The Criminal Code (Cth) Comes to the Northern Territory: Why Did the Original Criminal Code 1983 (NT) Last Only 20 Years?

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This article seeks to answer the question why the most recently minted Criminal Code in Australia prior to the arrival of the Model Criminal Code was unceremoniously abandoned shortly after its 20th birthday. The question becomes more pertinent when it is understood that the drafter of the Criminal Code 1983 (NT) was seeking to modernise the Criminal Code 1899 (Qld) and avoid key problems that had emerged over the some 80 years since Sir Samuel Griffith's Code had been in existence. Was it a question of a bold experiment to address the critical issue of intoxication in the Northern Territory that overreached itself, or was the principal criminal responsibility section fundamentally flawed, as a former Chief Justice of the High Court of Australia suggested in describing the section as 'astonishing'? Did the long process of consultation prior to the Criminal Code 1983 (NT) being rolled out, which was designed to build consensus, in fact achieve the opposite? Were the robust interactions between the architect of the Code and the legal profession merely a precursor for the later sustained attacks upon the Code from judicial and academic quarters? Or, in the end, was it simply a political decision from an incoming Labor Government, which had never been in office since self-government in 1978, to jettison a controversial Code in favour of the progeny of the Model Criminal Code: namely, Chapter 2 of the Criminal Code 1995 (Cth)? The conclusion reached in this article is that the decision to adopt Chapter 2 of the Criminal Code 1995 (Cth) was the correct one but that the drafter of the original Criminal Code 1983 (NT) was also prescient in his effort to turn away from the principal criminal responsibility section of the Criminal Code 1899 (Qld).

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THIS paper will examine why, when the Criminal Code 1899 (Qld) and the Criminal Code 1902 (WA) have lasted over 100 years without significant amendment, the far more recently minted Criminal Code 1983 (NT) only lasted a little over 20 years before being abandoned in favour of Chapter 2 of the Criminal Code (Cth).[1] Ironically, the architect of the Criminal Code 1983 (NT), after extensive consultation, was seeking to take account of changes in community attitudes that had occurred since the turn of the century when the first two Griffith Codes were produced. A further central drafting objective was to overcome the perceived problems that had emerged within the Griffith Codes, particularly section 23, which remains the principal section dealing with criminal responsibility. This paper will explore the reasons behind the Northern Territory Government's decision in 2004 to announce its intention to overhaul the major criminal responsibility provision in section 31 of the Criminal Code 1983 (NT) which culminated in a decision in 2005 to adopt Chapter 2 of the Criminal Code 1995 (Cth).[2] The focus is on the controversial sections of the Criminal Code 1983 (NT). This paper contends that it was the sustained attacks on these sections which generated the momentum for change. It will also be contended that while much of the judicial and academic criticism of key sections of the original Criminal Code 1983 (NT) was misplaced, in the final analysis the Northern Territory Government made the correct decision to switch Codes. However, whether the then Attorney-General's claim that 'at the end of the day, Territorians will have a Criminal Code that sets appropriate standards of criminality in our community'[3] is valid will be subjected to close analysis. In a twist that takes this history full circle, it will be argued that it is now the criminal responsibility sections of the Griffith Codes that are in need of major reform. The example of Chapter 2 of the Criminal Code 1995 (Cth) is now available to both the Queensland and Western Australian Governments as an alternative model of criminal responsibility.

THE PROVENANCE OF THE CRIMINAL CODE (NT) 1983

On 1 July 1978, the Northern Territory was granted self-government by an Act of the Commonwealth Parliament.[4] The principal piece of Northern Territory criminal law legislation, the Criminal Law Consolidation Act (NT), was regarded

1. This paper takes the Griffith Codes to be the Criminal Code 1899 (Qld), the Criminal Code 1902 (WA), the Criminal Code 1924 (Tas) and the Criminal Code 1983 (NT). While the Northern Territory has imported Chapter 2 of the Criminal Code 1995 (Cth) as Part IIAA effective from 20 December 2006, this presently applies only to a very narrow range of offences against the person listed in Schedule 1.
2. Since 20 December 2006, the Criminal Code (NT) contains two separate and mutually exclusive criminal responsibility sections: the original Pt II which still covers the vast majority of offences; and Pt IIAA which is effectively Chapter 2 of the Criminal Code (Cth) which presently applies only to a very narrow range of offences against the person listed in Sch 1. The Northern Territory government originally indicated that all offences would come under Pt IIAA within 5 years but, apart from the addition of an occasional new offence, Sch 1 is unchanged in the past 4 years.
3. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 5 May 2005 (P Toyne, Attorney-General).
4. Northern Territory (Self-Government) Act 1978 (Cth).

by the then Attorney-General as 'a virtual anachronism'.[5] In tabling the draft criminal code for the Northern Territory in 1981, the Attorney-General noted that 'in Australia, we are lucky to have two criminal codes in existence already from which to draw experience'.[6] Having observed that if it could be said that the tabled draft criminal code resembled any code it was the Criminal Code 1924 (Tas) which was the most modern, the Attorney-General went on to say:

> Yet even the Tasmanian Code is, in several areas, outdated and in many aspects certainly does not reflect current Northern Territory government policy. I refer to the sexual offence areas, theft areas and criminal damage to property areas. Our draftsmen looked elsewhere for assistance, much of it coming from the English Law Reform Commission.[7]

However, by 1983 the emphasis on the draft code's provenance had changed slightly from the Criminal Code (Tas). A new Attorney-General identified that 'a great deal of use has been made of the Queensland Criminal Code', albeit with some new concepts such as the laws relating to intoxication, for the obvious reason that 'we are introducing a document which is based on a code tested for some 80 years'.[8]

It is therefore unsurprising that in the seminal case of *Director of Public Prosecutions (NT) v WJI*,[9] Kirby J was able to reflect:

> The provenance of the NT Code was different from State codes. It was enacted nearly a century after the Griffith Code was adopted in Queensland and long after the adoption of the criminal codes in Western Australia and Tasmania. As was mentioned in *Charlie*, the NT Code grew out of extensive consultations in Darwin. These were followed by a period of gestation that probably helps to explain the many points of difference from the other Australian criminal codes.[10]

The philosophy behind the draft criminal code was expressed by the Attorney-General to be as follows:

> The Code aims to give complete protection to the innocent people of the Territory; that is the innocent victim and the innocent defendant. As an integral part of this protection of the innocent, the Code puts into effect the approach that, where a person takes a criminal course of action, he will be responsible to the people of the Territory through the criminal law for the course of action and its logical consequences.[11]

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5. Northern Territory, *Parliamentary Record*, 4 Mar 1981, 788 (Mr Everingham, Attorney–General).
6. Ibid 787. The Attorney-General was referring to the Griffith Codes of Queensland and Western Australia, which he described as virtually identical, and the Tasmanian Code.
7. Ibid.
8. Northern Territory, *Parliamentary Record*, 24 Aug 1983, 752 (Mr Robertson, Attorney–General).
9. (2004) 219 CLR 43.
10. Ibid 67 (footnotes omitted).
11. Northern Territory, *Parliamentary Record*, above n 5.

At a later stage of the consultation process, the incoming Attorney-General considered the revised draft code 'to be a well-balanced and an effective piece of legislation' which in his view 'will be of considerable benefit to the community and truly reflects its wishes'.[12] The then Attorney-General singled out the new laws that dealt with intoxication which had been introduced 'because of the tragic effects of intoxication' but more particularly because of 'its relevance in crime and the fact that the community is no longer prepared to tolerate intoxication as an excuse for crime'.[13]

The architect and principal drafter of the Northern Territory's original criminal code was Mr DG Sturgess QC, who was also the first Queensland Director of Public Prosecutions. Mr Sturgess wrote a preface to the Criminal Code[14] in which he gave an overview of the final draft criminal code that became the Criminal Code Act (NT), which was assented to by the Administrator on 4 October 1983 and commenced on 1 January 1984.

The purpose of the Criminal Code 1983 (NT) was to replace the common law 'in respect of the various matters therein dealt with'.[15] In his preface, Mr Sturgess stated that it was natural that the Criminal Code (Qld) should be turned to for 'the convenience of the Territory having the same criminal laws as two of its contiguous States'.[16] However, Mr Sturgess acknowledged that too many years had passed since 1899 when the Criminal Code (Qld) had come into operation and that 'time and cases, as must be expected, have both revealed and created problems, and moral values, which the criminal law must reflect, have much changed'.[17]

Thus, it was with a degree of optimism that the Criminal Code 1983 (NT) was enacted on 1 January 1984. Both the Code's architect and the Northern Territory Government were confident that this most recent Code was superior to the three earlier State Codes. One of the reasons for this optimism can be found in the conviction that section 31 overcame the problems associated with section 23 Criminal Code (Qld). Another reason lay in the belief that between them sections 7 and 154 satisfactorily addressed the problem of intoxication, which was considered to be in a state of disarray following the 4-3 High Court decision in *R v O'Connor*.[18] The next section will address these two specific issues as they are both integral to the provenance of the Criminal Code 1983 (NT) and to the ultimate decision to incorporate Chapter 2 of the Criminal Code 1995 (Cth). As will be seen, it was the perceived failure of section 31 that led the Northern Territory Government to

12. Northern Territory, *Parliamentary Record*, 24 Mar 1983, 273 (Mr Robertson, Attorney–General).
13. Northern Territory, *Parliamentary Record*, above n 8.
14. DG Sturgess, Criminal Code, Preface (12 Aug 1983).
15. Criminal Code Act 1983 (NT) s 5.
16. See Sturgess, above n 14, 1.
17. Ibid.
18. (1980) 146 CLR 64.

consider either redrafting section 31 or embracing a far more extensive reform of criminal responsibility in the form of Chapter 2 of the Criminal Code 1995 (Cth).

TWO CENTRAL MATTERS TO THE PROVENANCE OF THE CRIMINAL CODE (NT) 1983

Two matters mentioned in the preface written by Mr Sturgess are worthy of attention as a momentum of criticism surrounded them after the Criminal Code (NT) came into operation, and are further developed in later sections of this paper. The first related to the principal section dealing with criminal responsibility, section 31, and the second concerned the treatment of intoxication. As to former, Mr Sturgess said:

> Perhaps the most troublesome area of the Queensland Criminal Code has been with respect to the meaning of its section 23, a section of fundamental importance, the counterpart of which in this code is section 31.... It is hoped the difficulties found in the Queensland legislation have been removed.[19]

This proved to be a pious hope and no section of the Criminal Code (NT) has aroused more criticism and controversy than section 31. Section 31 will be the subject of extensive analysis in this paper but at this juncture it is sufficient to note that Brennan J described section 31 as 'astonishing'.[20]

The second matter of significance discussed by Mr Sturgess in his preface to the criminal code is the treatment of intoxication. Having referred to the Northern Territory Government's policy that a defence based upon voluntary intoxication was to be regarded as an excuse of little merit,[21] Mr Sturgess continued:

> In giving effect to this policy the following matters have been provided for: involuntary intoxication has been given a strict definition (section 1); until the contrary is proved it is to be presumed that intoxication was voluntary and, unless it was involuntary, that the accused person foresaw the natural and probable consequences of his conduct and intended them (section 7); that voluntary intoxication is only relevant in relation to penalty when doing a dangerous act is charged and, in most cases, will increase the penalty (section 154).[22]

19. See Sturgess, above n 14, 6.
20. *R v Breedon*, HCA, Special Leave Hearing D1/1994, 2: 'To relieve a person from criminal liability for an act unless its consequences are foreseen is an astonishing proposition.... It does not matter whether it is voluntary or not: however much the act is intended or willed, if he does not see what the results are going to be, he is going to be acquitted.'
21. 'In early Anglo-Saxon law, no concession was made in practice to an intoxicated accused': S Bronitt & B McSherry, *Principles of Criminal Law* (Sydney: Thomson Lawbook, 2005) 242, citing RU Singh, 'History of the Defence of Drunkenness in English Criminal Law' (1933) 49 *Law Quarterly Review* 528, 529.
22. See Sturgess, above n 14, 8.

As it transpired part of this policy fell foul of the Federal Government and section 7 proved to be the first section of the newly minted Criminal Code (NT) to be amended.[23] As originally worded, section 7 did not contain the word 'evidentially' and established a legal presumption ('until the contrary is proved') that, in any case where 'intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence', the accused 'foresaw the natural and probable consequence, of his conduct and intended them'.[24] In response to a question as to whether the onus of proof had been reversed under section 7, Mr Sturgess replied as follows at a seminar on the Criminal Code (NT) held shortly after the Code had been passed by the Northern Territory in October 1983: 'No, you are talking about an inference here. An inference may be drawn in the circumstances that you intended what you actually did, and Lionel Murphy says that is the law – it always was the law – you are presumed to have intended what you did'.[25]

The above reference was to Murphy J's judgment in *R v O'Connor*:

> Perhaps no harm will be done if the (rebuttable) presumption continues to be used, even if it is described as a process of inference. It is important in cases where there is evidence of intoxication that the tribunal understand that, consistently with the presumption of innocence, an inference is available to it that a person intends the natural and probable consequences of his actions. In the absence of other evidence, this is the only reasonable inference open to them in most criminal cases.[26]

This presumption of foreseeing the natural and probable consequences of conduct was criticised shortly after the Criminal Code (NT) had been passed in November 1983, by the then Prime Minister, as placing an 'insuperable burden on a defendant' and as a breach of article 14 (the presumption of innocence) of the 1966 International Covenant on Civil and Political Rights scheduled to the Human Rights Commission Act 1981 (Cth).[27] It is perhaps no coincidence that the language of the then Prime Minister is strikingly similar to that of the then Labor Leader of the Opposition in the Northern Territory Parliament, Mr B. Collins, who just two months earlier had attacked the Northern Territory Government's policy on intoxication as undermining the principle of mens rea whereby 'an accused is now placed in a position where he must prove his innocence rather than the

23. Criminal Code Amendment Act 1984 (NT).
24. In *Director of Public Prosecutions v Smith* [1961] AC 290, the House of Lords adopted the objective test of the reasonable person as opposed to the subjective test of the defendant's intention. The objective test in *Smith* was rejected by the High Court in *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ).
25. Comments by DG Sturgess, Criminal Code Seminar Transcript (Darwin, Oct 1983) 119.
26. *O'Connor*, above n 18, 116.
27. The Hon Robert Hawke, letter to the Chief Minister of the Northern Territory (17 Nov 1983), cited in Parliament of Victoria Law Reform Committee, *Criminal Liability for Self-Induced Intoxication*, Report No 53 (1999) 49.

prosecution establish his guilt'.[28] The fledgling Northern Territory Government immediately accepted the Prime Minister's criticism under the threat of section 122 of the Federal Constitution.[29]

This was a significant outcome for three reasons. Firstly, no State could have been subjected to such a humiliation of having to amend criminal legislation at Federal behest. Secondly, it is not correct to equate a legal burden on the defence on the balance of probabilities with a breach of the presumption of innocence. Thirdly, the forced amendment reduced the intended impact of section 7, which is still of significance given the vast majority of offences are still covered by the original criminal responsibility sections contained in Part II and not the new Part IIAA.[30]

The effect of the amendment was to change the presumption from a legal burden to an evidential one, such that the defendant must adduce evidence of intoxication but the burden of proving intention or recklessness remains on the prosecution.[31] This interpretation of the amended section 7(1)(b) was confirmed by the Supreme Court of the Northern Territory in *Charlie v The Queen* where two judges of the Court of Appeal spoke of section 7(1)(b) establishing an evidential burden only.[32]

Nevertheless, Bronitt and McSherry consider section 7(1)(b) to be 'somewhat different to the other jurisdictions in that it does not expressly state that intoxication may negate the fault element of a crime' and that its wording 'seems to suggest that self-induced intoxication will be irrelevant to the question of intention'.[33] The new Part IIAA (effectively Chapter 2 of the Criminal Code 1995 (Cth)) only applies to a narrow band of offences in Part VI which covers offences against the person,[34] because the Northern Territory Government gave priority attention in a staged process to repealing the existing manslaughter and dangerous act provisions which were replaced by reckless and negligent manslaughter offences and by reckless endangerment offences and dangerous driving causing death or serious harm. Consequently, section 7(1)(b) remains the relevant section dealing

28 Northern Territory, *Parliamentary Record*, Legislative Assembly, 30 Aug 1983, 883 (B Collins, Leader of the Opposition). Mr Collins subsequently became Senator Collins and a Minister in the Hawke government.

29. Federal Constitution, s 122 is entitled 'Government of territories' which gives the Federal parliament the power to make laws for the government of any territory. Action under the Northern Territory (Self-Government) Act 1978 (Cth) s 9 was proposed. See (1984) 9 *Commonwealth Record* 472, recording the agreement between the Commonwealth and Northern Territory Attorney-General for amendments to the Code, cited in Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No 31 (1986) [439].

30. Section 7 is to be found in Div 2 (Presumptions) of Pt 1 (Introductory Matters). Section 43AA(2) sets out the provisions of Pt 1 which do not apply to Sch 1 offences, one of which is s 43AA(2)(e) which covers s 7 (Intoxication).

31. Criminal Code Amendment Act 1984 (NT) s 7(1)(b).

32. (1998) 7 NTLR 152, 157 (Martin CJ), 170–1 (Angel J).

33. Bronitt & McSherry, above n 21, 249. Section 7(1)(b) states that 'unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct'.

34. Pt IIAA applies to all offences listed in Sch 1.

with intoxication for all other offences including causing serious harm and causing harm.

This paper contends that even the amended section 7(1)(b) is more effective than its equivalent section, section 43AS, in Part IIAA, given the very limited use of the *Majewski* principles in Chapter 2 of the Criminal Code 1995 (Cth). Such a conclusion can be fairly drawn because the omission from the reach of section 43AS of a fault element of intention for a physical element of a result or circumstance, and the accident and mistake of fact exceptions, severely limit the effect of section 43AS in excluding evidence of intoxication for offences of basic intent.

However, notwithstanding the amendment, the government's policy on intoxication, particularly in relation to section 154 (Dangerous acts or omissions), continued to generate concern. This policy was a legislative response to the common law position on intoxication as decided in *O'Connor v The Queen*[35] which was regarded by the Northern Territory Attorney-General 'an unfortunate decision'.[36] In *O'Connor*, Barwick CJ held that 'proof of a state of intoxication, whether self-induced or not, so far from constituting itself a matter of defence or excuse, is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility'.[37]

On one point the Chief Justice of the High Court and the Attorney-General of the Northern Territory were agreed, and that was the unsatisfactory position taken by the House of Lords in *DPP v Majewski*,[38] which distinguished between crimes of 'specific' and 'basic' intent and held that evidence of intoxication was only relevant to the former. In *DPP v Morgan*,[39] Lord Simon classified crimes of basic intent to mean 'those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus'.[40] The Attorney-General found the distinction to be 'confusing, illogical and so uncertain that it provides no real guidance as to how the courts will classify cases'.[41] The Chief Justice was similarly critical of *Majewski* in concluding that '[i]t seems to me to be completely inconsistent with the principles of the common law that a man should be conclusively presumed to have an intent which, in fact, he does not have, or to have done an act which, in truth, he did not do'.[42]

35. Above n 18.
36. Northern Territory, *Parliamentary Record*, Legislative Assembly, 25 Nov 1982, 3490 (Mr Everingham, Attorney–General).
37. *O'Connor*, above n 18, 71.
38. *DPP v Majewski* [1977] AC 443.
39. [1976] AC 182.
40. Ibid 216.
41. Northern Territory, *Parliamentary Record*, above n 36, 3489–90.
42. *O'Connor*, above n 18, 87.

The Northern Territory Government was equally opposed to *O'Connor* (which was favoured by the Opposition) and *Majewski*, and the Attorney-General was not persuaded by the application of the principles in *Majewski* applying in the codes states of Western Australia, Queensland and Tasmania.[43] This led to section 154 being constructed as 'a fall-back situation'.[44] A pale imitation of the *Majewski* principles became the law in the Northern Territory for offences identified in Schedule 1 of the Criminal Code 1983 (NT) following adoption of the criminal responsibility sections of the Criminal Code 1995 (Cth) on 20 December 2006.[45] Thus, the Commonwealth Criminal Code's Guide to Practitioners was able to state that 'specific intent has no counterpart in Chapter 2 and basic intent is given a restricted definition' such that *Majewski* is 'of little or no use in determining the application of the Code provisions'.[46]

However, the potential for adoption of the *Majewski* principles had been foreshadowed as early as 1991. Mr Manzie, the then Attorney-General, during a parliamentary debate to introduce a minor amendment to section 154, indicated that he favoured 'a uniform criminal code throughout Australia and I will continue to push for its introduction'.[47]

During the same parliamentary debate, Mr Manzie referred to the genesis of section 154 flowing from *O'Connor* as 'Chief Justice Barwick, recognising that the decision left a gap, encouraged the introduction of legislation to provide for an alternative charge where intoxication negates intent'.[48] The passage from *O'Connor* to which the Attorney-General alluded was as follows:

> There would be good sense ... in a statutory provision which gave to a jury who were driven to the conclusion that an accused, due to the result of self-induced intoxication, was not culpable of the crime with which he is charged to be able to bring in an *alternative verdict* that he, by his own conduct, had brought himself to a state where he was not responsible for his acts. There should be a substantial penalty provided for his conviction of this alternative charge, a penalty of confinement.... It would ... be quite just to make the accused responsible for his act of having taken alcohol or other drug to the point I have described.[49]

43. Northern Territory, *Legislative Assembly*, above n 36, 3489. See Criminal Code (Qld) s 28; Criminal Code (WA) s 28; Criminal Code (Tas) s 17(2).
44. See Sturgess, above n 25, 23.
45. Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
46. I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Canberra: Cth A-G Dept, 2002) 145.
47. Northern Territory, *Parliamentary Record*, vol XXXII, Legislative Assembly, 7 Feb 1991, 363 (Mr Manzie, Attorney–General).
48. Ibid 360.
49. *O'Connor*, above n 18, 87 (emphasis added).

Section 154 was intended to provide that alternative charge as Mr D Sturgess, who drafted the original Criminal Code (NT), had made clear.[50] Given all the furore that surrounded the introduction of section 154 being 'very broad in scope and covering all manner of conduct'[51] and constituting a departure from fundamental principles of criminal responsibility applicable to serious offences (which is discussed in the next section), it is passing curious that when section 154 was repealed it was in part replaced by section 174F Driving a motor vehicle causing death or serious harm.[52] Under section 316(2) a person charged with manslaughter may alternatively be found guilty under section 174F(1). Section 174F(4) makes an offence against section 174(1) an offence of strict liability, which in turn only permits the defence of mistake of fact under section 43AX, whereas the much maligned section 154 at least required an ordinary person similarly circumstanced to have clearly foreseen the danger and not have done the act.

Thus, the Northern Territory Government's policy on intoxication was bound up with the interaction of sections 31 and 154. As the main thrust of the criticisms of the Criminal Code (NT), from both the legal profession and the judiciary, centred on these two sections, it is now appropriate to consider these criticisms in detail. This paper is a partial history of the original Criminal Code (NT) as it singles out the controversial sections that built the momentum for a complete overhaul of the Code, and which will become even more apparent with inclusion of material that deals in part with Professor Paul Fairall's review of the Criminal Code (NT) in 2004 that was commissioned by the incoming Labor Government and which contained very specific terms of reference.[53]

SECTION 31 AND ITS INTERACTION WITH SECTIONS 154, 162 AND 192

1. Section 31 (Unwilled act and accident)

(a) The rejection of section 23 of the Criminal Code (Qld)

A public seminar was conducted by Mr D. Sturgess for the benefit of the legal profession prior to the enactment of the Criminal Code 1983 (NT). During the seminar, the architect of the Code stated that section 31 was an attempt 'to set down ... in different language exactly what Sir Samuel Griffith attempts to set down in his section 23 [of the Criminal Code (Qld)]'.[54] As will be considered

50. See Sturgess, above n 25, 24. The alternative verdict provision found expression in the now amended s 318 (Charge of offence against the person) where s 31 or intoxication is a defence.
51. *Sandby v The Queen* (1993) 117 FLR 218, 221–2 (Angel J).
52. Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
53 P Fairall, *Review of Aspects of the Criminal Code of the Northern Territory* (March 2004).
54. See Sturgess, above n 25, 16. In a colourful image, Mr Sturgess added there were 'so many legal barnacles encrusted upon s 23 of the Queensland Criminal Code that it is difficult to see what lies beneath it'. Section 23(1) of the Criminal Code (Qld) is entitled 'Intention – Motive' and states: '(1) Subject to the express provisions of this Code relating to negligent acts or omissions,

in this section, both academic commentators and judges consider that section 31 represents a radical departure from section 23. As will be discussed later, this stems from an attempt to inject subjective criminal responsibility into section 31 while section 23 was drafted at a time when the common law reflected objective criminal responsibility. Thus, it is the more surprising that one academic commentator has suggested that section 31 could perhaps be redrafted in line with 'the more careworn [than the Criminal Code (Cth)] but now reasonably well-understood section 23 of the Griffith Code'.[55] While the 'different language' utilised in section 31 may have been misguided, it was at least a recognition back in 1983 that section 23 is better described as tired and outdated than 'careworn'. Goode has aptly described 'the floating jurisprudence on the scope and meaning of section 23, [as] can hardly be called well settled or well understood'.[56]

Mr Sturgess was perhaps prescient in anticipating the observations of Gummow and Hayne JJ in *Murray v The Queen*[57] that section 23(1) was 'cast in terms consistent with the accused bearing the burden of establishing that there was an unwilled act or an accidental event'.[58] This conclusion follows because until the watershed case of *Woolmington v The Director of Public Prosecutions*[59] such had been the law for centuries.[60] Gummow and Hayne JJ go on to observe that since Dixon J's comments in *R v Mullen,*[61] 'if the evidence raises a question about an unwilled act or an accidental event, it is for the prosecution to prove beyond reasonable doubt that section 23(1) does not apply'.[62] Given that Sir Samuel Griffith approached the task of drafting section 23(1) from a different perspective regarding the onus of proof to that taken post 1938, combined with the 'floating jurisprudence on the scope and meaning of section 23', it is perhaps unsurprising that Mr Sturgess sought to redraft section 23(1) Criminal Code (Qld).

Some four years after the 'careworn' observation, the efficacy of section 23(1)(b), the excuse of accident, came under the legal spotlight of a Queensland Law Reform Commission report.[63] This followed a Queensland Government reference

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a person is not criminally responsible for: (a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that occurs by accident.'

55. See Fairall, above n 53, 15, quoting in aid of this proposition the Queensland Court of Criminal Appeal in *R v Taiters* (1996) 87 A Crim R 507, 512.
56. MR Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 160.
57. (2002) 211 CLR 193.
58. Ibid 206.
59. [1935] AC 462.
60. Above n 57, 218, Gummow & Hayne JJ cite *Foster's Crown Law* (1762) 255.
61. (1938) 59 CLR 124, 136.
62. *Murray,* above n 57, 207.
63. Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (Sept 2008). 'Accident' is a complete misnomer as for the purpose of s 23(1)(b) accident means an unintended, unforeseen and unforeseeable event and not a random unexpected act, which of course does not sit well with grieving relatives of a victim intentionally punched.

which reflected growing community concerns over the treatment in the Criminal Code (Qld) of accused persons who had killed another 'with one punch'.[64] Surprisingly, the Law Reform Commission report recommended the retention of section 23(1)(b),[65] and it is contended that the Northern Territory Government has taken the better course in opting for the criminal responsibility sections of Chapter 2 of the Criminal Code (Cth) rather than turn back the clock to the Griffith Codes whose criminal responsibility sections are trapped in the 19th century. It is here argued that, with respect, the Queensland Law Reform Commission lacked vision having missed a golden opportunity to recommend reforms more suited to the present century. In a nutshell, whereas the basic fault element in Chapter 2 of the Criminal Code (Cth) is recklessness, as Goode points out, 'the Griffith Codes did not, and do not, deal with the (for them) entirely novel idea of recklessness'.[66] Indeed, as 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'.[67]

(b) Section 31 of the Criminal Code (NT)

As originally enacted (subsection (3) below has been amended to account for the repeal of section 154), section 31 of the Criminal Code (NT) was as follows:

> **31. Unwilled act etc. and accident**
>
> (1) A person is excused from criminal responsibility for an act, omission or event[68] unless it was intended or foreseen by him as a possible consequence of his conduct.

64. Western Australia has addressed the issue by introducing s 281 (Assault causing death) into the Criminal Code (WA) in 2008. Section 281(2) specifically overrides s 23B(2), which deals with accident, by holding a person criminally responsible 'even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable'.

65. See QLRC, above n 63, 9. 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. 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.

66. See Goode, above n 56, 159.

67. See Fairall, above n 53, 41. Professor Fairall stated that '[t]his proposition is derived from cases on the meaning of "accident" under s 23' citing as authority *Taiters,* above n 55, 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.'

68. The use of the collocation 'act, omission or event' was deliberate. Section 23(1) of the Criminal Code (Qld) distinguishes between an act or omission that occurs independently of the exercise of the person's will and an event that occurs by accident. See above n 54. In *Ugle v The Queen* (2002) 211 CLR 171, 178, a case concerning the Criminal Code (WA), Gummow and Hayne JJ state that '[t]he distinction which is made in s 23 between "acts" and "events" is not without difficulty'. Gummow and Hayne JJ go on to cite Mason CJ, Brennan and McHugh JJ in *R v Falconer* (1990) 171 CLR 30, 38: 'The first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act: it excludes from criminal responsibility consequences of the act which are not only unintended but unlikely and unforeseen.'

> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.
>
> (3) This section does not apply to the offences defined by Division 2 of Part VI.

Division 2 of Part VI then contained two sections: section 154 (Dangerous acts or omissions) and section 155 (Failure to rescue, provide help, etc).

In his preface to the criminal code, Mr Sturgess sought to explain how section 31 and the criminal responsibility provisions generally were to be interpreted.

> Apart from any mental element that may be prescribed, an offence is constituted by an act, omission, event or a combination or series of them.... Amongst the first tasks of the trial should be the identification of the act, omission or event the subject of the charge.... Importantly, this inquiry should not be allowed to extend beyond the matters contained in the charge or in the section or sections creating the offence; to consider the actual conduct of the accused person is only to introduce a likely source of confusion.[69]

Examples were given in the preface such as assault being constituted by an act (the application of force) and unlawfully causing grievous harm being constituted by an event (the occurrence of grievous harm).[70] The architect of the code indicated the terms 'act' and 'event' were interchangeable 'because the tests of criminal responsibility remain the same whether doing an act or causing an event is being considered'.[71] Importantly, Mr Sturgess specifically drew attention to this not being 'the position in section 23 of the Queensland Criminal Code' and hence the often heard controversy 'concerning what is the relevant act and what, if any, is the relevant event'.[72] Gummow and Hayne JJ point out in *Murray v The Queen* that '[i]n deciding what is the relevant act, it is important to avoid an overly refined analysis', going on to observe that the narrower the definition of act the more likely 'to be some question about whether the accused willed the act'.[73]

In *Ugle*, 179, it was the first limb of s 23 that was engaged, 'whether the knife had entered the body of the deceased independently [impaled] of the will of the appellant'.

69. See Sturgess, above n 14, 7.
70. Ibid 6.
71. Ibid 7.
72. Ibid.
73. *Murray*, above n 57, 209. Gummow and Hayne JJ cite HLA Hart, 'Acts of Will and Responsibility' in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) 90, 101–2. *Murray*, 210: 'The simple but important truth is that we deliberate and think about actions, we do so not in terms of muscular movements but in the ordinary terminology of actions.' In *Murray*, 212, the appeal turned on the trial judge's lack direction on the first limb of s 23 (Only instructed on the second limb of accident): '[T]he central issue for the jury in considering the charge of murder was did the appellant intend to fire the weapon [loaded shotgun] or merely present it to frighten the deceased?.'

Thus, as one academic commentator has noted in relation to the drafting of section 31:

> The draftsman would also have looked closely at section 23 of the West Australian and Queensland Criminal Codes which refer to an 'act or omission' that occurs independently of the exercise of a person's will (first limb), or an 'event' that occurs by accident (second limb). In my view, section 31 was drafted to overcome the problems of interpretation which had arisen from other Code provisions by applying the same test regardless of whether the matter in question was an 'act, omission or event', thereby making it unnecessary to distinguish between the 'act' and the 'event'.[74]

Mr Sturgess concluded his explanation of the operation of section 31 by noting that once the act, omission or event has been identified the next task is an evidentiary one as to whether the accused person did, made or caused that act, omission or event, as only then does the matter of criminal responsibility arise.

> In the application of section 31 one asks has the prosecution proved that that act, omission or event, now shown to have been done, made or caused by the accused person, was either intended or foreseen by him as a possible consequence of his conduct. If it fails this test that is the end of it and the accused must be acquitted. If it passes it, that is the end of the subjective and the start of the objective part of the inquiry provided for by sub-section (2). Thus, there are two aspects of section 31: one subjective, one objective, but the subjective must be dealt with first.[75]

In practice, the distinction between a subjective and an objective determination of the fault element is often blurred. Here, subjective refers to the actual mental state of the accused, whereas objective refers to the 'supposed mental state of a hypothetical reasonable person acting in the way in which the accused acted'.[76] The fault elements of intention and recklessness are subjective in nature. Where a subjective test is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. However, this is 'somewhat artificial as an accused, in many cases, will deny that he or she possessed the necessary state of mind necessary to commit the offence'.[77] In *Pemble v The Queen,*[78] Barwick CJ pointed out that the jury will normally have to infer the accused's state of mind from what the accused has actually done and the surrounding circumstances.

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably

74. A Hemming, 'A Tour de Force, a Faux Pas or a Coup de Grace? A Rejoinder to Criminal Responsibility Under Section 31 of the Criminal Code (NT)' (2002) 26 *Criminal Law Journal* 345.
75. See Sturgess, above n 14, 7.
76. J Clough & C Mulhern, *Criminal Law* (Sydney: LexisNexis, 2004) 17.
77. Ibid.
78. (1971) 124 CLR 107.

> be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind.... That conclusion [as to the accused's state of mind] could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.[79]

Fashioning the above comments on inference into the operation of section 31, it is clear that section 31(1) encapsulates the idea of intention or foresight which describes subjective mental states and is a truly subjective test. Thus, section 31(1) avoids the objective test (an external standard such as the ordinary person test) utilised for an event which occurs by accident as in the Griffith Codes.[80] Section 31(2) operates as an exception to section 31(1). The objective test (ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct) in section 31(2) only applies where foresight exists such that the person does not intend but foresees it (a particular act, omission or event) as a possible consequence.

The first test of the interpretation of section 31 occurred in *R v Krosel*.[81] The question in *Krosel* was what the Crown needed to prove in order to secure a conviction of manslaughter under the Criminal Code (NT). The Crown submitted that it was sufficient to prove that the 'act'[82] was intended (which this paper contends is the correct interpretation and had it been accepted would not have started a judicial excursus into deconstructing 'act, omission or event'). The defence submitted that the Crown had, in addition, to prove that the 'event'[83] of death was foreseen. Nader J favoured the argument put by the defence in that his Honour concluded that intention in section 31 referred to an act and foresight referred to an event. Turning to the onus of proof, Nader J held that the Crown had to prove both that the act causing death was intended and the event of death was foreseen by the accused.

> If the accused did not foresee death as a possible consequence of his conduct, he was excused from criminal responsibility for the death. He cannot be held

79. Ibid 120–1 (Barwick CJ). See also *R v Clare* (1993) 72 A Crim R 357, 369; *R v Cutter* (1997) 94 A Crim R 152, 156–7, 164–6.
80. There are two separate excuses provided for in s 23 of the Criminal Code (Qld) and the Criminal Code (WA). The first excuse (first limb) is that a person is not criminally responsible for an act or omission which occurs independently of the exercise of that person's will. The second excuse (second limb) is that a person is not criminally responsible for an event which occurs by accident. The first excuse goes to voluntariness which it is argued is far better handled in Criminal Code (Cth) s 4.2 (Voluntariness) and Criminal Code (NT) s 43AF (Voluntariness).
81. (1986) 41 NTR 34.
82. 'Act' is defined in s 1 in relation to an accused person as meaning the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention.
83. 'Event' is defined in s 1 as meaning the result of an act or omission.

> criminally responsible for the death merely because he intended the act that caused it. He must also have foreseen the death as a possible consequence: the death is the event for which he is excused unless, at the very least, he foresaw it as a possible consequence of his conduct.[84]

Even at this early stage it appears that judicial interpretation of section 31 was set to bedevil the principal section dealing with criminal responsibility. Notwithstanding the clear intention of the drafter of the Criminal Code (NT) to use the terms 'act' and 'event' interchangeably and to avoid the problems of interpretation associated with section 23 of the Criminal Code (Qld), Northern Territory judges were already displaying artificial constructions of section 31 inconsistent with the design of the Criminal Code (NT).

There is no sound basis for concluding, as Nader J did in *R v Krosel*, that the Crown could not secure a manslaughter conviction if it could prove an intentional act causing death but rather faced the super-added burden of also proving foresight of death as a possible consequence. Section 31(1) uses the words intended or foreseen, and section 31(2) only comes into play if a person does not intend a particular act, omission or event. While it is right to say that normally a manslaughter case would turn on foresight under section 31(2), if the Crown can prove intention under section 31(1) there is no need to turn to section 31(2) at all.[85] In *Pregelj v Manison*[86] decided in 1987 one year after *R v Krosel*, Nader J revisited his own judgment in *Krosel* in relation to section 31.

> Foresight seemed appropriate only for an event. So I suggested that [section 31] had the effect of excusing acts, omissions and events that were not intended and events that were not foreseen. But, I would now accept the charge of superficiality. A moment's attention to the words of section 31(2) shows that the author of the section intended no such complete distinction between 'act' and 'omission' on the one hand and 'event' on the other.... In *Krosel*, I should have adverted to the fact that the expression used in section 31(1) is 'possible consequence of his conduct', not 'possible consequence of his act or omission'.[87]

While Nader J's self confession to a charge of superficiality is an improvement on his Honour's view of section 31 in *Krosel*, the judicial muddying of the waters regarding the interpretation of section 31 continued in *Pregelj v Manison* and

84. *Krosel*, above n 81, 36.
85. Following the adoption of Ch 2 of the Criminal Code (Cth) as Pt IIAA Criminal Code (NT), under s 43AK (Recklessness), subsection (4) states that: 'If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.' Applying Pt IIAA to the new s 160 (Manslaughter), the elements of s 160 can be broken down as follows: (i) The person engages in conduct where the physical element is conduct and the fault element is intention; and (ii) That conduct causes the death of another person where the physical element is result and the fault element is reckless or negligent as to causing the death of that or any other person by the conduct.
86. (1987) 88 FLR 346.
87. Ibid 358–9.

maintained the implication that the meaning of section 31 was doubtful. Nader J noted that section 31 differs from the other Codes in 'the more indiscriminate use of the terms "act", "omission", and "event"'.[88] His Honour's use of the word 'indiscriminate' is unfortunate and indicates a fundamental misunderstanding as to how section 31 operates. A better view is 'comprehensive' or 'interlocking' to describe the manner in which section 31 has been drafted. The same conclusion is reached whether 'act' includes consequences or 'act' is read with 'event'.[89] This comprehensive view is supported by Kirby J in *Director of Public Prosecutions (NT) v WJI* where his Honour describes the collocation 'act, omission or event' as a phrase that is 'compendious'.[90] Kirby J stressed that the High Court had repeatedly said it was a 'mistake to dissect words and to endeavour to construe them in isolation'.[91]

In *Pregelj v Manison,* the appellants had been convicted below for offensive behaviour upon a finding of an intent to do the act complained of rather than to offend. The issue before the Court of Criminal Appeal (NT) was whether, in a case involving sexual intercourse in public, the 'act' of the defendant in section 31(1) included the act of offending. In separate judgments Nader and Kearney JJ held that it did and therefore the appellants were not criminally responsible for offensive conduct unless they either intended the punishable act or foresaw it as a possible consequence of their conduct.

In quashing the conviction, Nader and Kearney JJ parted company with Asche J who had upheld the conviction imposed by the Magistrate. Asche J had held that whether or not the behaviour is offensive is a matter to be determined objectively from the circumstances. His Honour concluded that '[i]n this case the appellants chose to have sexual intercourse naked and with the light on at night in circumstances when in my view they knew or should have known that any passer by in the lane could have seen them'.[92]

It is contended here that Asche J was correctly applying section 31 by looking at both subsections 31(1) and (2). Thus, while section 31(1) is subjective the circumstances of the case were sufficient for a judge or jury to conclude by an overwhelming inference that given their knowledge of the room and its proximity to the lane, the appellants must have foreseen their being seen as a possible consequence of their conduct, thereby activating the objective test in section 31(2) of an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct, described by one academic writer as the 'reasonable risk-taking'[93] provision in the Criminal Code (NT). This application of

88. Ibid 358.
89. See Hemming, above n 74, 347.
90. *DPP (NT) v WJI,* above n 9, 70.
91. Ibid.
92. *Wurramura v Haymon* (1987) 85 FLR 52, 56.
93. S Gray, *Criminal Laws Northern Territory* (Sydney: Federation Press, 2004) 107.

section 31(1) and (2) in tandem is entirely consistent with the view of Barwick CJ in *Pemble v The Queen* discussed above that the accused's state of mind 'must almost invariably be a matter of inference'.[94] The language of the statute mandates the foresight of an ordinary person.

Nevertheless, the interpretation of section 31 favoured by Nader and Kearney JJ has never been overruled and has had a far reaching effect given *Pregelj v Manison* was decided just four years after the Criminal Code (NT) came into law by the Court of Criminal Appeal. This analysis of section 31 will now focus on the interaction between section 31 and other sections of the Criminal Code (NT) such as the now repealed section 154 (Dangerous acts or omissions), the now repealed section 162 (Murder), and the now amended section 192 (Sexual intercourse and gross indecency without consent).

2. Sections 31 and 162 (Murder)

In *Breedon v The Queen,*[95] the Court of Criminal Appeal considered the interaction between section 31 and the now repealed section 162 (Murder). At the trial the Crown had sought to prove the charge of murder on the basis of either intention to kill or cause grievous harm, or the death had been caused by means of an act done when committing the offence of robbery (constructive murder). The appeal focused on the latter which required the consideration of section 31 and the then section 162(4) which stated: 'In the circumstances referred to in subsection (1)(b) [the 'trigger' offence set at 7 years or longer] it is immaterial that the offender did not intend to hurt the person.'

The Crown argued that section 31 did not apply to a case of constructive murder because once the intention to permanently deprive and to use force are proven as prerequisites of robbery, then robbery itself is proven without recourse to section 31 and the only additional feature is the necessity to show the likelihood that the act will endanger human life. Section 162(4) made it immaterial that the offender [applicant] did not intend to hurt the deceased.[96]

The Court of Criminal Appeal (Martin CJ, Gallop and Angel JJ) in a unanimous judgment rejected the Crown's argument. The Court held that any consideration of section 162 necessarily required consideration of section 31 because murder involves an unlawful killing and the use in section 162 of the word 'unlawfully' (defined in section 1 as meaning 'without authorisation, justification or excuse'), required consideration of section 31 which is in Part II, Division 4 of the Criminal Code (NT) entitled 'Excuse'. The only sections to which section 31 did not apply were stated in section 31(3) and did not include section 162. The Court therefore applied the maxim expressio unius est exclusio alterius.

94. *Pemble,* above n 78, 120 (Barwick CJ)
95. (1993) 3 NTLR 119.
96. Ibid 120

Thus, notwithstanding the clear language of section 162(4), which is entirely consistent with common law constructive murder, the Court of Criminal Appeal quashed the murder conviction on the grounds that if the offender did not at least foresee death as a consequence of his act then he was excused from criminal responsibility under section 162(1)(b) (Constructive murder). It is contended that this holding was unwarranted even on a literal application of the legislation because section 162(4) was specific to constructive murder.

The reaction of the Northern Territory legislature was to amend section 162(4) as follows:

> In the circumstances referred to in subsection (1)(b), notwithstanding section 31, it is immaterial that the offender did not intend to hurt any person or did not foresee the death of the deceased as a possible consequence of the act causing death.[97]

As the Crown's application to the High Court was refused,[98] the next opportunity for the Court of Criminal Appeal to revisit the interaction between sections 31 and 162 occurred in *Charlie v The Queen*.[99] Interestingly, two of the three appeal judges in *Charlie* also heard the appeal in *Breedon* (Martin CJ and Angel J). Kearney J was the third judge in *Charlie* and his Honour's judgment, with respect, gives the clearest and most cogent explanation of the proper approach to construing the Criminal Code (NT).

In *Charlie v The Queen,* the appellant had appealed against his conviction for murder under the now[100] repealed section 162(1)(a) which read as follows:

> (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:
>
> (a) if the offender intends to cause the death of the person killed or of some other person or if the offender intends to do to the person killed or some other person grievous harm ...
>
> is guilty of murder.

Counsel for the appellant naturally placed considerable reliance on *Breedon v The Queen* in arguing that section 162(1)(a) was qualified by section 31 such that a defendant would only be liable for murder based on an intention to cause grievous harm if in addition he or she foresaw death as a possible consequence under section 31. This argument was accepted by Angel J in dissent in holding that:

> *Breedon* is authority for the proposition that section 31, to the extent that in its terms it is operable, is applicable to, inter alia, offences of specific intent – including

97. Criminal Code Amendment Act 1995, s 3.
98. Application to the High Court (Brennan, Deane & Dawson JJ) for special leave to appeal from the decision of the Court of Criminal Appeal refused on 25 August 1994.
99. Above n 32.
100. Section 162 was repealed on 20 December 2006.

> murder. It was not argued that *Breedon* is wrong, or irrelevant to the present appeal.[101]

Martin CJ unconvincingly (perhaps chastened by the amendment to section 162(4) which specifically excluded section 31) sought to distinguish *Breedon* from *Charlie* by finding that 'no particular mental element, intent or foresight, was prescribed in section 162(1)(b) ... Breedon has no bearing upon this case which falls to be considered under section 162(1)(a).[102]

Kearney J in his judgment quoted the well known passage of Dixon CJ in *Vallance v The Queen* where the Chief Justice discussed the operation of the general provision for criminal responsibility, section 13(1) of the Criminal Code (Tas), in the following terms: 'It is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as section 13 can be worked out judicially'.[103]

Kearney J then adapted Dixon CJ's approach such that murder in terms of section 162(1)(a) is one of a 'large number of crimes [defined in the Code] ... to the elements of which section 31(1) can have little ... to say'.[104] Kearney J concluded that 'the legislature intended to set out comprehensively and exclusively in section 162(1)(a) the mental elements required for that type of murder' and that the only role for section 31(1) is 'its requirement that the homicidal act be intentional'.[105]

Unlike *Breedon*, the High Court granted special leave to hear an appeal in *Charlie*. The High Court in a 3 to 2 decision[106] upheld the Northern Territory Court of Criminal Appeal's decision, with Callinan J giving the leading judgment for the majority. His Honour found that the majority in the Court of Criminal Appeal were right in holding that the express reference to intent in section 162(1)(a) meant that section 31 of the Criminal Code (NT) did not have the effect contended for by the appellant.[107] Furthermore, Callinan J held that the definition of 'grievous harm' does 'not require any element of awareness of result'[108] in rejecting Lord Steyn's view in *R v Powell* that murder involved either an intention to cause death or an intention 'to cause really serious bodily harm coupled with an awareness of the risk of death'.[109] Callinan J trenchantly drew attention to the fact that:

101. *Charlie*, above n 32, 169.
102. Ibid 155–6.
103. *Vallance v The Queen* (1961) 108 CLR 56, 61 (Dixon CJ).
104. *Charlie* above n 32, 166–7.
105. Ibid 167.
106. Ibid (Gleeson CJ, McHugh & Callinan JJ; Kirby & Hayne JJ dissenting).
107. *Charlie v The Queen* (1999) 199 CLR 187, 410.
108. Ibid 411.
109. *R v Powell* (1997) 3 WLR 959, 967.

> The common law has never thought it anomalous that an offender having such an intention and taking such a risk should, if the consequences of the act exceed the intended purpose, be convicted of murder.[110]

Of course, one unintended side effect of *Charlie* was to reduce the significance of the perceived problems with section 31 since it had now been explicitly stated that this section had no role to play in either murder or constructive murder in section 162(1)(a) and (b) respectively. Thus, as *Charlie* was confirmed in the High Court, by 1999, some sixteen years after the introduction of the Criminal Code (NT), the reach of section 31 had been clarified by the High Court.

3. Sections 31 and 154 (Dangerous acts)

Callinan J noted in *Charlie* that section 162(1)(a) was not the only section of the Criminal Code (NT) which prescribed its own mental element,[111] and drew attention to the now (20 December 2006) repealed section 154 which was concerned with dangerous acts or omissions in stressing that the elements to found a conviction may vary from situation to situation. His Honour was of the view that 'although it [section 154] requires as an element, foreseeability, that foresight is to be not the subjective foresight of the accused person but that of "an ordinary person similarly circumstanced" clearly foreseeing the relevant danger'.[112]

In the previous section of this paper reference was made to section 154 (Dangerous acts or omissions) being a legislative response or 'fall back situation'[113] to *R v O'Connor*,[114] and earlier when detailing section 31 it was noted that by virtue of section 31(3) the section did not apply to section 154. Subjective mental states are excluded from section 154. According to Blokland, section 154 was designed to 'inculpate persons who might otherwise be acquitted of an offence on the grounds of lack of intent by reason of self-induced intoxication'.[115] To this quotation can be added: 'or might otherwise be acquitted of manslaughter due to lack of foresight for the same reason', given the then alternative verdict provisions of the now amended section 318. To reinforce the legislative concern that the excuse of intoxication be minimised under the Criminal Code (NT), as set out below, section 154(4) made intoxication a circumstance of aggravation, not an excuse, which carried a penalty of further imprisonment for four years.

110. *Charlie,* above n 107, 412.
111. Ibid 409. Section 172 (Procuring abortion), s 176 (Stupefying in order to commit crime), s 177 (Acts intended to cause grievous harm or prevent apprehension), s 182 (Attempting to injure by explosive substances), s 249 (Damaging mines) and s 272 (Personation are further examples).
112. Ibid.
113. See Sturgess, above n 25, 23.
114. Above n 18.
115. J Blokland, 'Dangerous Acts: A Critical Appraisal of Section 154 of the Northern Territory Criminal Code' (1995) 19 *Criminal Law Journal* 74, 76.

154. Dangerous acts or omissions

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.

The elements of the offence are set out in section 154(1) whilst subsections (2) to (4) provide circumstances of aggravation. As Blokland points out subsection (5) means that 'lack of voluntariness due to gross intoxication depriving the person of the will to act is specifically excluded from consideration'.[116] Under the new Part IIAA Criminal Responsibility for Schedule 1 Offences,[117] section 43AF(5) states that evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary. Thus, while the now repealed section 154(5) was confined to section 154, section 43AF(5) applies to any offence in Schedule 1[118] which will ultimately include all offences in the Criminal Code (NT).

Kearney J in *R v Ashley* described the general purpose of section 154(1) as 'the punishment of those persons who, by their acts, endanger others'.[119] In *Baumer v The Queen,*[120] the High Court in a unanimous decision described section 154 as an unusual section.

> It casts a wide net, so as to cover all acts or omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious.[121]

116. Ibid, 79.
117. Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
118. Schedule 1 currently only includes a narrow band of offences in Part VI which deals with offences against the person.
119. *R v Ashley* (1991) 77 NTR 27, 29.
120. (1988) 166 CLR 51 (Mason CJ, Wilson, Deane, Dawson & Gaudron JJ).
121. Ibid 55.

However, the breadth of the offence of dangerous act is not the live issue, but rather the critical elements of section 154(1) which are firstly, the act causes 'serious danger'; secondly, the danger must be 'clearly foreseen; and thirdly, the objective test of ordinary person similarly circumstanced. The leading case on section 154(1) is *Sandby v The Queen,*[122] where Mildren J discussed all three elements.

> If the danger is `serious', the quality of the seriousness of the risk is to be judged by the requirement that the danger must be clearly foreseeable by an ordinary man, and of such a quality, that the ordinary man would not have taken it. The use of the word `clearly' indicates, as does the word `serious', that the risk must not be too slight, too remote, too improbable or unlikely; but that is not to say that only risks that are fanciful or far-fetched are outside of the section. In my opinion the test of foreseeability of risk is not the same as reasonable foreseeability of risk of injury in the law of civil negligence.[123]

These observations of Mildren J could be supplemented by noting that section 154(1) uses the words 'clearly foreseen' whereas section 31(2) uses 'foresight' against the objective test of 'ordinary person similarly circumstanced'. Thus, whilst it is true that section 31(3) excludes section 31 from the operation of section 154, the language of section 154(1) makes 'allowance for ordinary human fallibility'.[124] As Gray pointed out, 'the courts have so far [writing in 2004] been careful to interpret it in such a way that it does not fulfil its obvious potential for injustice'.[125]

Section 154 had many critics. Blokland categorised section 154 as representing 'a departure from fundamental principles of criminal responsibility normally applicable in serious cases',[126] while Leader-Elliott described it as 'infamous' and 'draconic' in arguing the effects of section 154 were 'uncertain in practice and infected with paradox'.[127] The Office of the Director of Public Prosecutions (DPP) noted that section 154 was drafted as an offence of criminal negligence but had probably primarily been used to prosecute intentional acts, omissions and events which the DPP considered to be 'conceptually and philosophically wrong' and if the offence of dangerous act is to be retained 'its use should be restricted to the prosecution of criminal negligence'.[128]

122. (1993) 117 FLR 218.
123. Ibid 232.
124. Ibid.
125. See Gray, above n 93, 104.
126. See Blokland, above n 115, 74.
127. I Leader-Elliot, 'Alcohol Misuse and Violence, Legal Approaches to Alcohol-related Violence: the Reports' (Paper presented at the National Symposium on Alcohol Misuse and Violence, July 1994) 276, quoted in Fairall, above n 53, 10.
128. See Fairall, above n 53, 10–11.

With the adoption of the criminal responsibility sections in Chapter 2 of the Criminal Code (Cth) in Part IIAA of the Criminal Code (NT),[129] section 43AL (Negligence) (section 5.5 Criminal Code (Cth)) follows *Nydam v The Queen*[130] and is an objective rather than a subjective test because the accused's state of mind is irrelevant.

> **43AL. Negligence**
>
> 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.

This begs the obvious question as to why the test in *Nydam* statutorily adopted in section 43AL above is necessarily to be preferred for the offence of gross negligence manslaughter[131] as opposed to section 154. Gross negligence manslaughter effectively in part replaces section 154, where the latter required an act causing serious danger has to be clearly foreseen and not done by an ordinary person similarly circumstanced. The preference for gross negligence manslaughter is at least questionable to the extent that section 154 has drawn such strong, and as here contended, unmerited criticism. More practically, the Northern Territory Law Society favoured the retention of section 154 because individuals who are often intoxicated 'commit dangerous acts without either the requisite foresight or intent for the purposes of other offences' such that as other witnesses are often similarly intoxicated were the offence of dangerous act to be abolished 'in many instances these individuals would be acquitted'.[132]

The clearest statement of how section 154 interacts with murder or manslaughter is to be found in the judgment of Asche CJ in *Attorney-General v Wurrabadlumba*.[133]

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129. Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
130. [1977] VR 430. Contrast *Nydam* and s 43AL with the Queensland case of *R v Jackson & Hodgetts* [1990] 1 Qd R 456, 463–4, where the defendants had put meat preservative into a Coca Cola tin thinking it would be unpleasant. However, the victim was suffering from advanced coronary disease and died. Thomas J held that a person cannot be found criminally negligent unless at least some serious harm was reasonably foreseeable by him or her.
131. Under Criminal Code (NT) s 160(c) the fault element for manslaughter can be either reckless or negligent. Under s 43AK (Recklessness) a person is reckless in relation to a result if the person is aware of a substantial risk that the result will happen, and having regard to the circumstances known to the person, it is unjustifiable to take the risk. This definition is closer to reasonable foresight under s 154, but given recklessness and negligence are alternative fault elements for manslaughter under s 160, why would the Crown ever prosecute manslaughter under the higher test of recklessness when it can use negligence?
132. See Fairall, above n 53, 11.
133. (1990) 74 NTR 5.

> In the context of a charge of murder or manslaughter section 154 covers what might be called the third alternative, where death or grievous harm was neither intended nor (subjectively) foreseen by the actor, but should clearly have been foreseen by him.... If the accused did not intend but foresaw that his actions might result in the death of or grievous harm to the victim, and death occurred, he would, (absent section 31(2)), be guilty of manslaughter under the Code. If, however, he did not subjectively foresee that consequence but objectively should have foreseen it he could be guilty not of manslaughter but of an offence under section 154.[134]

Thus, it is clear from Asche CJ's analysis that section 154 was indeed the 'fall back situation' where subjective foresight was lacking for manslaughter but objectively the person should have foreseen his actions could have resulted in death to the victim. The most obvious reason for this lack of subjective foresight is intoxication which was dealt with through a combination of sections 31(3) and 154. The Part IIAA equivalent is the partial adoption of *DPP v Majewski*[135] by virtue of section 43AS(1) which states that evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed. However, section 43AS (1) is qualified by subsections which allow self-induced intoxication to be taken into consideration in determining whether the conduct (but not a result or circumstance)[136] was accidental (section 43AS(2)) or whether the person had a mistaken belief about facts (section 43AS(3)). The author respectfully agrees with Odgers who concluded that the exceptions in sections 8.2(3) and (4), which are the equivalent subsections in the Criminal Code 1995 (Cth), 'to a large extent remove the prohibition created by the rule'.[137]

The incorporation of Chapter 2 of the Criminal Code (Cth) as Part IIAA of the Criminal Code (NT) brought another key section into play for the purposes of the treatment of evidence of intoxication: namely, section 43AF which deals with voluntariness (section 4.2 in the Criminal Code (Cth)). Section 43AF(1) states that conduct can only be a physical element[138] if it is voluntary, and section 43AF(2) explains that conduct is only voluntary if it is the product of the will of the person whose conduct it is. By way of clarification, examples of conduct that is not voluntary are given such as a spasm, convulsion or other unwilled bodily movement; an act performed during sleep or unconsciousness; and an act performed during impaired consciousness depriving the person of the will to act. These two subsections set out well settled legal territory on voluntariness and specifically import automatism into the Criminal Code (NT).

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134. Ibid 7.
135. Above n 38.
136. See note to s 43AS(1).
137. S Odgers, *Principles of Federal Criminal Law* (Sydney: Lawbook Co, 2007) 70–1.
138. Under s 43AC which deals with establishing guilt of offences a person must not be found guilty of committing an offence unless the existence of the physical elements of the offence and for each physical element one of the fault elements (where required) for the physical element is proved.

For present purposes, it is section 43AF(5) which moves centre stage. Section 43AF(5) states that evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary. Section 43AD(1) defines conduct as an act, an omission to perform an act or a state of affairs, while section 43AE sets out that a physical element of an offence may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct, happens. Thus, clearly, the effect of section 43AF(5) above is to exclude evidence of self-induced intoxication from the physical element of an offence (or the actus reus). As Odgers has pointed out:

> If the only evidence tending to suggest that a person's conduct was not the product of the person's will is evidence the person was intoxicated, and the intoxication was self-induced, such evidence must be disregarded by the tribunal of fact. If it must be disregarded then, presumably, the inference of voluntariness will be drawn.[139]

It is illuminating to consider the ramifications of section 43AF(5) in the context of the well known passage from Barwick CJ's judgment in *R v O'Connor*.[140]

> But the state of intoxication may, though perhaps only rarely, divorce the will from the movements of the body so that they are truly involuntary. Or, again, and perhaps more frequently, the state of intoxication, whilst not being so complete as to preclude the exercise of the will, is sufficient to prevent the formation of an intent to do the physical act involved in the crime charged.[141]

If one conceives of these two states of intoxication on a scale of 0 to 10, where 0 is stone cold sober and 10 is paralytic, then 7.5 could represent a person being sufficiently intoxicated to prevent the formation of an intent to do the physical act which goes to the fault element or mens rea. Then again, 9 could represent a person who is so intoxicated that the will has been divorced from the movements of the body which goes to the physical element or actus reus. It is this second or super-intoxicated state that section 43 AF(5) has knocked out from the evidential equation. However, for crimes of specific intent the *O'Connor* principle of intoxication being part of the totality of the evidence is alive and well for the first intoxicated state relating to the fault element of intention.

The mechanics of evidence of intoxication being excluded for voluntariness and included for intention under Part IIAA can be illustrated for the specific intent offence of murder.

139. See Odgers, above n 137, 27.
140. Above n 18.
141. Ibid 72.

156. Murder

(1) A person is guilty of the crime of murder if:

(a) the person engages in conduct; and

(b) that conduct causes the death of another person; and

(c) the person intends to cause the death of, or serious harm to, that or any other person by that conduct.

The elements of section 156(1) can be broken down as follows:

1. The person engages in conduct
   - Physical element – Conduct
   - Fault element – Intention (section 43AM(1)[142] default fault element)

2. That conduct causes the death of another person
   - Physical element – Result
   - Fault element – Intention to cause the death of, or serious harm to, that or any other person by that conduct.

Consequently, it can be seen that section 43AF(5) means that evidence of intoxication cannot be considered for the physical element of conduct as per section 156(1)(a) above where the person engages in conduct. The requirement of voluntariness applies only to conduct. By contrast, evidence of intoxication is able to be considered as to whether the person intended the result of that conduct as per section 156(1)(c) above.

It is here contended that the repeal of section 154 and the adoption of a watered-down version of *DPP v Majewski* care of the difficult intoxication provisions found in the Criminal Code (Cth), such that crimes of basic intent like manslaughter are still subject to evidence of self-induced intoxication being taken into consideration for accident and mistake under sections 43AS(2) and (3), have made it more and not less likely that the outcome predicted by the Northern Territory Law Society of 'in many instances these [intoxicated] individuals would be acquitted' will come to pass. Furthermore, the argument is made that the Criminal Code 1995 (Cth) and the Criminal Code 1983 (NT) have the weakest and least effective version of the *Majewski* principle of all Australian jurisdictions such that the relevant basic intent provisions make the prohibition virtually meaningless.

142. Section 43AM(1) states: 'If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.' By contrast, s 43AM(2) states: 'If a law that creates an offence does not provide a fault element for a physical element that consists only of a result or circumstance, recklessness is the fault element for the physical element.' There is a note for s 43AM(2) which states: 'Under s 43AK(4), recklessness can be established by proving intention, knowledge or recklessness.'

4. Sections 31 and 192 (Sexual intercourse without consent)

Given the Supreme Court of the Northern Territory's allowance for ordinary human fallibility in interpreting section 154 and the High Court's clarification in *Charlie v The Queen* of the specific intent provisions of section 162(1)(a) excluding section 31, it is somewhat surprising that the Northern Territory Government's decision to review[143] the Criminal Code (NT) finally turned on the interaction between sections 31 and 192 (Sexual intercourse without consent). The specific case was *Director of Public Prosecutions (NT) v WJI*[144] which like *Charlie v The Queen* was ultimately decided by the High Court.

The question before the High Court in *Director of Public Prosecutions (NT) v WJI* was whether the 'act' for the purposes of section 192 was the 'act' of sexual intercourse itself or whether it was the 'guilty act' of sexual intercourse without consent. As Gray observed 'if the "act" were to be defined narrowly, the prosecution would need only to prove that the sexual intercourse itself was intended or foreseen in order to satisfy the requirements of section 31'.[145] Conversely, a broad interpretation of 'act' would result in the prosecution needing to prove 'that the defendant at least foresaw that the sexual intercourse was without the victim's consent'.[146]

Gleeson CJ put the question as follows:

> [T]he question to be asked is whether, in relating ss 192(3) and 31(1) of the Northern Territory Code, having regard to the definition of 'act' (deed ... not limited to bodily movement), the act for which a person is excused from criminal responsibility unless it was intended is intercourse, or intercourse without consent. Is the 'deed' sexual intercourse, or rape? If the wider concept of the relevant act is adopted, then there will be criminal responsibility only if there was an intent to have sexual intercourse without consent. It will not suffice to establish criminal responsibility that there was an intent to have sexual intercourse.[147]

His Honour answered the above question as follows:

> Having sexual intercourse with someone who is not consenting is a 'deed' which is not limited to the bodily movement of the perpetrator. It involves violence, and a serious affront to the dignity and personal integrity of the victim. It is consistent with the ordinary use of language to describe the absence of consent as a part of the deed which attracts criminal responsibility. It is a defining aspect of the deed.[148]

143. See Fairall, above n 53.
144. Above n 9.
145. S Gray, 'The State of things in the Territory: Literalism, Principle and Policy in Northern Territory Criminal Law' (2005) 29 *Criminal Law Journal* 37, 37–8.
146. Ibid 38.
147. *DPP (NT) v WJI*, above n 9, 49.
148. Ibid 50.

Thus, the Chief Justice adopted a broad interpretation of 'act' such that the relevant act is having sexual intercourse with another person without the consent of the other person. The broad interpretation was upheld 4 to 1 in the High Court.[149] Kirby J reinforced Gleeson CJ's conclusion by stating that the act of sexual intercourse was 'neutral'[150] as far as the Criminal Code (NT) was concerned given that sexual intercourse is overwhelmingly consensual and normally no criminal responsibility is attached to the act so there is nothing to be excused. 'This is the fundamental reason why the reading hypothesised by the appellant does not work.'[151] Kirby J added, having noted that the definition of 'act' was not limited to bodily movement, that this specific elaboration in the Criminal Code (NT) clearly indicated 'there should be no further niceties about whether the relevant "act" was the act of firing of an air gun pellet in the direction of a victim as distinct from the act of wounding of the victim'.[152]

The High Court's decision in *Director of Public Prosecutions (NT) v WJI* would have come as no surprise to the Northern Territory Government. On 19 December 2002, the Northern Territory Court of Criminal Appeal in *DPP Reference No 1 of 2002*[153] had decided 4 to 1[154] in favour of the broad interpretation of 'act' for the purposes of section 192. On 6 October 2003, the Northern Territory Government appointed Professor Paul Fairall to review aspects of the Criminal Code (NT). The terms of reference were as follows:[155]

> To consider whether:
>
> 1. Dangerous act (s 154 of the Criminal Code) should be abolished;
> 2. Standard minimum non-parole periods can be introduced for manslaughter if dangerous act is abolished, given many dangerous act offences would move into the manslaughter offence;
> 3. A form of manslaughter resulting in recklessness as to serious harm should be introduced;
> 4. An offence of dangerous driving causing death should be introduced; and
> 5. Whether other offences need to be introduced to cover the elements of the current dangerous act offence which relate to grievous harm rather than death.

Professor Fairall submitted his report in March 2004. One of the report's recommendations was that section 31 should be 'replaced by a provision modelled on section 23 of the Griffith Code'.[156] The High Court's decision in *Director of Public Prosecutions (NT) v WJI* was announced on 6 October 2004. On 25 October

149. Ibid (Gleeson CJ, Gummow, Kirby & Heydon JJ;. Hayne J dissenting).
150. Ibid 70.
151. Ibid.
152. Ibid [85], quoting *Vallance*, above n 103, 61.
153. (2002) 12 NTLR 176.
154. Ibid (Martin CJ, Thomas & Bailey JJ and Gallop AJ; Angel J dissenting).
155. See Fairall, above n 53, 3.
156. Ibid 5.

2004 the Attorney-General announced the Northern Territory Government's 'intention to repeal the dangerous act provision in section 154 of the Criminal Code (NT), and overhaul the major criminal responsibility provision in section 31 of the Criminal Code (NT)'.[157] Gray stated that 'these proposals have been publicly cited as a response to the High Court's decision in *Director of Public Prosecutions (NT) v WJI*.[158]

As previously mentioned with the adoption of the criminal responsibility sections in Chapter 2 of the Criminal Code (Cth) in Part IIAA of the Criminal Code (NT), the Northern Territory Government turned not to section 23 of the Criminal Code (Qld) to replace section 31 but to the Criminal Code (Cth). The now revised section 192(3) states:

> (3) A person is guilty of a crime if the person has sexual intercourse with another person:
>
> (a) without the other person's consent; and
>
> (b) knowing about or being reckless as to the lack of consent.

The new section 192(4A) spells out that being reckless as to a lack of consent to sexual intercourse includes not giving any thought to whether or not the other person is consenting to the sexual intercourse. As section 192 is listed in Schedule 1 the provisions in Part IIAA apply. Section 43AK (Criminal Code (Cth) section 5.4) defines recklessness as an awareness of a substantial risk and having regard to the circumstances known to the person it is unjustifiable to take the risk.

The major change to section 192 is the inclusion of recklessness as a fault element which specifically includes not giving any thought as to whether or not the other person is consenting. This could have been accomplished irrespective of whether section 31 was retained, or whether section 31 was substituted for either section 23 of the Criminal Code (Qld) or for the relevant provisions of Chapter 2 of the Criminal Code (Cth).

Professor Fairall's reason for his recommendation that section 31 be amended to accord with section 23 of the Griffith Code is that the application of section 31 to homicide produced 'very peculiar results'.[159] Fairall referred to the defendant having a 'protective shield'[160] even if he did foresee the possibility of death if an ordinary person similarly circumstanced and having such foresight would have proceeded. More surprisingly, Fairall concluded that 'the recklessness of the offender, in proceeding with conduct that he foresees might cause death, is

157. See Gray, above n 145, 37, quoting 'Drink, Drugs Not an Excuse', *Northern Territory News* (25 Oct 2004).
158. Ibid.
159. See Fairall, above n 53, 14.
160. Ibid.

expunged by the absence of negligence'.[161] Fairall's main criticism of section 31 appears to be reduced to the effect of section 31 being to 'drastically limit the operation of the homicide provisions'.[162] This helps to explain why the Northern Territory Government selected the Criminal Code (Cth) as it had decided to repeal section 154 and replace that 'fall back' section with an expanded manslaughter section[163] in conjunction with a series of sections covering endangering life and serious harm and driving a motor vehicle causing death or serious harm.[164]

The Northern Territory Government's decision to widen manslaughter to include gross negligence may have been influenced by Fairall's observation that there is 'no pressing policy reason why egregious negligent conduct resulting in death should not be prosecuted as manslaughter'.[165] Fairall went on to address the question of self-induced intoxication stating that it was not a bar to prosecution where the fault element is gross negligence, rather, 'far from providing a defence, the fact of intoxication may be relied upon to support a finding of gross negligence'.[166] Ironically, this was exactly the genesis behind section 154 which went one step further and made self-induced intoxication a circumstance of aggravation.

Nevertheless, the Northern Territory Government took heed of Fairall's advice on a wide manslaughter provision and consistent with the equivalent section of the Criminal Code (Cth), specifically excluded the defence of mistake of fact where the fault element was negligence in section 43AW.[167] Thus, if the prosecution charges the defendant under section160 (Manslaughter) and uses the fault element of negligence then section 43AW is negated. However, arguably section 43AW is superfluous anyway. Even if the section 'did not exist, the situation would be the same – if a fault element cannot be proved because the D had a particular mistaken belief about a fact, or was ignorant of a fact, it cannot be proved'.[168]

The alternative to adopting the criminal responsibility sections contained in Chapter 2 of the Criminal Code (Cth) was to amend section 31. The Office of the Director of Public Prosecutions (DPP) recommended amending section 31 such that it provided for 'a test of objective foreseeability instead of the current subjective foresight test'.[169] The effect of the proposed amendment would be

161. Ibid 14–15.
162. Ibid 15.
163. Now Criminal Code (NT) s 160.
164. Now Criminal Code (NT) ss 174C–F.
165. See Fairall, above n 53, 15. Professor Fairall later cited, 38–39, *Wilson v The Queen* (1992) 174 CLR 313, 333 (Mason CJ, Toohey, Gaudron & McHugh JJ) as authority for the existence of two categories of involuntary manslaughter at common law: 'Manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury, and manslaughter by criminal negligence.'
166. Ibid.
167. Section 43AW is entitled Mistake or Ignorance of Fact – faults elements other than negligence. The equivalent section in the Criminal Code (Cth) is s 9.1.
168. See Odgers, above n 137, 77.
169. See Fairall, above n 53, 97.

to attach criminal responsibility to a person for the objectively foreseeable consequences of his or her intentional act whether or not he or she personally foresaw those consequences. The DPP's suggested redrafting of section 31 below was drawn from the test in *R v Van den Bemd*[170] which was in turn based on the reasoning of Gibbs J in *Kaporonovski v The Queen* where his Honour nominated the elements which comprise the test for accident.[171]

The DPP's suggested redraft of section 31 (Unwilled act, etc, and accident) was as follows:

> A person is excused from criminal responsibility for an act, omission or event unless –
>
> (a) he intended it, or
>
> (b) an ordinary person would reasonably have foreseen it.
>
> (2) This section does not apply to the offences defined by Division 2 of Part VI.[172]

Given both *R v Van den Bemd* and *Kaporonovski v The Queen* were concerned with the interpretation of section 23 Criminal Code (Qld), it is instructive to compare the redraft of section 31 suggested by the DPP above with section 23 which is the equivalent criminal responsibility section in the Criminal Code (Qld).

> **23. Intention – motive**
>
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for--
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident.

Thus, it can be seen that the DPP's redraft of section 31 retains the collocation 'act, omission or event' and sheets home criminal responsibility where there is either intention (subjective) or an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome (objective). This compares with section 23 where the first limb is concerned not with intention but with voluntariness, and the second limb is specifically limited to accident rather than a broader test of objective foresight. It would seem that the DPP is collapsing both limbs of section 31 into the second limb of section 23, which may explain why Fairall, as noted earlier, preferred 'the more careworn [than

170. *R v Van den Bemd* (1995) 1 Qd R 401.

171. *Kaporonovski v The Queen* (1973) 133 CLR 209, 231: 'It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.'

172. See Fairall, above n 53, 97.

the Criminal Code (Cth)] but now reasonably well-understood section 23 of the Griffith Code'.[173]

In seeking to explain why the Northern Territory Government opted for Chapter 2 of the Criminal Code (Cth), it will be recalled that the architect of the Criminal Code (NT), Mr Sturgess, was seeking to avoid the difficulties encountered with section 23 when he drafted section 31.[174] Section 23(1)(b) has recently been the subject of extensive review by the Queensland Law Reform Commission[175] in the context of accused persons who had killed another 'with one punch'. In recommending the retention of section 23(1)(b) the Commission identified two main arguments in favour of retaining the section in its present form. Firstly, the current excuse of accident embodied a flexible test of foreseeability (the foreseeability of death as an outcome of the defendant's intentional act provides the necessary fault element) and is consequently capable of adapting to reflect changes in community perceptions. Secondly, because accident is an excuse of general application and is not limited to manslaughter, 'a change to the excuse of accident could have serious unintended consequences'.[176]

One option the Queensland Law Reform Commission considered was a new offence of manslaughter based on an unlawful and dangerous act, to which the defence of accident does not apply. In rejecting this option, the Commission quoted from the Law Reform Commission of Ireland's review of murder and involuntary manslaughter which labeled such an offence as punishing 'very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim'.[177]

However, manslaughter based on criminal negligence, which is a category of manslaughter to which accident does not apply, is specifically adopted in section 160 Manslaughter of the Criminal Code (NT). The decision of the Northern Territory Government to expand the offence of manslaughter assists in an understanding the selection of Chapter 2 of the Criminal Code (Cth), ahead of a reworked section 23 of the Criminal Code (Qld). In order to approximate to the new provisions of the Criminal Code (NT), the definition of manslaughter in section 303 of the Criminal Code (Qld), which currently defines manslaughter as 'a person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter', would need to be amended to encompass conduct that causes the death of another person where the fault element is either recklessness or negligence. The difficulties with the outdated criminal

173. Ibid, 15, quoting in aid of this proposition the Queensland Court of Criminal Appeal (Macrossan CJ, Pincus JA & Lee J) in *Taiters*, above n 55, 512.
174. See Sturgess above n 14, 6.
175. See QLRC, above n 63.
176. Ibid 128.
177. Ibid 135, quoting Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) [5.39].

responsibility architecture of the Griffith Codes reinforce the better choice of the Northern Territory Government to opt for Chapter 2 of the Criminal Code (Cth).

COMETH CHAPTER II

As mentioned at the commencement of this paper, in 1981 the existing Northern Territory criminal law legislation was described as 'a virtual anachronism'.[178] Some 24 years later the language is eerily reminiscent as a later Attorney-General, Dr Toyne, described the Criminal Code (NT) as 'eclectic in the utilisation of earlier models, containing provisions that are quite individual; indeed, almost idiosyncratic'.[179] The charge was made that under the existing criminal responsibility sections of Part II of the Criminal Code (NT), 'offenders who cause the death of another have not been held criminally responsible to the same degree as they would have been had they committed the identical act in another jurisdiction'.[180] The political barbs continued as the previous Country Liberal Party was alleged to have chosen 'to stick with provisions of lower culpability specifically to apply to drunken, violent offenders'.[181]

The justification for these statements was grounded in the narrow provision of the offence of manslaughter and the wide catch-all nature of the residual offence of dangerous act. Professor Fairall had referred to 'the distorting effect such a provision'[182] (section 154 – Dangerous act) had on the law of homicide in the context of doubting whether Barwick CJ would have anticipated such an outcome when proposing an alternative charge,[183] and drew attention to the remarks of Mildren J in *R v Hofscuster*.[184]

> Under the Northern Territory's Criminal Code, the offences of murder and manslaughter are not the same as those offences at common law, and have their own peculiarities, which are not always easy to understand or explain. The main reason for this is section 154, which establishes a crime unknown to the common law, viz dangerous act. The effect of the provisions of the Code relating to murder, manslaughter and dangerous act, is that in some circumstances, what would amount to murder or manslaughter in other jurisdictions is the crime of dangerous act in this Territory.[185]

The Attorney-General quoted Mildren J's observations in his second reading speech as well as another case, *Dooley v The Queen*,[186] which had also been singled out by Professor Fairall as a case where the defendant was convicted under

178. See Northern Territory, *Parliamentary Record,* above n 5.
179. See Northern Territory, *Parliamentary Debates,* above n 3.
180. Ibid.
181. Ibid.
182. See Fairall, above n 53, 12.
183. *O'Connor,* above n 18, 87.
184. (1992) 110 FLR 385.
185. Ibid 393–4.
186. [2003] NT CCA 6 (Angel, Mildren & Riley JJ).

section 154 but 'it is doubtful whether a revenge vigilante style killing would result in anything less than, at the very least, a conviction for manslaughter in other Australian jurisdictions'.[187] Given Dooley was sentenced to 9 years imprisonment with a non-parole period of 5 years, when the maximum term of imprisonment was 14 years because the defendant was intoxicated and the sentence was well within the normal range for manslaughter, it seems more a case of academic and political special pleading than a telling point against section 154.

The Attorney-General was on stronger ground when pointing to the advantage of adopting Chapter 2 as Part IIAA of the Criminal Code (NT) because the general principles of criminal responsibility provisions of the Criminal Code (Cth) are 'now in force in the Territory in respect of the commission of federal offences' and incorporating Chapter 2 in 'our own Code seeks to create uniformity of standards in the criminal laws that apply in the Territory by aligning the criminal responsibility for Territory offences with that for federal offences'.[188]

More arguable is the Attorney-General's statement that Chapter 2's 'new style uses clear and precise language to make our criminal laws more readily understandable'.[189] In *R v JS*[190] Spigelman CJ in discussing the Criminal Code (Cth) replacing case law spoke of 'the comparative rigidity of a set of interconnecting verbal formulae which ... involve the application of a series of cascading provisions, including definitional provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage'.[191] More generally as Gani has pointed out 'it is a legal paradox to codify the criminal law – to take a legislative-centric approach to it – without also legislating for how that code is to be interpreted'.[192] While a *Guide for Practitioners*[193] has been produced to assist with the interpretation of the Criminal Code (Cth), this still leaves the courts with the task of interpreting difficult provisions such as those that deal with intoxication. Nevertheless, in comparison with the Griffith Codes and their treatment of criminal responsibility, Chapter 2 of the Criminal Code 1995 (Cth) comes far closer to Bentham's test for a Code of 'no blank spaces'.[194]

CONCLUSION

The architect of the Criminal Code (NT), Mr Sturgess, stated that section 31 was designed to remove the difficulties surrounding section 23, and an attempt to set down 'in different language exactly what Sir Samuel Griffith attempts to

187. See Fairall, above n 53, 13.
188. See Northern Territory, *Parliamentary Debates,* above n 3.
189. Ibid.
190. [2007] NSW CCA 272 (Spigelman CJ, Mason P, McClellan CJ, Hidden & Howie JJ).
191. Ibid [145].
192. M Gani, 'Codifying The Criminal Law: Issues of Interpretation', in S Corcoran & S Bottomley, *Interpreting Statutes: Essays on Statutory Interpretation* (Sydney: Federation Press, 2005) 222.
193. See Leader-Elliott, above n 46.
194. HLA Hart (ed), J Bentham, *Of Laws in General* (Athlone Press, 1970) 246.

set down in his section 23'.[195] The conclusion reached in this paper is that Mr Sturgess failed in his attempt because section 31 covers different legal territory to section 23 whilst purporting to cover the same legal territory albeit in different language. However, it is also contended that some judges of the Supreme Court of the Northern Territory have misunderstood and misinterpreted the operation of section 31(1) and (2) in tandem. Insufficient attention was given to the collocation 'act, omission or event'[196] and the need for a jury to normally infer the accused's state of mind as set out by Barwick CJ in *Pemble v R*[197] for subjective tests. It was argued that Asche J had correctly applied section 31 in *Pregelj v Manison*[198] and that it was unfortunate that the interpretation of section 31 favoured by Nader J and Kearney J in that case has never been overruled. The end result was that the perceived problems with section 31 were exaggerated at an early stage in the life of the Criminal Code (NT).

In turning to the interaction between section 31 and other key sections of the Criminal Code (NT), this paper has focused on section 154 (Dangerous act), section 162 (Murder), and section 192 (Sexual intercourse without consent). Section 154 has assumed major significance as it was the critical section dealing with the Northern Territory Government's policy on intoxication and its legislative response to *R v O'Connor*.[199] It is contended that section 154 was pilloried as a 'bogey' section by legal purists content to overlook the manifest problems securing convictions for intoxicated defendants in the Northern Territory, and as was pointed out the Northern Territory Law Society opposed the repeal of section 154.[200] The treatment of intoxication as an excuse has proved difficult in all jurisdictions, but it is certainly open to argue that section 154 generated more legal traction in dealing with intoxication than a watered down version of *DPP v Majewski*.[201]

The inconsistencies in statutory interpretation between judges of the Supreme Court of the Northern Territory were further exposed in relation to the interaction between sections 31 and 162 (Murder). In *Breedon v The Queen*[202] notwithstanding the clear language of section 162(4), which is entirely consistent with common law constructive murder, the Court of Criminal Appeal (NT) quashed the murder conviction on the grounds that if the offender did not at least foresee death as a consequence of his act then he was excused from criminal responsibility under section 162(1)(b) constructive murder. It is contended that this holding was unwarranted even on a literal application of the legislation because section 162(4) was specific to constructive murder.

195. See Sturgess, above n 25, 16.
196. *DPP (NT) v WJI*, above n 9, 70 (Kirby J).
197. Above n 79, 120–1 (Barwick CJ).
198. *Wurramura v Haymon*, above n 92, 56.
199. Above n 18.
200. See Fairall, above n 53, 11.
201. Above n 38.
202. *Breedon*, above n 95.

The above conclusion is strengthened when 5 years later the Court of Criminal Appeal effectively reversed itself in *Charlie v The Queen*,[203] notwithstanding an unpersuasive attempt by Martin CJ to distinguish *Breedon* from *Charlie*. It was left to Kearney J, with respect, to adopt the correct approach in following Dixon CJ in *Vallance v The Queen* in devising 'specific solutions of particular difficulties raised by the precise facts of given cases'[204] in finding that the mental elements for murder were completely set out in section 162(1)(a) and the only role for section 31(1) is 'its requirement that the homicidal act be intentional'.[205]

The High Court was again called upon to interpret section 31, this time in conjunction with section 192, in *Director of Public Prosecutions (NT) v WJI*[206] where the question was whether the 'act' for the purposes of section 192 was the 'act' of sexual intercourse itself or whether it was the 'guilty act' of sexual intercourse without consent. A majority of the High Court adopted a broad interpretation of 'act' such that the relevant act is having sexual intercourse with another person without the consent of the other person. Kirby J fired a judicial Exocet missile at some members of the Supreme Court of the Northern Territory and the Director of Public Prosecutions with this barbed observation:

> This Court has said over and over again that it is a mistake to dissect words and to endeavour to construe them in isolation. The natural unit of comprehensible communication in the English language is the sentence. The approach of the appellant attempts to lead this Court back to the dark days of statutory interpretation by reference to isolated words.[207]

In this paper it was stated that the *Director of Public Prosecutions (NT) v WJI* was the catalyst for the repeal of section 154 and the decision to overhaul section 31.[208] However, it was pointed out that the subsequent changes to section 192 could have been accomplished irrespective of whether section 31 was retained, or whether section 31 was substituted for either section 23 of the Criminal Code (Qld) or for the relevant provisions of the Criminal Code (Cth).

Nevertheless, given that the Northern Territory Government accepted Professor Fairall's advice on a wide manslaughter provision encompassing gross negligence manslaughter, it was inevitable that the Criminal Code (Cth) would be selected ahead of a revised section 31 or an adoption of section 23 Criminal Code (Qld), as a new manslaughter section would be required in any event. Even though the Queensland Law Reform Commission report in recommending the retention of section 23(1)(b) Criminal Code (Qld) postdated (2008)[209] the Northern Territory

203. Above n 32.
204. *Vallance*, above n 103, 61 (Dixon CJ).
205. *Charlie*, above n 32, 167 (Kearney J).
206. Above n 9.
207. Ibid 70 (footnotes omitted).
208. See Gray, above n 145, 37.
209. See QLRC, above n 63, 9.

Government's decision in 2005 to opt for the criminal responsibility sections of the Criminal Code (Cth), the Northern Territory Government has taken the better course.

In the end, it simply boiled down to the Northern Territory wisely following the Australian Capital Territory in adopting Chapter 2 of the Criminal Code (Cth) which was in turn based on the Model Criminal Code. It is perhaps not too fanciful to suggest that as the Criminal Code 1983 (NT) was created by the Country Liberal Party, which was in power from the arrival of Self Government in 1978 to 2001, the incoming Northern Territory Labor Government was intent on pursuing a completely different criminal code landscape. In so doing, the Northern Territory Labor Government did not face a legal profession that fully embraced and supported the then existing Criminal Code 1983 (NT), which is the opposite of the situation in Queensland.

Finally, in the course of the search for the reasons behind the original Criminal Code (NT) only surviving 20 years, attention was given to the Criminal Code (Qld). The observation was made in this paper that it is regrettable that with the example of Chapter 2 of the Criminal Code (Cth) before them, neither the Queensland nor the Western Australian Governments have seen fit after over 100 years to redesign the fundamental criminal responsibility sections of the Griffith Codes without which meaningful reform will be impossible. It is suggested that the Queensland and the Western Australian Governments should follow the example of the Northern Territory Government and embrace Chapter 2 of the Criminal Code (Cth).