith, above n 18, xiv.

Code, 1877] efforts as … arguably the best, 19th century utilitarian codifications of English criminal law'.[301] Griffith's Code is utilitarian in the sense the underlying fault element is negligence,[302] but on Wright's own calculation the overwhelming influences on Griffith's design are Stephen and the common law.[303] Wright assesses Griffith's particular contribution as 'his concise statement of the principles of criminal responsibility and treatment of defences in his general part which avoided reliance on unwieldy examples and illustrations',[304] even going so far as to state Griffith's general provisions have 'stood the test of time'.[305] Wright illustrates s 23 of the General Part as providing 'a concise and elegant statement of criminal responsibility',[306] in citing Griffith's own appreciation of this section:'… no part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction.'[307]

Such an appraisal overlooks the devastating criticism of s 23 by Dixon CJ in *Vallance v The Queen*[308] referred to earlier, that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences. As to standing the test of time, Gummow and Heydon JJ with *Woolmington v DPP*[309] in mind have pointed out in *DPP (NT) v WJI*, '[a] particular theory of the framers of State Codes may have been displaced by later common law decisions'.[310]

Furthermore, it is not apparent how Griffith's eschewal of illustrations and his favoured abstract approach 'was more consistent with a Benthamite conception of codification than even Macaulay and Wright'.[311] As discussed earlier, Bentham favoured including reasons which Macaulay rejected on pragmatic grounds preferring illustrations instead.[312] Whilst Bentham applied deductive reasoning to his code design by starting with the general and ending with the specific, his principal aim was clarity. In any event, Wright concedes that a conceptual gulf between inductive and deductive processes was

301 Wright, above n 54, 39.
302 Fairall, above n 118.
303 Wright, above n 141.
304 Wright, above n 54, 58.
305 Ibid, 64.
306 Ibid, 59.
307 Griffith, above n 18, x.
308 (1961) 108 CLR 56, 59, 61.
309 [1935] AC 462 (HL).
310 (2004) 219 CLR 43, 54 [31]. See above n 135.
311 Wright, above n 54, 60.
312 See above n 252 and n 253.

'inconsequential in practical effect because, again, the foundation and main substance of his [Griffith] code was applicable legislation and English common law'.[313]

It is here contended that Bentham would have marked Macaulay's Code closer to his ideal than Griffith's Code. Support for this argument can be found in Bentham's approval of Livingston's draft Penal Code for Louisiana in 1826, where the 'definition of crimes sometimes entailed a unique blending of command and explanation'.[314] Kadish points out that 'Livingston further attempted to make the Code more fully understood through an early general statement of the motives and basic principles of the legislature in enacting the code'.[315]

Despite romantic notions to the contrary,[316] the influences on Griffith of Zardinelli's Italian Code and Field's New York Code of 1881[317] were negligible. The plain fact is that Griffith took Stephen's cautious narrow Code and made sure he met Cockburn's criticism relating to the absence of defences. 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',[318] could equally well apply to Griffith's Code. The key difference was that Griffith bestrode Queensland like a legal and political Leviathan.[319]

To underscore the point about defences, all Griffith attempted was short statements of the common law. For example, s 22(2) deals with the excuse of honest claim of right.[320]

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313 Wright, above n 54, 60.

314 Kadish, above n 198, 1101. Kadish argues that Livingston's draft Penal Code, although never enacted, represented 'the first complete view of what a penal code built on Benthamite principles would look like' (1100), going on to suggest that 'Bentham appears to have realised this' (footnote 17) because Bentham helped Livingston to obtain needed material and secured publication of Livingston's Code in England, citing *Works of Jeremy Bentham* 11, above n 176, 35, 37, 51.

315 Ibid 1102.

316 Cadoppi, above n 112.

317 Kadish, above n 198, 1137, dismisses Field's Code as 'a tame treatment of the existing law'.

318 Cockburn, above n 218.

319 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.

320 Another example, discussed earlier in *CTM v The Queen* (2008) 236 CLR 440, is to be found in s 24 Mistake of fact which reads: 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.' 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,

> (2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.

In *R v Fuge*,[321] Wood CJ at common law identified a total of nine common law principles relating to an honest claim of right all of which are implicitly imported into s 22(2) of the *Criminal Code 1899* (Qld), but of which the lay reader is totally unaware.[322]

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

C *American Model Penal Code and Australian Model Criminal Code in the 20th Century*

> *The beginning of wisdom in all the mens rea cases to which our attention was called is … that mens rea means a number of quite different things in relation to different crimes.*[323]

By the mid 20th century and the production of the American *Model Penal Code* over the ten year period 1952 to 1962, 'the codification controversy of the nineteenth century was over [as] the legislatures had long since asserted their dominance as lawmakers'.[324] Kadish has argued that the driving force behind the American *Model Penal Code* was not an arrogant judiciary or the aspiration that any citizen could understand his or her rights and obligations,[325] but that American

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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 R* (1998) 105 A Crim R 309 a different, broader interpretation was taken. A further example can be seen in s 25 Extraordinary emergencies: 'Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.'

321 (2001) 123 A Crim R 310 [24].

322 For a fuller treatment, see Andrew Hemming, 'The Time Has Come to Tighten the Reach of Honest Claim of Right in Australian Criminal Codes' (2009) 11 *Newcastle Law Review* 167.

323 *DPP v Morgan* [1976] AC 182 (HL), 213 (Lord Hailsham).

324 Kadish, above n 198, 1138.

325 Ibid.

statutes were 'disorganised and often accidental in their coverage, a medley of enactment and of common law'.[326] Kadish's view is disputed by Dubber who has contended that '[t]he original Code set out to wrest control of penal lawmaking away from the judiciary'.[327] Given the innate conservatism of the legal profession, McClellan lends support to Dubber's view when discussing the likely opposition to a new federal code in the United States: 'It will … be suggested that a new code will cause great confusion and uncertainty and deprive the practicing bar of its accumulated wisdom under the existing law.'[328]

In any event, Kadish has suggested that the most notable feature of the *Model Penal Code* enterprise was 'its affinity with the fundamental reformist zeal of the early Benthamite codification movement'.[329] Herbert Wechsler, the architect of the *Model Penal Code*, identified the drafting task as a 'legislative commission, charged with construction of an ideal penal code'.[330] The purpose was 'to determine the contents of the penal law, the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it confers, by a contemporary reasoned judgment'.[331]

In terms of a theory of criminal liability, the major achievement of the *Model Penal Code* was to formulate 'a set of definitional tools with which the entire code of specific crimes could be fashioned'.[332] *Mens rea* questions were defined within the four mental states of purpose (intention), knowledge, recklessness and negligence. The appropriate mental state was specified against three objective or physical elements identified as the nature of the conduct, the attendant circumstances, and the result of the conduct.[333] Chapter 2 of the *Criminal Code 1995* (Cth) draws heavily on the *Model Penal Code's* analytical precision, but

326 Ibid, citing Professor Herbert Wechsler, 'A Thoughtful Code of Substantive Law' (1955) 45 *J Crim. LC & PS* 524, 526.

327 Markus Dubber, 'Penal Panopticon: The Idea of a Modern Model Penal Code' (2000-2001) 4 *Buffalo Criminal Law Review* 53, 59. Dubber suggests that '[t]his attempt by the Code to establish legislative control over the definitional aspect of penal law, while limiting judicial influence to its impositional aspect, has been highly successful' (ibid). Cf Robinson, above n 102.

328 John McClellan, 'Codification, Reform and Revision: The Challenge of a Modern Federal Criminal Code' (1971) *Duke Law Journal* 663, 686.

329 Kadish, above n 198, 1138.

330 Wechsler, above n 326, 525.

331 Herbert Wechsler, 'The Model Penal Code and the Codification of American Criminal Law' in R. Hood (ed) *Crime, Criminology and Public Policy* (1976) 419, 424 – 425.

332 Kadish, above n 198, 1143.

333 Model Penal Code (1962) 2.02.

'unlike the American *Model Penal Code*, the elements of the offence are sharply distinguished from the defences'.[334]

As Leader-Elliott has pointed out, 'Bentham was familiar with the characterisation problem'[335] writing that 'the description of an act is performed by the enumeration of particulars which are called circumstances'.[336] For example, Bentham discusses the need for an intelligible law against theft to be 'translated into a law that forbids the taking under certain circumstances; which circumstances when specified will constitute so many limitations or exceptions to the general prohibition against taking'.[337] Further examples can be found in another work of Bentham's where he identifies 'the consequences of an act are events',[338] and 'the intention or will may regard either of two objects: 1. The act itself: or, 2. Its consequences'.[339] Leader-Elliott convincingly argues that 'Bentham's account presages modern element analysis'.[340]

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

> To render it [a law] explicit enough to be understood by those who are to obey or execute it, it must be taken to pieces as it were and made up again according to a fuller pattern. The short name given to the act [for example, murder] must be laid aside and a definition substituted in its stead.[341]

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

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334 Leader-Elliott, above n 3, 410.

335 Ibid, 420.

336 Bentham, above n 5, 44.

337 Ibid 119.

338 Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books, New York, 1988) 77. Significantly, the principal section dealing with criminal responsibility in the *Criminal Code 1899* (Qld), s 23(1), distinguishes between (a) an act or omission that occurs independently of the exercise of the person's will and (b) an event that the person does not foresee as a possible consequence. Section 23 of the *Criminal Code 1913* (WA) makes the same distinction between an act or omission for voluntariness and an event that occurs by accident.

339 Ibid 82.

340 Leader-Elliott, above n 3, 421.

341 Bentham, above n 5, 117.

> This however was no hindrance to hanging men for theft. It is one thing to conceive an idea, it is another thing to express it: it is one thing to form a particular idea on a particular occasion, it is another thing to abstract from it a general idea for all occasions.[342]

The two extracts above are effectively Bentham's answer to critics of comprehensive codes that the English language is too vague and indeterminate to permit the fulfilment of Bentham's test of 'no blank spaces'. Bentham's position was that the severe consequences of possible criminal conviction demand maximum legislative clarification rather than the vagaries of the common law as interpreted by individual judges. Chapter 2 of the *Criminal Code 1995* (Cth), by distinguishing between conduct, results and circumstances, is a modern testimonial to Bentham's perspicacity in identifying the characterisation problem nearly two hundred years before the American *Model Penal Code*.[343]

Nevertheless, whilst Bentham can lay claim to being the intellectual father of codification he never obtained a codification commission and 'nor did he ever produce a completed code, penal or otherwise'.[344] Bentham's major contribution was to create a distinct methodology of codification 'proceeding systematically from basic principle to practical corollary to the construction of an internally harmonious and philosophically grounded system'.[345] Bentham's detailed plans for civil and penal codes addressed the same general questions that face modern codifiers. The main issues that confront those embarking on codification have been usefully collected separately by Dubber[346] and Ferguson.[347] The list below collates and combines the issues identified by both authors:

- What is a criminal code as distinct from a series of criminal statutes? Should it contain the substantive criminal law, criminal process and evidence?
- What is the purpose of a criminal code as regards either restating the current law or attempting law reform at the same time? How much reform is practical?
- Should the code be structured into a General Part and a Special Part?
- What is the audience of a criminal code as regards the adoption of technical as opposed to plain language?
- Should a criminal code be exclusive or should the common law continue to develop alongside the criminal code?
- How should a criminal code be kept up-to-date?

342 Ibid, 118, footnote a2.

343 Bentham also ridiculed Blackstone's division of every law into four parts: a declaratory, a directory, a remedial, and a vindicatory. See above n 5, 2, footnote a.

344 Kadish, above n 198, 1099.

345 Ibid.

346 Dubber, above n 327, 74-75.

347 Ferguson, above n 156, 141.

Bentham's answers to these questions can be readily deduced from his writings, and this article contends Bentham's plan for a criminal code is more achievable today than during the 19th century. Thus, for example, Bentham would endorse a code being structured into a General Part and a Special Part; the audience would be the general public; the code would be exclusive and establish the full control of the legislature; and the code would be regularly updated in keeping with its overall structure. On the first question in the above Dubber and Ferguson list, the very point being made here is that for the Griffith Code there is nothing substantive to distinguish it from the common law States of New South Wales, Victoria and South Australia. Given much of the necessary law reform for offences has already been undertaken in Chapter 2 of the *Criminal Code 1995* (Cth), the next step in Australia should be to follow Canada and adopt a single Criminal Code.[348]

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

> The business of government is to promote the happiness of society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency is pernicious, will be the demand it creates for punishment. What happiness consists of we have already seen: enjoyment of pleasures, security from pains.[349]

Public policy is the modern form of utilitarianism or the overall 'good' of society. In discussing the legal principle that ignorance of the law is no excuse, Leader-Elliott cites Oliver Wendell Holmes as justifying the principle on the basis that 'public policy sacrifices the individual to the general good'.[350] Translating the notion of the public good into the *Criminal Code 1995* (Cth), the underlying fault element is recklessness.[351] Essentially, the basic structure of the *Criminal Code 1995* (Cth) is that the conduct (act) must be intentional coupled with recklessness as the threshold for liability for the result of conduct or a circumstance in which conduct happens. Leader-Elliott has rightly described recklessness as the 'ubiquitous fault element'[352] which requires an awareness of a substantial risk which is unjustifiable to

348 *Criminal Code 1892* (Canada).

349 Bentham, above n 338, 70.

350 Leader-Elliott, above n 3, 432, citing Oliver Wendell Holmes, *The Common Law* (Mark Howe, ed, Little, Brown & Co, 1963) 41.

351 For the definition of recklessness, see s 5.4 *Criminal Code 1995* (Cth).

352 Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28, 39.

take.[353] However, as mentioned earlier, the Commonwealth legislature can equally apply strict or absolute liability to a specific offence where there is no fault element.[354]

To illustrate the point in relation to the adoption of Chapter 2 of the *Criminal Code 1995* (Cth), the author has previously drafted[355] a new proposed section for the *Criminal Code 1983* (NT)[356] called *Assault causing death* to deal with killings that have resulted from so called 'one-punch' assaults, which have bedeviled s 23(1)(b) of the *Criminal Code 1899* (Qld).[357] This new section is drawn from s 281 of the *Criminal Code 1913* (WA) which deals with unlawful assault causing death, and s 174F of the *Criminal Code 1983* (NT) which covers driving a motor vehicle causing death and is a strict liability offence. This proposed section would go into the *Criminal Code 1983* (NT) as s 188A and would be a Schedule 1 offence.

> Section 188A: Assault causing death
>
> (1) A person is guilty of a crime if –
>
> (a) the person assaults another person; and
>
> (b) that conduct causes the death of that person.
>
> (2) An offence against subsection (1) is an offence of strict liability.
>
> Penalty: Imprisonment for 10 years.

By making the proposed s 188A an offence of strict liability and a Schedule 1 Offence (which means Part IIAA applies), this would result in s 188A being an offence without a fault element. The flexibility of a structured suite of physical and fault elements which are to be found in Chapter 2 of the *Criminal Code 1995* (Cth) means that the task of constructing new sections of a Code becomes far easier. The legislature rather than the courts, as Bentham envisaged, determines whether a

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353 This is not the common law position in Australia where recklessness is treated as subjective. Recklessness is unknown to the Griffith Codes where the baseline fault element is the objective test of negligence.

354 See above n 91.

355 See Andrew Hemming, 'Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests' (2011) 13 *University of Notre Dame Australia Law Review* 69, 101-102.

356 *The Criminal Code 1983* (NT) and the *Criminal Code 2002* (ACT) are the only two Australian jurisdictions to have adopted Chapter 2 of the *Criminal Code 1995* (Cth). Australian State jurisdictions have ignored the *Model Criminal Code* and Chapter 2.

357 The equivalent section in the *Criminal Code 1913* (WA) is s 23B(2). Western Australia has addressed the issue by introducing s 281 Unlawful assault causing death into the *Criminal Code 1913* (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.'

specified offence has a fault element or not, and if so at what level on the staircase of fault liability the offence should lie (intention, knowledge, recklessness or negligence).

Consistent with the above analysis, the newly elected Northern Territory Government (August 2012) has introduced legislation for a new proposed s 161A Violent Act Causing Death under the Criminal Code 1983 (NT).[358] This new section (set out below) has a fault element of intention as regards engaging in conduct involving a violent act (ie, for example, the defendant intended to throw the punch), but for the result of that conduct (the defendant causes the death) strict liability applies.

> s 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).

It can be seen from s 161A(2) above, that there is no fault element for the result of the conduct. Therefore, if the Crown decided it was unable to prove beyond reasonable doubt the objective fault element of negligence for manslaughter under s 43AL,[359] then the proposed s 161A above would allow the Crown to proceed with a charge for which there is no fault element for the result of conduct.

As mentioned above, the residual fault element of recklessness in the *Criminal Code 1995* (Cth) straddles the subjective requirement of awareness of a substantial risk and the objective requirement of the taking of the risk being unjustifiable. In a previous article,[360] the author contended for an objective test for recklessness as the underlying fault element of criminal responsibility, based on the natural and probable consequences test adopted in *DPP v Smith*[361] in the guise of *Caldwell*[362] recklessness. The purpose behind such support of objectivity in

358 Criminal Code Amendment (Violent Act Causing Death) Bill 2012 (NT).

359 *Nydam v The Queen* [1977] VR 430. 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.'

360 Hemming, above n 355, 103-104.

361 [1961] AC 290.

362 *R v Caldwell* [1982] AC 341.

determining criminal responsibility is grounded on the 'object of the law is to prevent human life being endangered or taken … to compel men [and women] to abstain from dangerous conduct … at their peril to know the teachings of common experience'.[363] The philosophy is unashamedly utilitarian.

Jeremy Bentham would approve at two levels: first, the concept of an underlying fault element *per se* is consistent with his science of legislation; and, second, of the principle of utility guiding the hand of legislation in shifting the emphasis away from subjective to objective tests of criminal responsibility. In any event, whichever underlying fault element is selected, the legislature has the capacity to select the combination of physical and fault elements under the nomenclature of Chapter 2 of the *Criminal Code 1995* (Cth). As Leader-Elliott has observed in the context of drug trafficking, the Commonwealth legislature 'has taken the provisions of Chapter 2 as an effective set of instructions for subverting common law principles'.[364]

There is a double irony here: Chapter 2 was born of the American *Model Penal Code* and the MCCOC's *Model Criminal Code*, where the focus was on personal and property offences which in Australia are the province of the States who in turn have 'spurned'[365] Chapter 2. Conversely, Commonwealth offences focus *inter alia* on drug offences, corruption, terrorism *et al*, broadly following Federal heads of power under s 51 of the Federal Constitution, such that 'Chapter 2 will find its primary application in offences where the general principles of common law may have very little purchase'.[366] Consequently, this article contends that Bentham's comprehensive code design remains viable and desirable as the model design for a code. Chapter 2 provides the springboard[367] into a single Criminal Code for the whole of Australia following the Canadian example.

As an example of how a Benthamite section might look, the author has set down elsewhere the following extended version of s 149C of the *Criminal Code 1983* (NT) below as a template for a code seeking

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363 Oliver Wendell Holmes, Jr, *The Common Law* (Little, Brown & Co, 1881) 57.

364 Leader-Elliott, above n 3, 401.

365 Ibid.

366 Ibid.

367 See Andrew Hemming 'When Is A Code A Code?' (2010) 15(1) *Deakin Law Review* 65, 89-96, for an argument that for defences in Chapter 2, as opposed to offences, a copious body of case law sits behind the short sections dealing with defences. The article contends that the imprint of the common law is still discernible behind the sections of Part 2.3 Circumstances in which there is no criminal responsibility, and provides a suggested template as to how defences in Part 2.3 could be more explicitly expressed in keeping with Bentham's model of 'no blank spaces'.

to cover the field leaving 'no blank spaces', which is designed to fully reflect the common law and the deeming provisions of the Griffith Code under the rubric of the 'substantially contributes' test of causation.[368] The present section constitutes sub-section (1) only.

> Section 149C: Causing death or harm
> 1) For an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm.
> 2) For the purpose of this section, conduct includes direct or indirect means, threats, intimidation or deceit.
> 3) For the purpose of this section, substantially means more than trivial or minimal but need not be the sole cause or even the main cause of the victim's death.
> 4) For the purpose of this section, a *novus actus interveniens* must be voluntary in the sense that the intervening act is free, deliberate and informed, and later conduct can only constitute a *novus actus interveniens* if it was not itself caused by the earlier conduct. The test to be applied is that the later conduct must be so independent of the accused's acts, and in itself so potent in causing death, that the contribution made by the accused is reduced to insignificance.
> 5) For the purpose of this section, any person who causes to another person any harm from which death results, kills that person, although the immediate cause of death be treatment proper or improper, applied in good faith.[369]

Additionally, Bentham's code design combined the science of legislation with a utilitarian philosophy. Dubber has criticised the American *Model Penal Code* ('*AMPC*) for having a central weakness based on 'the drafters' failure to ground it in a theory of penal justice and of penal codification'.[370] Dubber has identified the *AMPC* as implementing a model of preventing 'crime through deterrence, and if deterrence fails, through treatment and correction'.[371] The reasons why the original *AMPC* is said to be redundant include 'the expansion of the victim's significance … the shift from penal codes to punishment guidelines … the retention and spread of strict liability offences … and the continued splintering of the penal law outside the penal code'.[372] Essentially, Dubber argues that the original *AMPC* cannot cope with the war on crime which has 'transformed penal law from a policy means into a weapon'.[373] This leads Dubber to propound the need for a new *Model Penal Code* based 'on principles that connect the penal law to the power of a democratic state over its constituents, grounding penal theory in political theory'.[374] Bentham would certainly endorse such a statement.

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368 Andrew Hemming, 'In Search of a Model Code Provision for Murder in Australia' (2010) *Criminal Law Journal* 34(2) 81, 85-87.
369 Ibid 87.
370 Dubber, above n 327, 98.
371 Ibid 53.
372 Ibid 56-57.
373 Ibid 54.
374 Ibid 99.

Dubber's attack on the AMPC could equally well apply to all Australian Codes. However, the Griffith Code does not even possess the merit of internal consistency exhibited in the *AMPC*. Dubber's Benthamite insistence that a penal code should be 'measured in terms of legitimacy first, and crime prevention second'[375] is founded on his belief that '[t]he task of a new model code is to reassert the presumption of innocence'.[376] With respect, legitimacy and the presumption of innocence do not necessarily go hand in hand. Even within Lord Sankey's famous 'golden thread' speech,[377] there was a significant qualification relating to the presumption being subject to any statutory exception as to the onus of proof placed on the prosecution, such as the defence of insanity.

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

Putting aside the absence of a binary system of physical and fault elements in the *Griffith Code*, this article contends that Bentham's model code design is also relevant today to the legitimacy of the code. Ad hoc incorporations of responses to the 'crime du jour' whilst having the legitimacy of Parliament, do not meet the wider criterion of fitting within a code that is regularly reviewed and updated. The citizen now faces under the *Griffith Code* a roulette wheel of criminal responsibility based on historical accident, legislative inertia, and legislative knee-jerk reactions. Furthermore, there is an absence of plain language in the *Griffith Code* for the citizen to establish the nature of the criminal liability that he or she faces. For example, s 328(4)A of the *Criminal Code 1899* (Qld) covers the offence of dangerous operation of a vehicle where a death is caused. As with s 281 (Unlawful assault causing death) of the *Criminal Code 1913* (WA) discussed earlier, there is no indication to the reader that s 328A(4) is a strict liability offence. By comparison, the *Criminal Code 1995* (Cth) clearly identifies for each physical element of an offence, which fault element is applicable or whether strict or absolute liability applies.

As to interpretation, the Texas *Penal Code* has an unusual provision that suspends the rule that a criminal statute be strictly construed, rather the

375 Ibid 98.
376 Ibid 55.
377 *Woolmington v DPP* [1935] AC 462 (HL), 481.

provisions 'shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code'.[378] Ferguson makes the astute observation that codifiers should not expect their code to be interpreted according to their intentions, 'but rather should assume that it will be ruthlessly exploited to the best advantage of the accused'.[379] Bentham, having advocated that the legislator be 'his own and sole interpreter',[380] would endorse the legislature clearly deciding where the criminal responsibility bar is to be set, be it strict liability, or placing the onus of proof on the defence, or selecting the combination of physical and fault elements for a particular offence.

In summary, the lens of the legal history of codification has been used to examine the viewpoint that the more detailed a code, the more vulnerable it is to statutory gridlock.[381] In rebuttal, the argument has been made that the outstanding Benthamite code of the 19th century was Macaulay's *Indian Penal Code* because it successfully incorporated illustrations, and the treatment of *mens rea* questions anticipated modern element analysis. The arrival in the 20th century of the American *Model Penal Code* paved the way for Australia's *Model Criminal Code* now operational as the *Criminal Code 1995* (Cth). This article has contended that not only does the *Criminal Code 1995* (Cth) represent the only Australian Code worthy of the name, but also that this most recent of Australian Code can be further usefully developed on Benthamite lines. The result will not be incoherence or inconsistency, but legislative dominance through amplitude of the views of the legislator.[382]

IV Conclusion

> *In the evident conviction that a criminal code is unsatisfactory, England continues to resort to the alternative of enacting ad hoc legislation superimposed on the common law*.[383]

This article contends that Mackay's statement above in relation to England is equally applicable to all Australian jurisdictions bar the *Criminal Code 1995* (Cth), as to all intents and purposes the *Griffith Code* sets out restatements of the common law. As the basic premises of the *Griffith Code* remain unchanged, it is open to the same criticism made by Mackay of the Canadian Code discussed earlier.

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378 Texas Penal Code, s 1.05(a).
379 Ferguson, above n 156, 161.
380 Bentham, above n 8.
381 Leader-Elliott, above n 175.
382 Bentham, above n 7.
383 Mackay, above n 290.

Gray and Blokland have suggested for a Criminal Code that '[i]f the law is set out simply, then it will fail to cover the complexities of human behaviour … [i]f it is set out exhaustively … it would be an effective reproduction of the common law itself'.[384] This article agrees with the first part of the above statement, which is fully applicable to the *Griffith Code*. However, the second part is contested at several levels. First, the whole architecture of the *Criminal Code 1995* (Cth) allows the legislature to subvert or replace the common law, which has already occurred.[385] Secondly, the implication is that exhaustive statements are unwieldy and impractical. Bentham would argue (as does this article) to the contrary, in that clarity and not confusion is the result when the legislature specifies the rules it wishes to incorporate backed by examples or illustrations.

The essential point is that from Bentham's familiarity with the characterisation problem, through Macaulay's treatment of *mens rea* questions, to modern element analysis in the US *Model Penal Code*, criminal law theory is now well placed to deliver Bentham's vision of a comprehensive criminal code. The *Criminal Code 1995* (Cth) provides the framework for this vision to come to fruition in Australia. The only pity is that in the 1890s Australia did not possess someone of John A Macdonald's vision to press for federal jurisdiction over criminal law.

384 Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2nd ed, 2012) 7.

385 Leader-Elliott, above n 91.