

An Introduction to
CRIMINAL LAW
in Queensland and Western Australia



J M Herlihy
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An Introduction
to
Criminal Law
in
Queensland
and
Western Australia

by

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Preface

The codification of the criminal law in Queensland, Western Australia and Tasmania has produced many variations from the common law principles which previously applied there and which remain the basis of the criminal law in the other states. We consider that the degree of divergence is sufficient to warrant a separate treatment of the criminal law pertaining to the code states. In this book we have focused on Queensland and Western Australia where the codes are almost identical. It is not our intention to provide a definitive treatment of the law in those states, however, and the book is designed as an introductory text. In addition, it may appeal to persons generally interested in the fundamentals of criminal law as well as police officers, probation and parole officers, court officials and social workers who are concerned with the operation of the criminal law.

For their assistance in preparing the manuscript, we thank Sheena Simpson and Peter Little.

JH
RGK
July, 1977

TABLE OF COMPARATIVE SECTIONS IN THE CRIMINAL CODES OF WA AND QLD

The Respective Acts are:—

The Criminal Code Act 1913-1976 (WA)

The Criminal Code Act 1899-1977 (Qld)

and their comparative sections are:—

WA	Qld
1	1
2	2
—	3
3	4
4	5
5	6
6	7
7	8
8	—

CRIMINAL CODE

IDENTICAL SECTIONS (Sometimes punishments differ.)

WA	Qld	WA	Qld	WA	Qld
2	2	49	49	93	98
4	4	50	50	94	99
5	5	51	51	95	100
6	6	52	52	97	101
7	7	53	53	98	102
8	8	54	54	99	103
9	9	55	55		(1) to (6)
10	10	56	56	101	105
11	11	57	57	103	107
12	12	59	58	104	108
13	13	60	59	105	109
14	14	62	61	108	112(2)
15	15	63	62	109	113
16	16	64	63	110	114
17	17	65	64	111	115
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25	25	70	71	120	119
26	26	71	72	121	120
27	27	72	73	122	121
28	28	73	74	123	122
29	29	74	75	124	123
30	30	75	78	125	124
31	31	76	79	126	125
32	32	77	80	129	126
33	33	78	81	130	127
34	34	79	82	131	128
36	36	80	83	132	129
37	37	81	86	133	130
38	38	82	87	134	131
39	39	83	88	135	132
40	40	84	89	136	133
41	41	85	90	137	134
42	42	86	91	138	135
43	43	87	92	139	136
44	44	88	93	140	137
45	45	89	94	141	138
46	46	90	95	142	139
47	47	91	96	143	140
48	48	92	97	144	141

CRIMINAL LAW

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146	143	236	259	315	337
147	144	237	260	316	338
148	145	238	261	317	339
150	147	239	262	318	340
151	148	240	263	321	343
152	149	241	264	324	346
153	150	242	265	326	348
154	151	243	266	327	349
155	152	244	267	328	350
156	153	245	268	329	351
157	154	246	269	330	352
158	155	247	270	332	354
159	156	248	271	333	355
160	157	249	272	334	356
161	158	250	273	335	357
162	159	251	274	338	359
163	160	252	275	344	364
164	161	253	276	345	365
165	162	254	277	346	366
166	163	255	278	347	367
167	164	256	279	348	368
169	193	257	280	349	369
170	194	258	281	350	370
171	195	259	282	351	371
172	199	260	283	352	372
173	200	261	284	353	373
174	201	262	285	354	374
175	202	263	286	355	375
176	203	264	287	356	376
177	204	265	288	357	377
178	205	266	289	358	378
179	206	267	290	359	379
180	207	268	291	360	380
181	208	269	292	361	381
182	209	270	293	362	382
184	211	271	294	363	383
196	221	272	295	364	384
199	224	273	296	365	385
200	225	274	297	366	386
201	226	275	298	367	387
203	227	276	299	368	388
204	228	283	306	370	390
205	229	284	307	371	391
207	230	285	308	(1) to (6)	(1) to (6)
209	231	286	309	372	392
213	235	287	310	373	393
214	236	288	311	374	394
215	237	290	313	375	395
216	238	291	314	376	396
217	239	292	315	377	397
218	240	293	316	378	398
219	241	294	317	(1) to (3)	(1) to (3)
220	242	295	318	378(4a)	398(12)
221	243	296	319	378	398
222	245	297	320	(5) to (12)	(4) to (11)
223	246	300	322	379	399
224	247	301	323	380	400
225	248	302	324	381	401
226	249	303	325	382	402
227	250	304	326	383	403
228	251	305	327	384	404
229	252	306	328	385	405
230	253	307	329	388	406
231	254	308	330	389	407
232	255	309	331	390	408
233	256	311	333	391	409
234	257	312	334	392	410

COMPARATIVE TABLE

WA	Qld	WA	Qld	WA	Qld
393	411	483	498	575	557
394	412	484	499	576	558
395	413	485	500	578	560
396	414	488	502	580	562
399	417	(2) to (3)		581	563
400	418	489	504	583	565
408	426	490	506	584	566
409	427	491	507	587	569
410	428	492	508	588	570
411	429	493	509	591	572
412	430	494	510	592	573
413	431	495	511	594	574
414	433	510	514	596	578
415	434	512	515	597	579
416	435	513	516	598	580
417	436	514	517	599	581
419	437	515	518	600	582
420	438	516	519	601	583
422	439	517	520	602	584
423	440	518	521	603	585
424	441	519	522	604	586
425	442	520	523	605	587
431	448	521	524	606	588
433	450	522	525	607	589
434	451	523	526	610	592
435	452	524	527	613	595
437	454	525	528	614	596
438	455	526	529	615	597
439	456	527	530	617	599
440	457	529, 530	442B	618	600
441	458	531	442C	619	601
442	459	532	442D	620	602
443	460	533, 534	442E	621	603
444	461	535	442F	622	604
	(a)(b)(d)	537	442G	623	605
445	462	538	442I	624	606
446	461(c)	539	442J	625	607
447	463	540	442K	626	608
448	464		442L(1)	627	609
449	465	541	442L(2)	628	610
450	466	542	442M(1)	630	612
451	467	543	442M(2)	631	613
452	468	544	442H	632	614
453	469	545	442M(3)	633	615
(I-V), VII, VIIA, VIII.	(I-V), VII, VI, VIII.	546	442A	634	616
457	472	547	531	635	617
458	473	548	532	636	618
459	474	549	533	638	620
460	475	552	535	639	621
461	476	553	536	640	622
462	477	554	537	641	623
463	478	555	538	642	624
467	482	556	539	643	625
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476	491	566	548	654	648
477	492	567	549	655	649
478	493	568	550	656	650
479	494	569	551	671	657
480	495	570	552	672	658
481	496	571	553	673	659
482	497	572	554	674	660
		573	555	675	661

CRIMINAL LAW

WA	Qld	WA	Qld	WA	Qld
676	662	715	683	730	696
677	663	716	684	731	697
681	667	717	685	732	698
689	668E	720	686	733	699
693	668F	721	687	734	700
697	671B	722	688	736	701
702	671L	723(i)	689	737	702
706	676	724	690	740	704
707	677	725	691	745	705
712	680	726	692	746	706
713	681	727	693		
714	682	728	694		

Not identical provisions, but similar in purport.

WA	Qld	WA	Qld	WA	Qld
1	1	343	363	608	590
14A	14A	369	389	611	593
20	20	390A	408A	612	594
21	671G(3)	390B	417A	616	598
	21	397	415	637	619
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35	35	401	419	646	628
68	69	402	420	659	655
107	111	403	421	661-665	659A-659I
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186	213	407	425	680	666
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191	217	428	445	690	668C
192	218	429	446	689	669
193	219	430	447	(1), (2)	
194	220	451A	467A	692	668
197	222	455	470, 470A	693A	669A
198	223	464	479	694	670
277	300	465	480	695	671
278, 279	302	466	481	696	671A
280	303	557	540	697	671B
281	304	561	543A	699	671D
282	305	565A	547A	700	671G
294A	317A	574	556	701	671H
296A	319A	577	559	703	668
323	345	579	561	705	675
325	347	582	564	711	679
337	358	585	567	711A	679A
339	360	586	568	739	703
340	361	590	571	747	707
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1

Introduction

[101] The most important point to notice at the outset of any discussion regarding criminal law in Queensland and Western Australia (and also Tasmania) is that the law, in the main, has a statutory basis. This contrasts fundamentally with the situation prevailing in the criminal law of England, New South Wales, Victoria and South Australia where the common law is still an important source of the criminal law thus necessitating a reliance on the decisions of courts as the primary source of the law rather than the legislation of Parliament. In Queensland and Western Australia, too, decided cases must be studied to understand the criminal law, but these cases do not form the basis of that law, they merely aid the interpretation of the various statutes wherein the criminal law is to be found. While the criminal law in the common law jurisdictions has been subjected to much statutory intervention over recent years, such statutes assume the continued existence of the common law and do not purport to replace it entirely. However, in Queensland and Western Australia the common law with respect to crime has been almost completely abrogated.¹

Reference to the constitutional development of Queensland and Western Australia reveals that the respective State Parliament is but one source of the legislation pertaining to the criminal law. Consideration must also be given to both Imperial and Commonwealth Statutes.

[102] The first settlers in New South Wales brought with them so much of the law of England (both common law and statute law) as was applicable to their situation and the condition of the infant colony. To clarify doubts concerning important changes to English law after 1788 and the applicability of those changes to New South Wales, the *Australian Courts Act* 1828 (Imperial) was passed. Section 24 of that Act declared 25 July 1828 to be the relevant date for ascertaining the English law to be applied in the administration of justice in the courts of New South Wales. Consequently, the law of New South Wales in 1828 comprised so much of the then English law as was applicable to the conditions and requirements of the colony of New South Wales. Following separation from New South

¹ The *Criminal Code Act* 1899, ss2 and 5 (Qld); *Criminal Code Act* 1913, ss2 and 4 (WA).

Wales in 1859, Queensland retained 25 July 1828 as the date for determining the applicability of Imperial Statutes.² In Western Australia the relevant date is 1 June 1829.³

After 1828, the Imperial Parliament retained, and still retains, the power to legislate directly for New South Wales and, since separation, Queensland. The position is similar for Western Australia for Imperial Statutes passed after 1 June 1829. In order to so apply, however, such legislation must be declared expressly to apply to the particular colony (State since 1901) or generally to all the colonies, or to Dominions, or to British Possessions (where the term includes the Dominions). Examples of Imperial Statutes in force in Queensland and Western Australia dealing with the criminal law are the *Admiralty Offences (Colonial) Act* 1849, the *Courts (Colonial) Jurisdiction Act* 1874 and the *Territorial Waters Jurisdiction Act* 1878. These statutes deal with the trial of offences committed on the sea or in certain inlets of the sea. Further examples are the *Extradition Acts* 1870-1935, the *Fugitive Offenders Acts* 1881-1915 and the *Colonial Prisoners Removal Acts* 1869-1884.

[103] An examination of the Commonwealth Constitution will show that there is no express power for the Commonwealth Parliament to legislate with respect to Criminal Law as a distinct subject matter. However, the Constitution in s51(xxxix) empowers the Commonwealth Parliament to make laws with respect to matters which are incidental to the execution of any power vested in the Parliament or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. The High Court has held that this provision empowers the Commonwealth to enact legislation relating to criminal law, provided its operation is limited to one of the Commonwealth agencies referred to in s51(xxxix). This was held to be so in *R v Kidman*⁴, where the High Court decided that the power conferred by s51(xxxix) of the Constitution on the Commonwealth Parliament is as plenary as any other power to make laws, and that the *Crimes Act* of 1915 was a law with respect to matters incidental to the execution of one or more of the powers given to the Commonwealth Parliament under s51.⁵

Where a power is exclusively vested in the Commonwealth Parliament, that Parliament alone may create criminal offences with respect to the subject matter of that power (eg a law forbidding the obstruction of a Commonwealth officer engaged in the discharge of his duty). The power given to the Commonwealth Parliament under s52(1), exclusive of the States, to make laws . . . "with respect to . . . all places acquired by the Commonwealth for public purposes" has meant that an act is criminal on a Commonwealth place (eg an army base, a post office, etc) only if there is a valid law of the Commonwealth in existence characterising the behaviour as criminal. Thus, in *R v Phillips*⁶ the High Court decided that

2 See also s20 *Supreme Court Act* 1867-1973 (Qld).

3 *Interpretation Act* 9 Geo V no xx, s43.

4 (1915) 20 CLR 425.

5 Ibid, Isaacs J at 440, Higgins J at 448-450, Gavan Duffy and Rich JJ's at 456 and Powers J at 460-461.

6 (1970) 44 ALJR 497.

the Criminal Code of Western Australia did not extend to the conduct of persons on the Pearce aerodrome, Perth.⁷ This predicament led to the Commonwealth Parliament's passing a law adopting State laws operating in the State in which the Commonwealth place is found⁸, so that the Queensland Criminal Code now operates as a valid law of the Commonwealth Parliament on Commonwealth places in Queensland. The situation is the same in Western Australia.

Where the Commonwealth Parliament has merely a concurrent power with the States to make laws with respect to a certain subject matter, each State retains the power to create criminal offences with respect to that subject matter until such time as the Commonwealth Parliament enacts overriding legislation.⁹ Thus, s94 of the Commonwealth *Marriage Act* 1961 defines the offence of bigamy for the whole of Australia and the Code provisions relating to bigamy are thereby rendered redundant. The Commonwealth Parliament may enact legislation defining bigamy, because such legislation is incidental to the execution of the power vested in the Commonwealth Parliament to make laws with respect to marriage.¹⁰

The *Crimes Act* 1914 contains most of the important criminal law enacted by the Commonwealth Parliament, but other Acts may also make provision for offences against Commonwealth law. We have noted the bigamy provisions of the *Marriage Act* 1961 previously. Many sections of the Crimes Act have been based on analogous provisions in the Queensland Criminal Code. However, whereas the Code provisions are usually general in nature, the Crimes Act provisions are limited to matters over which the Commonwealth has power.¹¹

[104] Although the above-mentioned Imperial and Commonwealth legislation is significant, the most important legislation in criminal matters is that which has been enacted by the Queensland and Western Australian State Parliaments. Between 1828 and 1859 New South Wales legislation operated in the area which was to become the colony of Queensland. Such legislation was mainly concerned with adopting English statutes passed after 25 July 1828 and which were not made to apply to NSW. After separation these statutes continued to have force in Queensland but, since that time, the Queensland Parliament has repealed most of these NSW Statutes and has enacted its own legislation dealing with various aspects of criminal law.¹² In 1886, for example, the Queensland Parliament enacted the Justices Act dealing with the powers and duties of Justices of the Peace, still one of the most important statutes relating to the criminal law of Queensland.

7 Ibid, Barwick CJ at 500, McTiernan J at 500, Menzies J at 503, Owen J at 507.

8 *Commonwealth Places (Application of Laws) Act* 1970, *Commonwealth Places (Administration of Laws) Act* 1970-74 (Qld), *Commonwealth Places (Administration of Laws) Act* 1970-74 (WA).

9 Constitution s109.

10 Constitution s51(xxi). In *A-G (Vic) v Commonwealth* (1962) 36 ALJR 104, s94 of the Marriage Act was held valid by the High Court as a law with respect to marriage. See also *R v Flanders* [1976] QdR 153 and *R v Loewenthal* (1974) 4 ALR 293.

11 Cf *Crimes Act* s65 with s488 Code (Qld).

12 See *New South Wales Acts (Termination of Application) Act* 1973 (Qld).