

# THE CONCEPT OF THE CRIMINAL OFFENCE IN AUSTRALIAN CRIMINAL LAW

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## Abstract:

Since the concept of criminal offence is not a concept that is clearly defined by common law, this paper focuses on this concept within Australian criminal law, identifying its borders with other issues to which it is closely related, like criminal liability. All this is addressed from the viewpoint of both a general part and a special part of Australian criminal law.\*\*

## Key Words:

Criminal Offence; Issues; Demarcation; Code and Non Code Jurisdictions; Criminal Responsibility.

## Resumen:

*Teniendo en cuenta que el concepto de ofensa no está claramente definido por el sistema de common law, este texto se centra en dilucidar dicho concepto en el derecho penal australiano, así como en identificar de los límites del mismo. Todo ello se aborda tanto desde la parte general como desde la parte especial del derecho penal australiano.*

## Palabras Clave:

*Ofensa Criminal; Cuestiones; Demarcación; Jurisdicciones Con y Sin Codificación; Responsabilidad Penal.*

## Summary:

### I. Introduction.

II. The Concept of the Criminal Offence. III. The Criminal Offence, Wrongful Conduct and Legal Theory. IV. The Concept of Categorization of the Criminal Offence. V. The Concept of the Offender. VI. The Concept of a General Part and Special Part of Criminal Law. VII. Conclusions. i. Appendix.

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## I. Introduction.

Australian criminal law comprises a conglomerate, complex project which consists of the legislation and common law of the Commonwealth, and each of the states and self-governing territories. Although there is much uniformity in the criminal law in the Code and non-code jurisdictions within Australia<sup>1</sup> there is no singular definition of crime that is either contained within their separate criminal law systems, or shared by them.

This absence of clear definition has long been a cause of discomfort for common law legal scholars. In his treatise on the Outlines of Criminal Law Kenny comments:<sup>2</sup>

'There is one grave – if not indeed insoluble – difficulty which has to be faced in studying the law of crime. And this difficulty comes at the very outset of the subject. For it consists of the fundamental problem – What is a Crime?... How are we to distinguish those breaches of the law which are crimes from those which are merely illegal without being criminal?'

This concern about the definition of crime is expanded upon in a later edition of this work:<sup>3</sup>

'The definition of a crime has always been regarded as a matter of great difficulty...The truth appears to be that no satisfactory definition has yet been achieved, and that it is, indeed, not possible to discover a legal definition of crime which can be of value for English law. The reasons for this are to be found in the history of our common law'.

Despite the absence of a singular definition of crime there is still significant unity and uniformity in the criminal law within Australia. The concept of the criminal law in Australia is not nebulous or ill-defined and the reasons for this are manifold. They are associated with common historical, political and cultural roots which are most strongly formulated by the fundamental and intrinsic position of the rule of law within Australian legal tradition. The result is that there is generally considerable and almost complete overlap at the level of general doctrine within the basic foundations of Australian criminal law. This is demonstrated by the concept of the criminal offence. Although there is no uniform definition of this and related concepts within Australian criminal law, those that exist are expressed in similar language, so that, with the aid of the common law concept, a uniform concept of criminal offence can be posited for Australian criminal law.

This purpose of this paper is to address the concept of the criminal offence within Australian criminal law and the core issues which assist to inform it and with which it is connected. The concept of the criminal offence does not exist in isolation. There are broad and often overlapping borders between this concept and other issues to which it is closely related particularly the concept of criminal liability, and therefore the analysis extends to issues that lie at the intersection of these concepts. Within this paper this is addressed briefly within the concept of a general part and a special part of

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<sup>1</sup>This division within Australian criminal law is not dealt with here. See the Appendix to this paper for a brief explanation of the operation of code and non-code jurisdictions in Australia

<sup>2</sup>Kenny, C. S., *Outlines of Criminal Law*, (4<sup>th</sup> ed), Cambridge, 1909, p. 3 (reprinted in Turner J.W.C., *Kenny's outlines of criminal law* (16<sup>th</sup> ed), 1952, p. 530-547)

<sup>3</sup>Turner J.W.C., *Kenny's outlines of criminal law* (19<sup>th</sup> ed), Cambridge, 1966, at p. 1, see generally p. 1-6

Australian criminal law, an aspect of Australian criminal law that directly raises the form by which Australian criminal law addresses the concept of criminal liability.

The concept of the criminal offence has a central role in criminal law doctrine. It focuses on the issue of the nature and form of the fact of the offending conduct and examines how this is constituted and structured. In this sense it refers to the structure of the criminal act. It is an area of micro analysis of the criminal law and this distinguishes it from analysis of the function, nature and form of criminal law as a discrete area of the law in general, an area of macro-analysis.

This understanding of the concept of the criminal offence also provides a foundation for its intrinsic relationship to the concept of criminal liability, which arises from it. This concept, which is expressed in Australian criminal law through the concept of 'general principles of criminal responsibility', is a distinct and complex issue which expands on the foundations of the fact of the offence and the fact of the criminal act, expressed through the notion of the criminal offence itself. It is founded on and requires an analysis of the objective and subjective elements of the offence, as well as how these elements inform the core aspects of liability in Australian criminal law, namely the physical and fault elements of the offence. This understanding of the concept of criminal responsibility makes it an issue for separate consideration which is beyond the immediate scope of this paper.<sup>4</sup>

In focusing on the criminal offence, the paper aims to explore and explain what the concept means in Australian criminal law, how the criminal offence itself is structured, what its core elements are, and how this informs the concept of the criminal wrong. This requires consideration of issues which inform the concept itself. The first of these is discussion of the qualitative as well as the quantitative aspects that distinguish crimes from other wrongs that have a civil or administrative character. Amongst other considerations, an important aspect here is the concept of wrongfulness as a necessary characteristic of a criminal wrong and how this may be informed within Australian criminal law by the idea that derives essentially from German criminal law theory, of the protection of legal interests, as a means of informing the substantive concept of the criminal offence.<sup>5</sup> A second issue that informs the concept of the criminal offence is the categorization of crimes according to the seriousness of the act or to the type and severity of the threatened punishment. In Australian criminal law these issues have far-reaching substantive legal as well as procedural consequences for the nature and operation of criminal law. Thirdly, the concept of the criminal offender arises as an issue for consideration within the context of this paper. This occurs from the obvious fact that criminal offences attach to offenders, and who these are needs to be established before criminal liability can be found and imposed. Already however in this area of analysis the borders between the criminal offence and criminal liability begin to manifest themselves.

In dealing with these issues the paper constitutes part of a broader goal that seeks to establish a framework for an analysis of Australian criminal law that addresses and distinguishes core

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<sup>4</sup>See for a brief overview of the operation of general principles of criminal responsibility within Australian criminal law, my Chapter 'The concept and systematization of the criminal offence in Australia' in International Max Planck Information System for Comparative Criminal Law, Max-Planck Institut für ausländisches und Internationales Strafrecht, forthcoming.

<sup>5</sup>The phrase, 'substantive concept' is used here in a broad, open sense and not necessarily as referring to the 'material' wrong of a crime, or the concepts of material unlawfulness and the material concept of crime, as these concepts have been developed within German criminal law theory. However, the use of the term here and its relationship to a concept of 'legally protected interest', as set out in this paper (see below), represents an attempt to start to consider how the concept of legal protected interest may be a consideration in the nature and form of the criminal offence within Australian criminal law.

concepts that inform it. The point here is that in framing a definition and understanding of the criminal offence and of elements that inform it (the concept of 'wrong', categorization of crimes, of the offender and the distinction between criminal offence and criminal liability as core concepts of the law) the paper seeks to establish a framework for an analysis of Australian criminal law that recognizes complex features of it and to treat them as discrete topics whilst recognizing the inherent links between them.

## II. The Concept of the Criminal Offence

### a. Criminal Offence Definition within Australian Criminal Law.

There is no singular definition of criminal offence within Australian law, and the Code and non-code jurisdictions generally adopt a different approach to the need for a definition.

Consistently with the role of the Code as a complete statement of the law,<sup>6</sup> the Criminal Codes of Queensland (Qld), Western Australia (WA) and Tasmania (Tas) contain a definition of the term 'offence',<sup>7</sup> while the Northern Territory (NT) contains a definition of 'commission of offence'.<sup>8</sup> QLD, WA and Tas also contain a brief definition of 'crime' which is linked to the division of criminal offences into categories.<sup>9</sup> A different approach to the meaning of 'offence' is adopted in the Commonwealth Criminal Code and the Criminal Code of the Australian Capital Territory (ACT), as well as, for limited purposes, the NT Criminal Code.<sup>10</sup> In each of these jurisdictions the definition of offence is based on the meaning of 'the elements of an offence'.<sup>11</sup>

The other criminal law jurisdictions in Australia, the non-code jurisdictions, do not contain a legislative definition of criminal offence and are guided in its meaning by broad common law definitions of crime and criminal law. The common law however does not contain a given, singular, universal definition of these concepts. As noted above, as far as the common law is concerned, the concept of crime and issues related to it, such as the concept of an 'offence' or 'commission of offence'

<sup>6</sup>See Appendix

<sup>7</sup>In the Criminal Code (QLD) and Criminal Code (WA) offence is defined as, 'an act or omission which renders the person doing the act or making the omission liable to punishment' (s. 2). The Criminal Code (Tas.) contains a broader definition, defining 'offence' as 'any breach of the law for which a person may be punished summarily or otherwise' (s 1).

<sup>8</sup>In the Criminal Code (NT) 'commission of offence' is defined as, 'an offence is committed when a person who possesses any mental element that may be prescribed with respect to that offence does, makes or causes the act, omission or event, or the series or combination of the same, constituting the offence in circumstances where the act, omission or event, or each of them, if there is more than one, is not authorized or justified' (s. 2)

<sup>9</sup>Offences in Australian criminal law are generally divided between 'indictable' and 'summary' offences. See below at 'Categorization of crime'

<sup>10</sup>The Northern Territory (NT) has two different approaches to the definition of offence, namely a definition of 'commission of offence' in s. 2 of the Code as well as the definition based on 'elements of an offence' in Part IIAA, s 43AB. This Part, which adopts the provisions of Chapter 2 of the Commonwealth Criminal Code, commenced in 2005 but applies only to prescribed offences which are set out in Schedule 1 of the Code. These are limited in number, and therefore Part IIAA itself has limited application to criminal offences within the NT. See Watson, *Australian Criminal Law: Federal Offences*, 10.120, 10.480.

<sup>11</sup>This definition is, 'an offence consists of physical and fault elements'. See Criminal Code (Commonwealth) (Section 3.1(1)), Criminal Code 2002 (ACT) (Section 11) and Criminal Code (NT) (Section 43AB). This definition of offence in the Criminal Codes of the Commonwealth and ACT is in addition to a reference to 'offence' in the 'Dictionary' in the Commonwealth Criminal Code and the Crimes Act 1900 (ACT) respectively. This is however stated very broadly, e.g. 'offence means an offence against a law of the Commonwealth' (Commonwealth Criminal Code Dictionary)

is a matter of great difficulty. The concepts have been mentioned and articulated in the cases on numerous occasions<sup>12</sup> however, consistently with the essential form and nature of the common law as a collection of law stated in diffuse cases, the concept of a uniform definition has not been articulated. Despite this, the common law has developed a widely adopted definition of crime which forms the premise of the common law rationale of criminal law. This is generally ascribed to Lord Atkin in *Proprietary Articles Trade Association v Attorney-General for Canada*,<sup>13</sup> who wrote:

'Criminal law connotes...such acts and omissions as are prohibited under appropriate penal provisions by authority of the state.'

#### b. Criminal Offence Definition, Legal Policy and the Rule of Law.

Within the context of Australian criminal law the differing approaches to and definitions of criminal offence and crime have a pragmatic effect. Most significantly, they reflect and permit a fluid and relativist approach to the definition of crime and particularly to the scope of the criminal offence as a foundation of criminal liability. This reflects deliberate legal policy, the intention of which is to allow maximum flexibility for the state in determining the breadth and scope of the criminal act. The result is that the Parliament in each jurisdiction in Australia has a wide power to define the contours of criminal conduct.

The breadth of this general criminal law making power recognizes the fluidity of crime as a social construct that changes with social, political and cultural conditions. Criminal law is a posited, within its Australian conception, as a codification in law of fundamental values, but these are fluid. They are dictated by and change with the demands of contemporary society. In this sense crime is characterized essentially as an injury or damage caused to the social, or community, good. The 'social good' is that set of social and communal,<sup>14</sup> legal, cultural, political, and other public interest values that constitute and inform the construct of a society at any given historical moment.<sup>15</sup> It is fluid and changes with the ebb and flow of the vast variety of interests and values that inform the social dynamic at any given time.

Further, the criminal law represents only one of many social processes which affect social values and conduct. The criminal law is a relative, as well as a selective process, for which there are alternatives when dealing with social problems. The result of a broad policy approach to the role and nature of Australian criminal law is that despite common areas of criminal conduct and liability, the criminal law of each jurisdiction is a reflection of localized and particular cultural, social and political influences.<sup>16</sup> In Australia, accordingly, 'crime is simply what ever the law-makers (legislatures or courts) at a particular time have decided is punishable as a crime'.<sup>17</sup> This essentially tautologous definition of crime is widely recognized and has credible foundations.<sup>18</sup>

<sup>12</sup>See e.g. a collection of definitions of 'crime' and 'offence' in James, John S., *Stroud's Judicial Dictionary* (4<sup>th</sup> ed), Sweet & Maxwell, London, 1971, Vol. 1 at p. 648 and Vol. 3 at p. 1824-26

<sup>13</sup>(1931) AC 310 at 324

<sup>14</sup>These include ethical, religious and aesthetic values

<sup>15</sup>See e.g. Ashworth, A., *Principles of Criminal Law* (6<sup>th</sup> ed), Oxford University Press, 2009, 'The boundaries of the criminal law are explicable largely as the results of political power at particular points of history', p. 3

<sup>16</sup>McSherry, B. & Naylor, B., *Australian Criminal Laws: critical perspectives*, Oxford University Press, 2004, p. 5.

<sup>17</sup>Bronitt, S. & McSherry, B., *Principles of Criminal Law* (2nd ed.), Lawbook Co., Sydney, 2005, p. 6. In other words, it is simply any conduct which is proscribed by the criminal law, as determined from time to time by the legislature, as being criminal and punishable (p. 7).

<sup>18</sup>See e.g. Hall, J., *General Principles of Criminal Law*, The Bobbs-Merrill Company, Indianapolis, 1947, p. 10. See for a contemporary observation of this characteristic of the definition, Daly, K., 'Aims of the criminal justice system' in Goldsmith, A., et al, *Crime and Justice: a guide to criminology* (3<sup>rd</sup> ed), Lawbook Co., 2006, p. 270

This definition of the notion of crime typifies a general approach towards the influence of, and reliance upon, social and public policy as a means of informing crime at the expense of criminal law theory generally in Australian criminal law.<sup>19</sup> The nature of criminal law practice before the courts as a case management process in which a huge caseload of matters are dealt with according to managerialist principles of 'fair, just, fast and efficient' leaves little scope for a discerning approach to an assessment of criminal law as a social issue that requires extensive theoretical analysis.

Despite, however, the open parameters that the legislature allows to itself in setting the boundaries of crime, it is clearly necessary for there to be limits on the capacity of the state to 'make' criminal law. The concept of crime must be restricted by a legal framework so that the state cannot act arbitrarily, and the community has some advance knowledge of the range of conduct which is deemed to be impermissible and prohibited by criminal law. This fundamental requirement of the nature of criminal law is informed by the rule of law and more concretely, to the extent to which it exists within Australian criminal law, the principle of legality.<sup>20</sup> A definition of the criminal offence therefore provides at least a framework within which the body of the criminal law can operate and evolve. The core characteristics of the criminal offence are identified with this legal and social goal in mind.

### c. A Formal Concept of Criminal Offence and Criminal Law in Australian Criminal Law.

These considerations of legal policy and the demands of the rule of law impact upon the broad schema of statutory definitions of offence and criminal offence, and the common law concept of the criminal offence. The consequence is that a broad concept of the criminal offence can be framed for Australian criminal law which is based on common elements of these definitions. This concept, which is akin to the idea of the formal concept of the criminal offence in civil law systems, can be postulated as follows: a criminal offence (or crime) is a legal wrong consisting of physical and fault elements which is prohibited by the state by way of penal provisions and punishment.<sup>21</sup>

This concept of the criminal offence is implemented within the criminal law by way of substantive and procedural rules of law. The concept of the criminal law, namely the law that gives effect to this notion of the criminal offence, arises through the linkage of this concept and the rules that give effect to it. An understanding of the relationship between these two aspects therefore assists to define the concept of the criminal law in Australia. This can be defined as a set of legal norms that determine the conditions under which legal persons may be held liable to punishment that is relative to the offending conduct.<sup>22</sup> It is the law, the criminal law, which determines whether 'conduct' amounts to a 'crime'. The rule of law foundations upon which the criminal law is founded require that it is for the judiciary to decide this, i.e. whether conduct amounts to a criminal offence and offends the criminal law or not is assessed according to law which is determined by the judiciary.

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<sup>19</sup>See below at 'The boundaries of the criminal offence and the role of legal theory'

<sup>20</sup>The principle of legality has a nuanced and unclear definition in Australian criminal law. See for an analysis of the principle of legality within Australian criminal law, my Chapter 'Principle of legality (nullum crimen sine lege) in Australia' in International Max Planck Information System for Comparative Criminal Law, Max-Planck Institut für ausländisches und Internationales Strafrecht, forthcoming.

<sup>21</sup>See Bronitt & McSherry, p. 6-7, McSherry & Naylor, p. 5, Lanham D., et al, Criminal Laws in Australia, The Federation Press, 2006, p. 8.

<sup>22</sup>Bronitt & McSherry, p.6-7, noting esp. Lord Atkin at (1931) AC 310

### III. The Criminal Offence, Wrongful Conduct and Legal Theory.

#### a. A Substantive Concept of the Criminal Offence.

The substantive concept the criminal offence is posted here as the notion of the nature and characteristics of the criminal offence that distinguish it from other wrongful conduct. This framing of the concept is conceived and derived from the notion of the concept in civil law systems of criminal law as, to put it in very general terms, human conduct whose wrongfulness deserves and requires punishment.

The concepts of the criminal offence and the criminal law noted above enable the criminal offence to be substantively conceived as a form of legal wrong that can be distinguished from other forms of wrong because it is comprised of features which, in the end, require that the actor should be subjected to punishment imposed by the state. These other wrongs with which the criminal wrong compares include civil wrongs and deviances from a moral norm which are of insufficient culpability to attract the punitive responses of punishment that is proscribed by the state.

#### b. A Qualitative and Quantitative Distinction between Crimes and Civil/Administrative Wrongs.

The procedural context in which conduct is proscribed by the criminal law is one of its critical defining characteristics. The criminal offence is constituted by the actualization of a verdict of criminal guilt following criminal proceedings. The punitive conditions that attach to the concept of the criminal offence – that certain conduct can be labeled as 'criminal' and 'punishable' and that this is realized through a formal guilt determining process - distinguishes it from other legal wrongs that are prohibited, and made unlawful, by other legal norms.

These elements of the concept of the criminal offence define crime and the criminal law as a discrete branch of the law. At this level of analysis a criminal wrong is contrasted to a civil wrong. The designation of conduct as criminal implies severe moral and social approbation. This does not attach to civil wrongs which operate at a lower and different level of social control and with different purposes.

The defining characteristic that separates criminal conduct from civil wrongs is that the commission of a criminal offence constitutes an offence which is punishable ultimately, though not always, by the deprivation of liberty. This severe punishment requires that the standard of proof of a criminal offence is the highest that the law imposes, 'beyond reasonable doubt'. It is this standard that defines and epitomizes criminal proceedings. Criminal proceedings are also characterized by the status of the prosecuting office, which is always a representative of the state in the form of the prosecutorial executive. In other words criminal prosecution is a public matter, and it is the state that has the principal power and responsibility to initiate and conduct criminal proceedings.<sup>23</sup>

By contrast, a civil wrong does not have the quality of an 'offence' (qualitative distinction). The standard of proof for all civil wrongs is always 'on the balance of probabilities', a legally lower and less exacting standard. Civil proceedings are commenced by individuals although serious civil infractions may be dealt with by an office of the state. Even if they are however, the penalty for a civil infraction

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<sup>23</sup>Lanham, p. 6

never includes a punitive order such as custodial sentence.<sup>24</sup>

Civil wrongs and the concept of 'civil law' include a very broad range of conduct but it is only at the border with the criminal law that there is any consternation with respect to the distinction (quantitative distinction). At this level civil wrongs aim to deal with serious regulatory infractions. The distinction here between civil and criminal relates to the moral opprobrium and the social censure and stigma attached to the conduct.<sup>25</sup>

Despite the theoretical distinction, in practice it is blurred by a wide range of civil punishments for industrial, corporate and individual wrongs which carry severe, but not custodial penalties. The existence of these so-called quasi-criminal, or criminal-like offences, confuses the framework that distinguishes criminal and civil wrongs. However the fundamental distinctions noted here remain. Once the offence crosses the boundaries of the standard of proof and the quality of punishment it becomes criminal. Within the fluid framework within which regulatory law operates, this will only happen where the state deems the conduct to be 'criminal' and attaches punitive consequences to it because of the moral and social harm with which it is associated.

### c. Indicators of Wrongfulness, Legally Protected Interests, and the Rule of Law.

The considerations that inform the distinction between criminal and civil conduct are based on legal and social values, but these are not defined, categorized or prioritized by the law. They include considerations about the seriousness of the offence and gravity of harm arising from it, and are informed by concepts of moral blameworthiness, reprehensibility, dangerousness, and wrongfulness amongst others. These considerations inform values that are aimed at protecting legal and social interests which may be, but are not necessarily, formulated in legislation or common law.

The legal and social values that inform the law and which underpin the distinction between criminal and other wrongs include a wide range of factors such as, protection from harm, guaranteeing and ensuring the security of the individual and the community, quiet enjoyment of property and non-violation of ownership and use of property, non-interference in the use, enjoyment and access to public and social amenities,<sup>26</sup> categorization and enforcement of deemed socially proper personal and community health behaviour,<sup>27</sup> and the equalization of burdens and responsibilities for social privileges.<sup>28</sup>

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<sup>24</sup>E.g. pursuant to the Australian Consumer Law, the first phase of which came into operation in March 2010, the Australian Competition and Consumer Commission (ACCC), a Commonwealth statutory office, may seek civil pecuniary penalties for contravention of consumer protection law and for failure to comply with enforcement powers within the legislation. These penalties permit very significant financial fines against offending corporations and individuals. However the leverage of these penalties lies in the ability of the ACCC to encourage offending corporations to compensate consumers, or in other non-punitive civil remedies such as injunctions and bankruptcy proceedings, rather than in punitive custodial enforcement measures. See Terceiro, M., 'Ramping up the powers of the consumer regulator and the court', NSW Law Society Journal, Vol. 48(3) (April 2010), pp. 66-70

<sup>25</sup>Bronitt & McSherry, p. 8

<sup>26</sup>This consideration informs laws that prohibit e.g. offensive behaviour, language and conduct in public places, and graffiti on private property and proscribed public places

<sup>27</sup>E.g. laws prohibiting the use of particular drugs

<sup>28</sup>E.g. social security fraud, tax law criminalization, corporate crime, trade practices and environmental criminal legislation



All of these factors and considerations constitute a broad framework for defining the parameters of criminal and civil culpability. They constitute a range of matters that are taken into account in determining the propriety of state intervention through the criminal law in personal and social affairs, and therefore how the state categorizes conduct at any particular historical moment. They can be traced to legal and political philosophy and in particular the philosophy that underpins liberalist values within the criminal law such as the concept of harm, as well as its counterpoint, the utilitarian critique of autonomous liberty.<sup>29</sup>

But these factors and considerations and their historical roots constitute something that is broader than a mere framework of regulatory law. In the end they represent political, social, economic and cultural decisions that are made within the context of a range of legal norms that are informed most strongly by the rule of law. Their effect is, in turn, that they inform contemporary and future legal norms, and particularly the norms of criminal law.

#### **d. The Concept of Legally Protected Interest as a Concept within Australian Criminal Law<sup>30</sup>**

Legal and socially protected interests have an indirect influence in informing criminal offences or a range of offences. The protection of these interests represents an underlying purpose of the criminal law rather than a concrete objective element of an individual offence. This goal informs the reason for promulgation of the offence, but it is not necessary to establish, as part of the elements of the offence, particularly the physical elements of it, any specific legal interest that the offence aims to protect.<sup>31</sup>

There are two broad circumstances in which the protection of a legal interest may inform the substantive content of an offence. These are firstly, the cumulative grouping of offences which share common attributes in particular parts of legislation, and secondly by way of a statement at the beginning of, or within particular parts of legislation, which sets out the purpose or goal of the legislation, or a part of it.

Criminal legislation of each of the Australian jurisdictions contains a wide range of substantive offences that are grouped according to common characteristics. This classification demonstrates a legislative goal to protect particular legal and social interests. For example, in the Criminal Code (QLD) offences are listed in 'Parts' below headings that include, inter alia, in Part 3, 'Offences against the administration of law and justice, against office and against public authority'. Sections which describe offences of corruption, extortion and abuse by public officials in this Part of the Code are designed to address a specific legal and social interest, namely the due accountability and transparency of acts of public officials. In this broad way, protection of legal interests is an implied element in the structure of specific criminal offences in this part of the Code.<sup>32</sup> A corollary of this is that offences within this part are less likely to be informed by other legal interests that are the concern of other parts of the Code, and vice versa. This example is replicated in the criminal legislation of other jurisdictions.

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<sup>29</sup>See below at 'The boundaries of the criminal offence and the role of legal theory'

<sup>30</sup>The concern of this section (which is an excursus to the central issues addressed up to this point) is to consider how the concept of legal protected interest may be a consideration in the nature and form of the criminal offence within Australian criminal law

<sup>31</sup>Any exception to this general position would need to be clearly set out as an element of the specific offence.

<sup>32</sup>This analysis is founded upon the general law of statutory interpretation. Most fundamentally this requires that sections or parts of legislation must be interpreted in a way that is consistent with, and conforms to, the specific legislative context where they are placed, as well as the context of the legislation as a whole. This is a general principle of the law which is adopted by the criminal law.

The second way in which protection of legal interests is achieved is through legislation that addresses specific areas of criminal law. A common feature of contemporary legislation generally, which is adopted also in the criminal law, is that it contains a section or part that states its purposes and objects. Offences or other provisions within the legislation must, according to rules of statutory interpretation, be interpreted consistently with these objects. For example, the Criminal Proceeds Confiscation Act 2002 (QLD) sets out a range of provisions that deal with the confiscation of money or property that is obtained through illegal financial activity. The objects and purpose of this Act is set out in s. 4. This section amounts to a statement of the legal interests that the legislation seeks to protect, namely, the removal of financial gain from illegal activities. The law of statutory interpretation requires that each of the specific provisions of the Act must be read and interpreted consistently with s. 4. In this way the section provides a framework for the adoption of a specific legal interest as part of the calculus for the interpretation of sections of the Act.

#### e. The Boundaries of the Criminal Offence and the Role of Legal Theory.

Despite the foregoing considerations, the borders between the classifications of wrongs can be difficult to define, are often strongly contested, and leave considerable scope for overlap; and this has engendered the space for expansive debate about the scope and legitimate reach of the notion of crime.<sup>33</sup> The essence of this debate is theoretical critique, deconstruction and reappraisal which questions and examines the classical notions of the criminal offence as a construct that reflects moral, social and community norms.

Attempts to define the parameters of the criminal offence have been informed by a number of approaches. Foremost amongst these within the liberalist tradition is the principle of harm attributed to the 19<sup>th</sup> century political philosophy of John Stuart Mill. This principle argues that the power of the state to restrict individual freedom through the criminal law is justifiable only in order to prevent harm to others.<sup>34</sup> Despite critique of this principle, the concept of the harm principle has exercised significant influence in legal policy concerning Australian criminal law.<sup>35</sup>

Yet the fundamental claim of the critique, that autonomous liberty must be balanced against other social values, norms and guidelines, has had an influence on the law. The result is that the concept of the crime and criminality is informed by a host of other major influences which are broadly based on a range of inter alia sociological, welfare, economic, and public policy principles and perspectives.<sup>36</sup> In Australian law these approaches have informed an extension of the range of criminal offences beyond 'traditional' crime to a wide range of regulatory offences, including strict and

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<sup>33</sup>See e.g. Israel, M., 'What is crime? Who is the criminal?' in Goldsmith, A., et al, *Crime and Justice: a guide to criminology* (3<sup>rd</sup> ed), Lawbook Co., 2006, p. 3 & 13

<sup>34</sup>This very brief statement of the conception of the principle of harm within Australian criminal law serves to demonstrate that it is very different to other legal conceptions of harm. In particular it is distinguishable from the principle of harm that informs the material concept of crime within German criminal law theory. Here the concept of penal harm is intrinsically related to the protection of legal interests. See Eser, A., 'The principle of harm in the concept of crime: a comparative analysis of the criminally protected legal interests', *Duquesne University Law Review*, 4 (1966) 345-417, at 374

<sup>35</sup>Bronitt & McSherry, p. 51-54

<sup>36</sup>Including human rights perspectives, Israel, p. 9. See also generally the collection of essays in 'Part 1 Understanding Crime' in Goldsmith, A., et al, *Crime and Justice: a guide to criminology* (3<sup>rd</sup> ed), Lawbook Co., 2006.

absolute liability offences, as well as the incorporation of international and transnational crime within the scope of domestic offences. They have also importantly led to a broader way in which offences and offending are perceived and dealt with which embraces socio-legal and socio-theoretical principles and approaches.<sup>37</sup> All of these influences provide a realist, secularist construction to the notion of the criminal offence and extend it beyond its positivist, liberalist, even moralist, traditions. They inform a qualitative sense of sufficient 'wrongfulness' or of the 'unlawful' which in the end lies at the core of the concept of the criminal offence.<sup>38</sup>

Notwithstanding these contributions to legal theory, the absence of a clear and defined border between the criminal offence and other wrongful conduct, or between crime and non-crime, reflects the failure of critical legal analysis to change the core dynamics by which the criminal offence is constructed.

The open-ended nature of criminal offence definition has been important in the expansion of the criminal law to statutory offences of absolute and strict liability, corporate crime, transnational crime and, on the other hand, the abrogation of obsolete offences. These developments reflect changes in social, political and cultural perceptions of social and legal values, and the role of the state in protecting the community and expressing its condemnation or approval of certain conduct. This, as noted above, is a fluid process and is subject to among others, domestic imperatives and constitutional conventions. It is not defined by concrete rules and standards.

In the end, as one commentator observes, '(t)he search for a single unifying theory that can explain or guide our decisions to proscribe behaviour as criminal is pointless'.<sup>39</sup> This comment reflects the debated role of legal theory within the context of functioning legal systems generally. It is argued that, 'for most functioning legal systems, theory is a sideshow, separate from the practical activity of actual lawyers'.<sup>40</sup> This contested role of legal theory is apposite for an understanding of the criminal offence and the broader role of criminal law as perceived within the Australian context. More widely it epitomizes the status of legal theory within Australian criminal law: it remains as something of a 'sideshow' to the 'real' practice of criminal law.

#### IV. The Concept of Categorization of the Criminal Offence.

An historical distinction between felonies and misdemeanours was developed by the English common law to distinguish between the forms of punishment to apply to a criminal offence. Felonies were capital crimes in which the offender, even if a death sentence was commuted, was subject to 'attainder', the loss of all civil rights including the right to hold property and institute legal proceedings. Attainder was received into Australian common law in 1828,<sup>41</sup> but it was largely not applied and was eventually abolished by statute.<sup>42</sup> Misdemeanours were less serious offences punishable by imprisonment or fine and to which attainder did not apply.

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<sup>37</sup>E.g. the concept of 'hate crimes', 'home invasion crimes', and 'battered women syndrome', among others.

<sup>38</sup>Bronitt & McSherry, pp. 48-68

<sup>39</sup>*Ibid*, p. 51

<sup>40</sup>Fichtelberg, A., *Law at the vanishing point: a philosophical analysis of international law*, Ashgate Publishing, Alershot, 2008, p. xiii

<sup>41</sup>*Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583*

The distinction between felonies and misdemeanours was adopted by all Australian jurisdictions except the Commonwealth, but has now been abolished; the last jurisdiction to do was New South Wales (NSW) in 1999.<sup>43</sup> The terminology that has been adopted to replace felonies and misdemeanours varies between the jurisdictions.<sup>44</sup> The Code jurisdictions generally refer to serious offences as 'crimes' and/or 'misdemeanours' or 'offences', and to minor offences as 'simple', or 'regulatory' offences; and contain brief definitions of these terms.<sup>45</sup> The term 'regulatory offence' is adopted as a formal offence descriptor only in the Northern Territory (NT) and in Queensland (Qld).<sup>46</sup> In other jurisdictions the term regulatory offences is used generally and informally to describe offences that require proof only of the physical element of the offence, generally its conduct element.<sup>47</sup> The non-Code jurisdictions, except NSW, refer to offences as either 'indictable' or 'summary' offences. NSW uses the terms 'serious indictable offence' (the term used to replace 'felony') and 'minor indictable offence' (the term used to replace 'misdemeanour'). The detail of categorization of crime is found in the legislation of each jurisdiction. For example the Criminal Code (QLD) sets out the division of offences in s. 3.<sup>48</sup>

Notwithstanding the differences in their nomenclature, classification of criminal offences in each of the jurisdictions consistently has the most significance across all jurisdictions in procedural law where it influences the type of trial that may be available to an accused.

Serious offences, however named, are tried in a superior court before a jury, although in NSW, South Australia (SA) and the Australian Capital Territory (ACT), the accused may elect to be tried by a judge alone.<sup>49</sup> Before the trial takes place there is an intermediate procedure that determines whether or not the charges against the accused can be sustained in law. This procedure, known as a 'committal' takes place in a lower court. It amounts to a vetting of the evidence that is to be used against the accused at the trial proper; only if this evidence has a legally determined appropriate weight is the accused 'committed' for trial to the higher court.<sup>50</sup> Simple or summary offences are tried before a Magistrate (a judge) in a lower court and always without a jury.<sup>51</sup> A third categorization exists for indictable and crimes offences which are deemed to be 'less serious'. These offences, regulated by

<sup>42</sup>e.g. in 1981 in NSW by the Felons (Civil Proceedings) Act 1981

<sup>43</sup>Section 580E Crimes Act, 1900 (NSW), see Brown, D., et al., *Criminal laws: materials and commentary on criminal law and process in New South Wales* (4<sup>th</sup> ed), The Federation Press, 2006, p. 1250

<sup>44</sup>Bagaric, M., *The Laws of Australia: Criminal Law Principles*, Volume 9, Sydney, 1993, at (9.1.980)

<sup>45</sup>*Ibid*, (9.1.990)

<sup>46</sup>*Ibid*, (9.1.1120). In these jurisdictions the term applies to specific forms of minor offending such as failing to comply with a noise direction (ss. 53A(2) & 91AA Summary Offences Act (NT)) or leaving a hotel without payment (s. 6 Regulatory Offences Act 1985 (Qld)).

<sup>47</sup>In these jurisdictions 'regulatory offences' cover areas of activity that are less serious in nature and may therefore be tried summarily. They exist in diverse legislation, the general purpose of which is the regulation of health, safety, occupational, industrial, environmental, business, consumer and revenue affairs. Within this context these offences, depending on their wording, are construed as offences of either 'absolute liability' or 'strict liability', Bagaric, (9.1.1120).

<sup>48</sup>This provides:

- (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
- (2) Criminal offences comprise crimes, misdemeanours and simple offences.
- (...)
- (4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.
- (5) An offence not otherwise designated is a simple offence.

<sup>49</sup>Bagaric, (9.1.1000-10).

<sup>50</sup>Namely, the 'Local' or 'Magistrates' court.

<sup>51</sup>Bagaric, (9.1.1100).

statute, must be dealt with summarily in the Local court unless the prosecution decides to proceed by indictment in a superior court.

These different forms of trial procedure have consequential effects. Trials in the higher courts are largely conducted by barristers who in turn are instructed by solicitors. The aim is that legal representatives who are specialized in the jurisdiction conduct the case. This adds a degree of formality and cost to higher court trials that does not exist in Local court trials which are, in the majority, conducted by solicitors alone.

These procedural effects in turn have substantive effects. An election or decision that a less serious offence is dealt with 'summarily' has the effect that the maximum penalty that may be imposed for conviction is less than that which may be imposed if the offence is dealt with by indictment. In other words the maximum sentence for an offence in this category is different depending on whether it is dealt with in the Local court, which has a jurisdictional limit on the maximum sentences that it may impose, or in a higher court.

The division of criminal offences and their procedural consequence has been rigorously critiqued.<sup>52</sup> Summary trials before a magistrate, it is argued, do not have the procedural justice and fairness characteristics of trials held before a judge and jury. Magistrates trials, usually referred to as 'hearings', are quicker, less formal and cheaper (for the accused as well as the state) than jury trials.<sup>53</sup> They are the favoured form of dealing with criminal offences – court statistics habitually demonstrate that the overwhelmingly number of cases are dealt with summarily.<sup>54</sup>

The effect is that there are distinct forms and levels of procedural legality within the Australian criminal justice system: a lower court system that provides 'conveyor-belt justice' for the vast majority of criminal offences which may include serious - but not serious enough offences, and a 'rolls-royce' system for the, by comparison, few 'serious' offences for which jury trial, subject to accused election, is compulsory.<sup>55</sup>

## V. The Concept of the Offender.

The concept of the offender in Australian criminal law is based on and related to the broad characteristics of culpability in criminal law, namely rational behaviour and moral blameworthiness as conditions of criminal liability that can be attributed to a human being. This can include children and mentally ill people, however their status as persons whose ability to behave rationally is in issue, exempts them in particular circumstances from criminal liability. Criminal liability is however, not

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<sup>52</sup>See e.g. McBarnet, D., *Conviction: Law, the State and the Construction of Justice*, The Macmillan Press Ltd., 1983; Brown, pp. 158-165, Bronitt & McSherry, p. 38-40, 96

<sup>53</sup>See above at 'The scope of the crime definition, legal policy and the rule of law'

<sup>54</sup>Most criminal matters are summary matters and almost all of these are dealt with in the magistrate's court where there is no jury participation. In 2005-06 in Australia 586,202 defendants were finalised in the criminal court system. Of these 569,883 (97%) were dealt with in the magistrates courts, see Australian Bureau of Statistics (ABS), 2008 Year Book Australia, Commonwealth of Australia, 2008, p. 413-14). Of the 3% of cases that were heard in the higher courts, only 20% were determined by trial (ABS 2008 p. 418). These statistics demonstrate that the participation of the jury in the criminal trial is a mythical ideal of the criminal justice system rather than its true representation.

<sup>55</sup>Brown, pp. 219-239

confined to human beings; non-human entities which have legal personality may also be subject to criminal responsibility. Accordingly, corporations may suffer criminal liability in situations where the law has considered that their conduct satisfies the fundamental characteristics of criminal culpability.

All jurisdictions include a range of offences which prescribe the scope of offenders to which they apply. This is discerned from definitions in the legislation, or from the specific offence, or the context of the legislation in which the offence is set out. For example Chapter 2 of the Criminal Code (QLD) sets out definitions of 'Parties to offences' (ss. 7-10A). This includes definitions of 'principal offenders', and the scope of offenders where an offence is committed by two or more persons. Part 3 of the Code sets out 'Offences against the administration of law and justice, against office and against public authority' – these offences inculcate offenders who by definition are in a position to commit them, namely persons 'employed in the public service'. The legislation of all the jurisdictions follows this approach. The difference is that the range of offenders in code jurisdictions is dependent on the statutory interpretation of the Code or legislation itself. In the non-code jurisdictions the common law is used to assist in the interpretation of legislation including the range of offenders to which it may apply.

Australian criminal law makes extensive provision in each of its jurisdictions for particular types of offenders, e.g. children, the mentally ill and corporate liability. This varies in its uniformity and complexity according to the extent to which legislation has superseded rules of common law. Thus whilst the substantive law of criminal liability of children is founded on common law principle and is relatively uniform, the legislative detail of the law of mental impairment and the terminology used varies considerably between separate jurisdictions.<sup>56</sup> The same could be said of the distinction between the common law and the Commonwealth Criminal Code with regard to corporate liability.

With respect to children the minimum age of responsibility in all jurisdictions in Australia is 10, so that a child under this age cannot be found guilty of a criminal offence. The *doli incapax* rule is also uniform law across Australia, with the effect that children between 10 and 14 are subject to a rebuttable presumption that they are incapable of wrongdoing. The existence and scope of this presumption however varies within the common law according to different interpretations in diverse countries in which it operates and recently has been reconsidered in England.<sup>57</sup> The law in Australia follows the decision in *C (a minor) v Director of Public Prosecutions*.<sup>58</sup> In order to rebut the presumption, the prosecution must establish that the child knew that his/her conduct was seriously wrong and the conduct was consistent with this, rather than conduct which amounted to mere 'naughtiness' or 'childish mischief'.<sup>59</sup>

Australian criminal law contains two basic foundations for establishing corporate criminal liability.<sup>60</sup> Principles of corporate liability established by the common law apply to corporations generally within Australia except to the extent that they have been displaced by legislation. The result is that in the Code jurisdictions of QLD, WA and Tas the attribution of corporate liability is a matter of the common law subject only to particular provisions in these Codes relating to criminal responsibility

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<sup>56</sup>See e.g. with respect to the differing law in each of the jurisdictions on 'the defence of mental impairment', Bronitt & McSherry, pp. 212-213

<sup>57</sup>*R v JTB* (2009) UKHL 10 (29 April 2009).

<sup>58</sup>[1996] 1 AC 1

<sup>59</sup>*R v CRH* (NSWCCA unreported) 18.12.1996.

<sup>60</sup>Bronitt & McSherry, p. 156

which apply equally to all legal persons including corporations.<sup>61</sup> The Commonwealth Code (and in the comparative provisions of the ACT and NT Criminal Codes)<sup>62</sup> however contains an expanded scheme of corporate liability to that of the common law. This is set out specifically in Part 2.5 (ss 12.1-12.6) of the Code. These Codes provide that their provisions apply to corporations in the same way as to individuals, subject only to modifications that are necessary due to the fact that criminal liability is imposed on a corporate entity rather than an individual.<sup>63</sup> The principal elements of these schemes which distinguish them from the common law relate to the rules for attributing conduct to corporations which are within the apparent authority of the corporation, and to the rules relating to the attribution of fault for all categories of offence. In this regard, the Codes establish a significant departure from the common law principle of corporate liability.<sup>64</sup>

## VI. The Concept of a General Part and Special Part of Criminal Law.

The concept of a General Part and Special Part of criminal law is not a categorization that explicitly exists or is adopted in Australian criminal law.

This terminology is translated within Australian criminal law jurisprudence as general principles of criminal responsibility and substantive criminal law (or substantive crime). For criminal law theorists, as opposed to practitioners, the general principles of criminal responsibility are recognized as providing equivalence to the concept of a General Part and the substantive criminal law to the concept of a Special Part of criminal law.<sup>65</sup>

Each of the Code and non-Code jurisdictions adopts a loose and informal division between a General Part and a Special Part, but they do not recognize it by this nomenclature.

The most important provisions relating to general provisions of criminal responsibility in the Queensland (QLD) and Western Australia (WA) Codes are contained in Chapter 5 (ss. 22-36) but these are supplemented by other sections of the Codes.<sup>66</sup> In Tasmania, general provisions of criminal responsibility are set out in ss. 13-14 of the Criminal Code.<sup>67</sup> The main content of each Code consists of substantive criminal law offences, supplemented in some jurisdictions by provisions relating to procedural law.

In the non-Code jurisdictions the general principles of criminal responsibility are based on common law principles.<sup>68</sup> Substantive criminal law offences are contained almost completely in criminal legislation, which is interpreted and informed by common law principles.

<sup>61</sup>Colvin, E & McKechnie, J., *Criminal Law in Queensland and Western Australia: Cases and Commentary* (5<sup>th</sup> ed), Chatswood, 2008, at (21.6-8), Bagaric, Volume 9, Part 2, (140).

<sup>62</sup>Criminal Code (ACT) ss. 49-55, Criminal Code (NT) ss. 43BK-43BP

<sup>63</sup>s. 12.1, see generally Odgers, S., *Principles of Federal Criminal Law*, Sydney, 2007, (12.1.100-120).

<sup>64</sup>As established in *Tesco Supermarkets Ltd v Natrass*. [1972] AC 153. See Bronitt & McSherry, p. 159, and Colvin & McKechnie, 21.6, 21.13-16. An analysis of corporate liability under the common law or in the Commonwealth Criminal Code is beyond the scope of this paper. See generally Bronitt & McSherry pp. 154-160 and Odgers, Chapter 4.

<sup>65</sup>See Brown, p. 8

<sup>66</sup>Kenny, R. G., *An Introduction to the Criminal Law of Queensland and Western Australia* (7<sup>th</sup> ed), Chatswood, 2008, p. 120.

<sup>67</sup>Bagaric, (9.1.2450); Blackwood, J & Warner, K., *Tasmanian Criminal law: text and cases*, University of Tasmania law Press, Volume 1, p. 73

<sup>68</sup>Watson, (10.120)

The Commonwealth Criminal Code was the first legislative instrument in Australia to more formally implement a division between a General Part and a Special Part of criminal law. However, even here this nomenclature is not used. Rather, the Code adopts the terminology of 'General principles of criminal responsibility', which are set out in Part 2 of the Code. The remaining Parts of the Code, like the code jurisdictions, sets out substantive criminal offences. This model is followed in the Australian Capital Territory (ACT) and the Northern Territory (NT). The Criminal Code 2002 (ACT) contains a Chapter on general principles of criminal responsibility in Part 2 which closely replicates the Commonwealth model.<sup>69</sup> The NT enacted similar provisions in Part IAA of its Criminal Code in 2005 however these have limited operation.<sup>70</sup>

## VII. Conclusion.

The concept of the criminal offence has a particular meaning, form and function within Australian criminal law, an analysis of which assists to articulate important concepts and classifications within the law. It refers to and elaborates upon the structure of the criminal offence itself, and an understanding of this is important to avoid confusion and overlap with other concepts and issues that inform other inter-linking aspects of the criminal law. In particular there is a distinction between the concept of the criminal offence and an analysis of crime that focuses on the function, nature and form of criminal law as a discrete phenomenon of the law in general. This is often not clearly perceived, and there is inevitably considerable overlap in analysis of these issues. This is most clearly manifested by the fact that the concept of the criminal offence does not exist in isolation within criminal law analysis.

The concept of the criminal offence, as defined in this paper, is framed in broad terms and there is an inherent link between it and other complex considerations of the criminal law. This arises particularly from the foundational elements within the concept of the criminal offence as comprising physical and fault elements. This raises an intrinsic connection between the concept of the criminal offence and the concept of criminal liability expressed, in Australian criminal law, through the general principles of criminal responsibility.

A consideration of the concept of a General Part and Special Part of the criminal law demonstrates that, although it is not clearly expressed, there is a division in the conception of Australian criminal law between substantive and procedural criminal law and the concept of criminal responsibility. In particular, it demonstrates that the way in which the general principles of criminal responsibility operate within Australian criminal law differs between the code and non code jurisdictions. This differing conception of the content of these principles is a critical element of Australian criminal law and this in turn is critical for understanding the operation of the concept of the criminal offence within Australian criminal law. Notwithstanding uncertainty at its borders, the concept of the criminal offence provides a distinct point of reference to the fluid form of criminal liability within Australian criminal law. An acknowledgement and understanding of the discrete existence of the concept of the criminal offence is essential for a proper articulation of foundational elements of Australian criminal law, and this in turn contributes to the formulation of Australian criminal law doctrine.

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<sup>69</sup>Bagaric, (9.1.2550).

<sup>70</sup>See above and Watson, (10.120)



## i. Appendix

The division between the 'Code and non-Code jurisdictions' represents a form of categorization and analysis of Australian criminal law. These jurisdictions represent the nine major criminal law jurisdictions in Australia, namely the Commonwealth, the six states and two major territories of Australia. The term 'Commonwealth' refers to the system of government and law that operates within the whole of the territory of Australia. This is called the 'commonwealth' or 'federal' level of government and the law is referred to as 'commonwealth' or 'federal' law. In this sense Commonwealth law is distinguished from the law of the states and territories.

The Code jurisdictions are referred to as Queensland (QLD), Western Australia (WA), Tasmania (TAS) and the Northern Territory (NT). The non-Code jurisdictions are New South Wales (NSW), Victoria (Vic), South Australia (SA), and to a lesser and more ambivalent extent, the Commonwealth and Australian Capital Territory (ACT). In the Code jurisdictions the relevant 'Criminal Code' (the title of the main criminal law legislation) purports to be an exhaustive statement of the substantive criminal law. This means that the role of the common law is curtailed and restricted to limited issues, particularly the interpretation of ambiguous language. The non-code jurisdictions do not have a criminal 'Code'; however they do have extensive and very similarly framed criminal law legislation. Notwithstanding this, the major difference between the code and non-code jurisdictions is that, as a general rule, the common law plays a significant role in the interpretation of the substantive criminal law of the non-Code jurisdictions in a way that it does not in the code jurisdictions.

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