HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. **H2 of 2020**

BETWEEN:

CHAUNCEY AARON BELL
Appellant

and

STATE OF TASMANIA
Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for Queensland intervenes in these proceedings, not in support of any party, and if necessary, seeks leave of the Court to intervene.

PART III: Reasons why leave to intervene should be granted

3. On 3 February 2021, during the hearing of this matter, Kiefel CJ directed the parties to write to all State and Territory Attorneys-General to inform them about these proceedings and provide the Attorneys-General with an opportunity to intervene.[1]

PART IV: Submissions

Summary of Argument

4. The Attorney-General's submissions are limited to the construction and application of the statutory 'mistake of fact defence' in Queensland[2] as compared with the common law 'excuse' or 'defence'.[3]

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[1] *Bell v State of Tasmania* [2021] HCATrans 005, at lines 985-995.

5. The *Criminal Code Act 1899* (Qld) establishes the Code of Criminal Law for Queensland, which is set out in schedule 1 to the Act ('**Queensland Code**'). As a matter of statutory interpretation, s 24 of the Queensland Code provides relief from criminal responsibility for an accused person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things, to the same extent as if the real state of things had been such as the person believed to exist.

6. Under the Queensland Code, an operative mistake may relieve an accused of criminal responsibility whether or not, notwithstanding the mistake, there remains culpability for a secondary offence (i.e. a different offence to that charged, including a simpliciter, equivalent or lesser offence). Where there is a secondary offence, an operative mistake relieves the accused of criminal responsibility in relation to the primary offence, but the accused may nevertheless be convicted of the secondary offence. Queensland courts have consistently interpreted s 24 of the Queensland Code to this effect.[4] That interpretation should not be displaced.

7. Dixon J's comment in *Thomas v The King,*[5] that s 24 of the Queensland Code states 'the common law with complete accuracy'[6], which requires the operative mistake be such that would make the act for which an accused is indicted an innocent act,[7] should be seen as per incuriam.

Statement of Argument

8. The substantive question in this case is whether the defence of honest and reasonable mistake as to age is available to the appellant pursuant to s 14 of the Tasmanian

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2 References in these submissions to Queensland's 'mistake of fact defence' is a reference to s 24 of Queensland's Criminal Code, being a convenient shorthand to refer to the provision (which is not a true criminal defence).

3 In *Jiminez v The Queen* (1992) 173 CLR 571, 581-2, honest and reasonable mistake was referred to as an 'excuse' and a 'defence'.

4 For example, *R v Kratzmann* [2020] QDC 103, [102]-[10]; *R v Duong* (2015) A Crim R 57, 69[56], Joint Book of Authorities ('**JBA**') Vol. 6, p 1470; *R v Phillips* [2009] 2 Qd R 263, [34]-[35] (Holmes J, White AJA agreeing); *R v Mrzljak* [2005] 1 Qd R 308; *R v Lyons* (1987) 24 A Crim R 298, 299-300 (Williams J); *R v Goulds and Barnes* [1960] Qd R 283, 291 [15]-[18] (Philp J); *Brimblecombe v Duncan; Ex parte Duncan* [1958] Qd R 8, 12 (Philp J); *Loveday v Ayre; Ex parte Ayre* [1955] St R Qd 264, 267-9 (Philp J), JBA Vol. 6, p 1409-11; *Anderson v Nystrom* [1941] St R Qld 56, 69-70, JBA Vol. 6, p 1232-3.

5 (1937) 59 CLR 279, JBA Vol. 5, p 982.

6 *Thomas v The King* (1937) 59 CLR 279, 305-6 (Dixon J), JBA Vol. 5, p 1008-9; referred to, seemingly with approval, by the majority in *CTM v The Queen* (2008) 236 CLR 440, 445[3], JBA Vol. 3, p 271.

7 The principle was restated in *CTM v The Queen* (2008) 236 CLR 440, 447[8], JBA Vol. 3, p 273.

Criminal Code[8] in relation to the charge of supplying a controlled drug to a child contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas).

9. The States of Tasmania and Queensland both enacted criminal codes based on a collection of the English and Australian common law and statutes applying at the time, Queensland doing so in 1899,[9] and Tasmania in 1924.[10] The two codes do not operate in the same way in relation to the common law generally, and in particular, the common law doctrine of mistake of fact.

10. Tasmania's Code is a modified version of the Queensland Code.[11] The provisions of the Tasmanian Code dealing with criminal responsibility and matters of justification and excuse were framed in light of the most recent decisions of the English Courts at the time of drafting, and 'very largely upon the recommendations of the English Criminal Code Commissioners.'[12] Unlike the Tasmanian Code,[13] the Queensland Code was enacted expressly intending to replace the common law.[14]

11. Both Codes exclude the doctrine of mens rea and instead provide that criminal responsibility attaches to acts that are voluntary and intentional and provide for a defence of mistake of fact. However, that defence operates differently under each Code.

12. The mistake of fact defence in Queensland is not the same as the common law defence as pronounced originally in *R v Tolson*[15] and followed by the High Court here in *Thomas v The King*.[16]

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8 *Criminal Code Act 1924* (Tas) sch 1.
9 Commenced on 1 January 1901.
10 *Criminal Code Act 1924* (Tas), sch 1 ('**Tasmanian Code**'), JBA Vol. 1, p 40. Commencing on 4 April 1924.
11 Criminal Code Bill (Tas), Speech by Attorney-General, Mercury Reprints HA 28 February 1924, p 196.
12 Criminal Code Bill (Tas), Speech by Attorney-General, Mercury Reprints HA 28 February 1924, p 196-7.
13 *Criminal Code Act 1924* (Tas) s 8 'Saving of common law defences'; JBA Vol. 1, p 42., Speech by Attorney-General, Mercury Reprints HA 28 February 1924, p 196.
14 *Criminal Code Act 1899* (Qld) s 5 (this provision was not part of Griffith's Draft Code); *Brennan v The King* (1936) 55 CLR 253, 263.
15 (1889) 23 QBD 168, JBA Vol. 6, p 1564.
16 (1937) 59 CLR 279, JBA Vol. 5, p 982.

Queensland's Criminal Code – Mistake of Fact – History and Interpretation

13. Queensland's 'mistake of fact' defence under s 24 is located in Chapter V of the Criminal Code, which is entitled 'Criminal Responsibility':

> **24 Mistake of fact**
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

14. The Queensland Code is intended to supplant the common law. As was recently observed by Gleeson J in *Namoa v The Queen*,[17] with the unanimous agreement of the other members of the Court,[18] the principles for interpreting a statutory code are well established. Her Honour went on to state that:

> A code is to be construed according to its natural meaning and without any presumption that its language was intended to do no more than restate the common law. The common law cannot be used to supply the meaning of a word used in a code except where the word has a well-established technical meaning under the pre-existing law and the code uses that word without definition, or it appears that the relevant provision in a code is ambiguous. The common law cannot be invoked in the interpretation of a code for the purpose of creating an ambiguity.[19]

15. It is therefore not the proper course in interpreting a code to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.[20] Rather, 'the first duty of the interpreter is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance.'[21]

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17 [2021] HCA 13.
18 Kiefel CJ, Gageler, Keane, Gordon, Edelman, and Steward JJ.
19 *Namoa v The Queen* [2021] HCA 13, [11]. Internal citations omitted.
20 *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).
21 *Pickett v Western Australia* (2020) 94 ALJR 629, 636[23] (Kiefel CJ, Bell, Keane and Gordon JJ), citing *Stuart v The Queen* (1974) 134 CLR 426, 437 (Gibbs J), JBA Vol. 4, p 859.

16. When interpreting s 24 of the Queensland Code, therefore, the focus must be upon the text and purpose of the provision read in its context of the Code as a whole.[22] Meaning must be given to every word of the provision, as 'no clause, sentence, or word shall prove superfluous, void, or insignificant' in the interpretation of statutes.[23] As it is a penal statute, the Code is to be construed applying the ordinary rules of construction. Although stated to be a rule of last resort, any ambiguity or doubt may be resolved in favour of an accused.[24]

17. Queensland Courts have consistently interpreted s 24 of the Queensland Code as determining the issue without recourse to the common law, observing that the common law is different. In *Anderson v Nystrom*,[25] Philp J (with whom Douglas J agreed) stated as follows:[26]

> No doubt the common law and the Queensland law are very similar, but there are differences … The rule as enacted is different from the Common Law doctrine. For example, at Common Law a defendant cannot rely on *ignorantia facti* with regard to an element of the offence if the act he does is otherwise unlawful. Thus, in England, a man charged with assaulting a police constable cannot plead ignorance that the man assaulted was a constable since the assault itself is unlawful. But under s 24 the man could be convicted only of assault *simpliciter*.
>
> But the most striking part of s. 24 is its last sentence. What is the reason for its enactment? No one doubts that any rule of law can be expressly or impliedly excluded by legislation, so that the sentence seems to be merely surplusage. The only reason I can see for its enactment is to provide that the rule of honest and reasonable mistake can be excluded only by the express or implied provisions of

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22 *R v Barlow* (1997) 188 CLR 1, 8-10 (Brennan, Dawson and Toohey JJ), 20-1 (McHugh J), 31-3 (Kirby J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2[69]-[71] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7[47] (Hayne, Heydon, Crennan and Kiefel JJ).

23 *The Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ) citing *The King v Berchet* (1688) I Show KB 106.

24 *Waugh v Kippen* (1986) 160 CLR 156, 164-5 (Gibbs C.J., Mason, Wilson and Dawson JJ) adopting the reasons for judgment of Gibbs J in *Beckwith v The Queen* (1976) 135 CLR 569, 576; *Krakouer v The Queen* (1998) 194 CLR 202, 223 [62]-[63] (McHugh J para); *R v A2* (2019) 93 ALJR 1106, 1119; [2019] HCA 35 [52] (Kiefel CJ and Keane J); *cf* Dixon J's statement that s 24 of the Queensland Code states 'the common law with complete accuracy', *Thomas v The King* (1937) 59 CLR 279, 305-6.

25 [1941] St R Qd 56, JBA Vol. 6, p 1219.

26 *Anderson v Nystrom* [1941] St R Qd 56, 69-70 (Philp J), 62, 65 (Douglas J), JBA Vol. 6, p 1232-3, 1225, 1228. Internal citations omitted.

> the statute enacting the offence, and that the statute must be interpreted according to the ordinary rules of interpretation. As the draughtsman of the Code well knew, the law in England on the matter is a chaos of irreconcilable decisions.

18. Subsequently in *Loveday v Ayre*,[27] in the context of considering the question of onus of proof in relation to an operative mistake under s 24 of the Queensland Code, Philp J again found that the provision under the Code and the common law are not the same, his Honour stating that 'whatever may be the position at common law, a mistake is not a *defence* in Queensland – it is not a matter which the defendant must prove on the balance of probabilities.'[28] In *Walden v Hensler*,[29] Brennan J (at 576) and Deane J (at 580) referred to Philip J's comments about the Queensland Code as compared to the common law with approval. In *Walden v Hensler*, the issue concerned the construction of s 22 of the Code. In that regard, Brennan J stated that '[w]hen the common law defence was reformulated for the purposes of the Code, it was given a different operation.'[30] It is submitted that the same is the case with s 24.

19. Sir Harry Gibbs also observed in his Review of Commonwealth Criminal Law[31] that under s 24 of the Queensland Code, if the accused believed in facts which would make him or her guilty of a lesser offence, he or she would be guilty of that offence only, and in that respect 'it does appear clear enough that s 24 of the Criminal Codes of Queensland and Western Australia is not the same as the common law.' In contrast, his Honour observed that 'at common law … the belief necessary to amount to an excuse must be a belief in facts which would make the act of the accused innocent.'[32]

20. The key difference between the common law doctrine of mistake of fact and s 24 of the Queensland Code is that under the Code, an operative mistake will only negative

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27 [1955] St R Qd 264, JBA Vol. 6, p 1406.
28 *Loveday v Ayre; ex parte Ayre* [1955] St R Qd 264, 267-8; JBA Vol. 6, p 1409-10. Emphasis supplied.
29 (1987) 163 CLR 561, JBA Vol. 5, p 1143.
30 *Walden v Hensler* (1987) 163 CLR 561, 573, JBA Vol. 5, p 1155.
31 Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters* (Interim Report, July 1990).
32 Ibid, 69[7.1].

criminal responsibility *to the extent of the mistake*; 'unlike the common law, the operation of mistake is not excluded by the unlawfulness of the act done.'[33]

21. If s 24 of the Queensland Code were to be construed consistently with the common law, the words 'to any greater extent than if the real state of things had been such as the person believed to exist' in s 24(1) would be otiose. Such interpretation would be contrary to the general principle of statutory interpretation that all words must prima facie be given some meaning and effect.[34]

22. Chapter V of the Queensland Code expresses criminal responsibility in negative terms, there shall be no guilt unless all acts of the accused forming the ingredients of the crime are voluntary and intentional.[35] Where there is an operative mistake, s 24 does not merely provide a matter of defence, it involves an exoneration from criminal responsibility[36] to the extent of the mistake. The common law requirement for there to be innocence has not been imported. The rationale for that requirement does not exist where there is a Code that is constructed in a way that allows for a person to be convicted of a secondary offence for which they were not charged.

Drafting of the Queensland Code s 24

23. Section 24 was enacted in 1899 as part of the original Queensland Code prepared by Sir Samuel Griffith, who was then the Chief Justice of Queensland, and has never been amended. His Honour made a note on the draft provision referring to the common law, which has been interpreted as suggesting that the section was a replication of the common law; however, for the reasons developed below, that interpretation should not be adopted.

24. Correspondence dated 29 October 1897 from Sir Samuel Griffith to the Attorney-General for Queensland, enclosed what his Honour described as a 'Draft of a Code

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33 *R v Goulds and Barnes* [1960] Qd R 283, 291[18].

34 See for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382[71] (McHugh, Gummow, Kirby and Hayne JJ).

35 *Vallance v R* (1961) 108 CLR 56, 60 (Dixon CJ) discussing s 13 of the *Criminal Code* (Tas), which is in similar terms to s 23 of the Queensland Code, JBA Vol. 5, p 1119.

36 *Geraldton Fishermen's Cooperative Ltd v Munro* (1963) WAR 129, 134 (the Full Court there considering the equivalent provision under the Western Australia Criminal Code).

dealing with the whole subject of the Criminal Law of Queensland'.[37] His Honour noted the desirability of having a 'collected and explicit statement of the Criminal Law'[38] and went on to make it clear that the Draft Code is not simply a restatement of the common law, stating that:

> … the Draft Code does not deal with the law embodied in Imperial Statutes which are in force throughout Her Majesty's Dominions irrespective of local legislation, nor with such provisions of the English Criminal Law in force in 1828, whether Statutory Law or Common Law, as are manifestly obsolete or inapplicable to Australia … I have endeavoured to include all the rules of the unwritten Common Law which are relevant to the question of criminal responsibility and the administration of justice in Court of criminal jurisdiction … In many instances it has been necessary to depart from existing rules for the purpose of avoiding admitted anomalies or of simplifying the law. The reasons for making such departures and for adopting the suggested rules will be found either in this letter, or, when the departures, are in matter of detail, in the form of Notes to the Draft Code itself.[39]

25. His Honour's reference to the year 1828 in the above passage was a reference to the *Australian Courts Act 1828* (UK),[40] which applied the whole body of English law to the eastern half of the Australian continent in the administration of justice, at the time comprising the two colonies of New South Wales and Van Diemen's Land (now Tasmania),[41] 'so far as the same can be applied within the said colonies'.[42] Queensland separated from New South Wales on 6 June 1859.[43] The laws and statutes in force in England at the time of passing of the *Australian Courts Act 1828* (so far as not inconsistent with laws or statutes in force in Queensland) were made directly applicable so far as they can be applied in Queensland, by the *Supreme Court Act 1867* (Qld) s 20.

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37 Sir Samuel Griffith's correspondence states that he 'transmit[s] herewith a Draft of a Code', however his Honour's correspondence contained his explanatory notes for Draft Code, rather than the draft code provisions. A Draft of a Bill to establish the Code was transmitted to the Attorney-General under correspondence from his Honour dated 29 November 1897.

38 At IV.

39 Sir Samuel Griffith, Draft of a Code of Criminal Law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p III-IV. Underlining added.

40 9 Geo 4, c 83.

41 The 1828 Act also confirmed the prior reception of English law in eastern Australia which had taken place at the date of settlement in 1788: see BH McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 336, citing *R v Farrell* (1831) 1 Legge (NSW) 5, 10. *Macdonald v Levy* (1833) 1 Legge (NSW) 39, 51 and *Cooper v Stuart* (1889) 14 App Cas 286, 291.

42 *Australian Courts Act 1828* (UK) s 24.

43 Order in Council of 6 June 1859 conferred the first constitution upon the Colony of Queensland.

26. His Honour observed that the Criminal Law of Queensland (apart from Imperial Statutes of general application) was at the time scattered through nearly two hundred and fifty Statutes and the unwritten portion, which formed a very large part of it, was only to be found in books of writers on the subject or in the decisions of relevant Courts.[44] In substance, a 'true and proper chaos'.[45]

27. In preparing the Draft Code, his Honour said that he freely drew upon the labour of distinguished lawyers[46] who had recently prepared a Draft Code of Criminal Law for England in 1880 (which was not enacted). Especially, his Honour stated, 'with respect to the statement of rules of the Common Law and the definition of Common Law offences.'[47] His Honour also derived 'very great assistance' from the Penal Code enacted in Italy in 1888,[48] describing it as 'the most complete and perfect Penal Code in existence'[49] and the Penal Code of the State of New York.

28. As for what codification was intended to do, his Honour repeated the words in the Report of the Royal Commission into England's Draft Code, that 'codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed.'[50]

29. His Honour explained that the Draft Code 'attempted to state specifically all the conditions which can operate at Common Law as justification or excuse for acts prima

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44 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p IV.

45 John D Heydon, 'Reflections on James Fitzjames Stephen' (2010) 5 *Queensland Law Journal* 51, citing: 'Codification in India and England' (1872) 18 *Fortnightly Review* 644, 654; *Anderson v Nystrom* [1941] St R Qd 56,70 (Philip J); JBA Vol. 6, p 43.

46 Lord Blackburn, Mr Justice Barry (of England), Mr Justice Lush and Sir James Fitzjames Stephen who were appointed by Royal Commission to be Commissioners to report on the provisions of a Draft Code of Criminal Law which had then been prepared in England; Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, at IV.

47 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p IV.

48 Commonly known as the 'Zanardelli Code', after the Minister for Justice responsible for its passage through the Italian Parliament.

49 Cullinane argues that the Zanardelli Code seemed to have only marginally influenced Griffith in the ambit of the regulation of mistakes of fact: see KA Cullinane, The Zanardelli Code and Codification in the Countries of Common Law (2000) 7 *James Cook University Law Review*, 116, 149.

50 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p V.

facie criminal, but not formally excluded other possible Common Law defences …'[51] As for criminal responsibility, his Honour said, '[t]his most important and difficult branch of the law is dealt with in Chapter V. I have appended to several of the sections Notes to which I invite special attention. No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction.'[52]

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30. Sir Samuel Griffith notably stated that he had ventured in a few instances (as per his Notes against relevant clauses) 'to suggest the adoption of principles which, perhaps, are not at present recognised by our law'.[53] The mistake of fact defence was clause 26 in the draft Bill, then renumbered as 24.[54] His Honour's notation beside that clause simply states, 'Common Law'. In concluding his explanation of the Draft Code, his Honour remarked that when a proposed provision is 'undoubted Common Law, I have not thought it necessary to do more than say so.'[55]

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31. While Sir Samuel Griffith did observe that the criminal law at the time was 'scattered' across numerous statutes and the unwritten law, he did not clarify the legal authority on which he relied to draft s 24.[56] It is safe to assume based on his Honour's abovementioned notation that he considered the mistake of fact defence as expressed in the Draft Bill, to be an expression of the common law. As much has been observed by the Queensland Court of Appeal.[57]

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32. Further, in correspondence dated 1 June 1896, from his Honour to the Attorney-General, his Honour provided a Digest that he said embodied all the existing Criminal Statute Law in Queensland. The Digest included provisions of no less than ninety-six

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51 Ibid, p VII. Namely, defences for assaults and defamation.
52 Ibid, p X.
53 Ibid, p VII.
54 Criminal Code Commission, Parliament of Queensland, *Report of the Royal Commission on a Code of Criminal Law, together with Proceedings of the Commission and Draft Criminal Code Bill and Criminal Code* (Government Printer, 1899) p 27.
55 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p XVI.
56 *cf. The Penal Code of the State of New York* (1881), as in force May 1, 1882, sets out case authorities in the sections and from which his Honour drew inspiration for the Queensland Criminal Code.
57 *R v Duong* (2015) 255 A Crim R 57, [49]; JBA, Volume 6, 1468.

statutes. No provision in the Digest appears to provide for a mistake of fact. It can be assumed that his Honour did not base that provision on existing statute.[58]

33. However, recall that his Honour also stated that he freely drew upon the common law statements and rules prepared in relation to the Draft Criminal Code for England. Section 420 of the English version was in similar terms and effect as his Honour's draft provision, as follows:[59]

> **420**. In determining whether any person accused of any offence against this Code has or has not committed such offence, every such accused shall be deemed to have acted under that state of fact which he believed, in good faith and upon reasonable grounds, to exist at the time of committing the act of which he is accused; save and except in any case where, under any express provision of this Code, ignorance of, or mistake as to, a particular fact on the part of an offender is declared to be immaterial.
>
> Position of an accused who acts under ignorance or mistake as to fact.

34. The English version did not purport to excuse a person from criminal responsibility *entirely* where they have, in good faith and upon reasonable grounds, acted under ignorance or mistake as to fact. Rather, the person is deemed to have acted under that state of fact and their criminal responsibility is determined on that basis. Additionally, similar to s 24 of the Queensland Criminal Code, the English version expressly provides that the mistake as to fact defence does not apply where it is expressly declared to be immaterial.

35. As noted earlier, His Honour said that he was also assisted by the Penal Code of Italy and the State of New York. Article 52 of the *Italian Penal Code 1889* bears some resemblance to the text of s 24 of the Criminal Code. The version translated into English is as follows:[60]

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58 *A Digest of the Statutory Criminal Law in Force in Queensland on the First Day of January 1896*, prepared by the Hon. Sir Samuel Walker Griffith, GCMG, Chief Justice of Queensland, Brisbane: Government Printer 1896, p III-IV.

59 Criminal Code No. 2 Bill 1880 (UK).

60 The former Chief Justice, Sir Harry Gibbs, observed that Griffith may have been influenced by the Zanardelli Code because he was proficient in the Italian language: see Sir Harry Gibbs, *The Queensland Criminal Code From Italy to Zanzibar Opening Address for Supreme Court Library Exhibition*, Brisbane 19 July 2002 (2002), 15.

> 52. When anyone, by error or other accident, commits a crime prejudicial to another person against whom the latter could institute an action, the aggravating circumstances which derive from the degree of the offence or damage are not proceeded with, and the circumstances which would have decreased the punishment for the crime, if he had committed the action prejudicial to the person against whom the action was directed, are considered.

36. The *Penal Code of the State of New York 1881* made no express provision for a mistake of fact defence.

37. This Court observed in *CTM v The Queen*[61] that clause 26 appears to have been taken substantially from *Stephen's Digest of the Criminal Law*.[62] It is respectfully submitted that based on the framing of the English version above, what his Honour said about where he derived assistance with compiling the Criminal Code, and what *Stephen's Digest* says about mistake of fact,[63] the text of the English version is more likely to have been the source of Sir Samuel Griffith's inspiration.[64]

38. In any event, it is clear that Sir Samuel Griffith sought to codify the 'chaos of irreconcilable decisions',[65] as the common law was then and a large number of statutes. Relevantly, under Chapter V, his Honour codified the parameters of criminal responsibility. The term 'criminally responsible' and 'criminal responsibility' were defined by his Honour in clause 1 of the Draft Code to mean '*liable* to punishment as for an offence' and '*liability* to punishment as for an offence', respectively.[66] Chapter V of his Honour's draft included provisions dealing with ignorance of the law, intention, mistake of fact, extraordinary emergencies; presumption of sanity; insanity; intoxication; and immature age.

39. When the Criminal Code Bill was introduced into the Queensland Legislative Assembly the Attorney-General described the Bill as:

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61 (2008) 236 CLR 440, 445 [3]; JBA Vol. 3, p 54.
62 (3rd ed., 1883) p 26.
63 *Stephen's Digest*, Article 34. Ignorance of Fact.
64 Although, the source of the inspiration for the framing of the English version was likely *Stephen's Digest* and the subsequent Royal Commission.
65 *Anderson v Nystrom* [1941] St R Qd 56, 70 (Philip J); JBA Vol. 6, p 43.
66 Emphasis added to highlight the only difference in the definitions.

> … a Bill by which the whole of the statutes at present in force in Queensland - the statutes which had been passed by that House, the statutes which had been passed by the New South Wales Legislature before separation and were still in force in Queensland, the statute law passed before Act 9 George IV., cap. 83, and the whole body of the common law - which formed a large proportion of the law at present in force in Queensland, was to be reduced to a simple form, so that any intelligent man could understand it. It would enable a man to ascertain in a few minutes the law which now - however diligent and well-informed he might be - it would take him hours or days to ascertain.[67]

40. The Bill passed both Houses of the Queensland Parliament without any debate on, or amendment to, the mistake of fact provision.[68] The Attorney-General at the time said in his Second Reading of the Bill that 'chapter 5 …. relates to a very difficult branch of the law – criminal responsibility… I may say also in regard to this part of the work that in the judgment of the Commission it has been so admirably done that it has been very little interfered with in the process of revision.'[69]

41. Sir Samuel Griffith explained the ultimate result of his work on the Draft Code as follows:[70]

> In the result I have embodied in the Code a good many provisions which are not to be found in the Bill of 1880, but which I believe to be either correct statements of Common Law or propositions which will commend themselves as rules that, if they are not, ought to be, recognised as the law.

42. The Queensland Code was enacted expressly intending to replace the common law.[71] It is a principle of the common law that mens rea is an essential element in the

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67 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 September 1899, 85 (Arthur Rutledge, Attorney-General).

68 Except to renumber the provision from clause 26 to clause 24. Queensland, *Parliamentary Debates*, Legislative Council, 7, 8, 15, 22, 28 November 1898, 31 October and 7 November 1899; Queensland, *Parliamentary Debates*, Legislative Assembly, 20, 21, 27, 28 September 1899 and 3, 4, 5, 10, 20 October 1899 and 21 November 1899. The debates are published here: <https://digitalcollections.qut.edu.au/view/qld-law/Queensland_Criminal_Code/act.html> accessed 21 April 2021.

69 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 September 1899, p 108.

70 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p VII. Underlining added.

71 *Criminal Code Act 1899* (Qld) s 5 (this provision was not part of Griffith's Draft Code); *Brennan v The King* (1936) 55 CLR 253, 263.

commission of any criminal offence.[72] The common law with respect to mistake of fact, is part of the doctrine of mens rea.[73] However, as observed by Philp J in *Anderson v Nystrom*,[74] the doctrine of mens rea and what the Queensland Code calls 'criminal responsibility' are not the same.[75]

43. Chapter V of the Code supplants the presumption of mens rea,[76] the aim of which was, as explained by Griffith CJ when his Honour was Chief Justice of the High Court, that 'under the criminal law of Queensland, as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of mens rea …'[77] Rather, the Code expressly states the principles of criminal responsibility.[78] His Honour explained in his letter accompanying the Draft Code that s 23, which concerns 'intention - motive' (cl 25 of the draft) that he intentionally avoided using the terms 'malice and 'maliciously' in order to make the test of criminal responsibility an act voluntarily done (not accidental) with knowledge of what was being done.[79] He went on to say that '[t]he general rules of criminal responsibility set out in Section 25 render it unnecessary to express these elements in the definition of an offence.'[80]

44. In the matter of *Thomas v McEather*,[81] the Full Court of the Supreme Court of Queensland considered whether s 24 of the Queensland Code was available in relation to a by-law regulating travelling stock. In interpreting the section, Lukin J (with whom Cooper CJ agreed) stated:[82]

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72 *R v Tolson* (1889) 23 QBD 168, 171-2 and 180 (Wills J; Charles J CJ concurring); 187 (Stephen J); 193 (Hawkins J). JBA Vol. 6, pp 1567-8, 1576, 1583, 1589.

73 *R v Tolson* (1889) 23 QBD 168, 181 (Cave J), JBA Vol. 6, p 1577; *Bank of New South Wales v Piper* (1897) AC 383, 389-90; JBA Vol. 6, p 1308-9; *Thomas v The King* (1937) 59 CLR 279, 304-5 (Dixon J); JBA Vol. 5, p 1007-8; *Thomas v McEather* [1920] St R Qld 166, 174-5 (Lukin J), JBA Vol. 7, p 1762-3.

74 [1941] St R Qd 56; JBA Vol. 6, p 56; *Anderson v Nystrom* [1941] St R Qd 56, 69 (Philp J), JBA Vol. 6, p 42.

75 *Anderson v Nystrom* [1941] St R Qd 56, 69 (Philip J); JBA Vol. 6, p 42.

76 *Vallance v The Queen* (1961) 108 CLR 56, 78 (Windeyer J); JBA Vol. 5, p 1137; *Walden v Hensler* (1987) 163 CLR 561, 567 (Brennan J); JBA Vol. 5, p 1149; *Anderson v Nystrom* [1941] St R Qd 56, 65 (Douglas J), JBA Vol. p, 1228.

77 *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 981.

78 *The Queen v O'Connor* (1980) 146 CLR 64, 130 (Wilson J - obiter); *R v Kusu* [1981] Qd R 136, 139C.

79 Sir Samuel Griffith, Draft of a code of criminal law together with an explanatory letter to the Attorney-General, Brisbane: Government Printer, 1897, p VIII.

80 Ibid.

81 [1920] St R Qd 166, JBA Vol. 7, p 1754.

82 [1920] St R Qd 166, 174-5, at 177 (Real J held that s 24 extends protection to cases not covered by the doctrine of means rea). Internal citations omitted. JBA Vol. 7, p 1765. Underlining added.

> But we do not think that the assumption [that s 24 is merely a declaration of the law as it would exist had it never been enacted] is correct. Griffith C.J., in *Widgee Shire Council v. Bonney*, said: "that under the criminal law of Queensland, as defined in *The Criminal Code*, it is never necessary to have recourse to the old doctrine of mens rea, the exact meaning of which has been the subject of much discussion,"… It seems to us that the Queensland Legislature have, by the express provisions of ss. 23, 24, and 25, laid down in clear terms what the law in future should be in regard to the very much debated, very much misunderstood, and very confused doctrine of what is referred to as mens rea, and directed that the Courts should not in future be guided by the conflicting and irreconcilable decisions of various Courts on this question, but should be guided in determining the criminal responsibility of a person charged by reference to the tests prescribed by the language of those sections.

45. In contrast with s 24 of the Queensland Code, the common law requires a statutory offence be read as requiring mens rea unless there is a clear legislative intention that it should be otherwise.[83]

46. Section 24 of the Queensland Code is not simply a replication of the common law mistake of fact defence, rather it reflects a combination of the common law doctrine of mens rea and mistake of fact, recast through the eyes of Sir Samuel Griffith, as a codification of the common law with respect to criminal responsibility. His Honour drafted s 24 in a way that combined and perfected those common law doctrines. When his Honour was Chief Justice of Queensland, he described s 24 of the Queensland Code (and s 25 which concerns extraordinary emergencies) as rules of common sense as much as rules of law.[84]

47. Further, his Honour's notation of 'Common Law' beside his clause dealing with mistake of fact in his Draft Bill was for the purpose of simply identifying for the Attorney-General and others that the substance of the law was not sourced from statute and nor was it a new law proposed by him to be made. He was accounting for its source - common law or statute - rather than indicating that the framing of the provision is a precise statement of the common law without any modification.

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83 *He Kaw Teh v R* (1985) 157 CLR 523, 566-7 (Brennan J), JBA Vol. 3, p 379-80.
84 *Webster & Co v Australian United Steam Navigation Co Ltd* [1902] St R Qd 207, 217.

The Common Law is not the same as the Queensland Code

48. The application of the common law defence is of course an issue before the Court now, and Queensland does not seek to make submissions on the application of the common law in relation to the appellant's case particularly. However, in relation to the Court's consideration of what the common law actually is as compared with the Queensland Code provision, the case authorities discussed below clearly support an argument that under the common law, if there is a relevant mistake, the mistake would (need to) render the conduct of the accused 'innocent'.

49. What is meant by 'innocent' is ambiguous and unresolved.[85] The point sought to be made though is that it could mean not guilty of the offence charged and simultaneously, not guilty of any secondary offence.[86] Further, the common law arguably requires that to be the potential outcome for the defence to be available. Fullagar J gave colourful examples in *Bergin v Stack*,[87] where an accused's 'mistake' about which offence they were committing would not entitle them to an acquittal on the basis of their mistake and therefore the defence was not available.[88]

50. This appears to be the meaning given to the mistake of fact defence in *Tolson's Case,* which was decided around the time Sir Samuel Griffith drafted the Criminal Code. In that case, the often quoted[89] words of Cave J were that '[a]t common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence.'[90] However, Stephen J, in the same case, framed the rule as this: 'I think it may be laid down as a general rule that an alleged offender is deemed to have acted under

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85 *Bell v Tasmania* [2019] TASCCA 19, [33] (Brett J) citing *Criminal Defences in Australia*, 5th ed, Fairall and Barrett, at 2.42. JBA Vol. 6, p 1320.

86 Alternatively, 'innocent' means conduct that is 'outside the operation of the enactment', whatever that might mean, but possibly limited to 'an offence, or series of offences, defined by statute': *CTM v The Queen* (2008) 236 CLR 440, 447[8] citing *Proudman v Dayman* (1941) 67CLR 536. JBA Vol. 3, p 273.

87 (1953) 88 CLR 248. JBA Vol. 3, p 227.

88 *Bergin v Stack* (1953) 88 CLR 248, 262-263; JBA Vol. 3, p 241-2; *CTM v The Queen* (2008) 236 CLR 440, 491[174] (Hayne J), JBA Vol. 3, p 317.

89 For example, *Thomas v The King* (1937) 59 CLR 279, 287-8 (Latham CJ), 300 (Dixon J), JBA Vol. 5, p 990-1, 1003; *R v Reynhoudt* (1962) 107 CLR 381, 393 (Taylor J), JBA Vol. 5, 964; *F v Ling* [1985] Tas R 112, 114 (Underwood J), JBA Vol. 6, p 1397; *CTM v The Queen* (2008) 236 CLR 440, 445[3] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), JBA Vol. 3, p 271.

90 *R v Tolson* (1889) 23 QBD 168, 181. JBA Vol. 6, p 1577.

that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.'[91] Stephen J's version of the rule is similar to how Sir Samuel Griffith subsequently drafted s 24 of the Queensland Code.

51. It also appears to be the meaning given to the defence by Dixon J in *Proudman v Dayman*,[92] where his Honour said,[93] '[a]s a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.'

52. The majority in *CTM v The Queen*[94] also arguably endorsed the requirement that the mistake render the conduct 'innocent'.

53. While Sir Samuel Griffith appeared to consider that s 24 of the Queensland Code reflected the common law, the effect of the mistake of fact under that section is plainly not the same as the common law defence as pronounced in the above cases. Section 24 alleviates criminal responsibility to the extent of the relevant mistake only. It expressly leaves open the possibility that an accused's act or omission infected by such mistake, can nevertheless render the accused guilty of a secondary offence. In other words, s 24 does not necessarily 'excuse' an offending act or omission, nor does it require (if the common law does so) that the mistake render the accused person 'innocent' of the offence before the defence is available.

54. In contrast with the common law doctrine, s 24 applies unless it is expressly or impliedly excluded,[95] thereby broadening the application of the defence beyond that of the common law doctrine, which purports to apply only when it would have the effect of excusing the offending act or omission. Then when it applies, s 24 accommodates the effect of the mistake by allowing for degrees of excusal from criminal responsibility, rather than only providing for complete excusal as provided by the common law defence.

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91 *R v Tolson* (1889) 23 QBD 168, 188. JBA Vol. 6, p 1584.
92 *Proudman v Dayman* (1941) 67 CLR 536, JBA Vol. 4, p 879.
93 *Proudman v Dayman* (1941) 67CLR 536, 540, JBA Vol. 4, p 883.
94 (2008) 236 CLR 440, 447[8] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), JBA Vol. 3, p 273.
95 Queensland Code s 24(2).

55. The distinction between s 24 of the Queensland Code and the cases establishing the common law defence can be explained. The common law cases were often concerned with a rebuttal of the presumption of mens rea and not with an affirmative defence of mistake.[96] Also, the founding cases, namely *Tolson,* and in Australia, *Thomas*, involved a person being charged with bigamy, for which there is no secondary offence.[97] Therefore if there was the requisite mistake, that was a 'good defence' and the accused person was innocent, in the sense that they were not guilty of the offence.

56. The matter of *Thomas*,[98] was a bigamy case on appeal to this Court from the Court of Criminal Appeal of Victoria, notably not a criminal code State.[99] Dixon J (as his Honour was then) described as a 'general rule' that 'a person who does an act under reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist.'[100] His Honour then remarked, in obiter, that the general 'rule or rules have been embodied in the three criminal codes of Australia', relevantly identifying s 22 (Ignorance of the law-bona fide claim of right) and s 24 of the Queensland Criminal Code; and then stated that '[t]hese provisions, which are in the same terms, state, in my opinion, the common law with complete accuracy'.[101]

57. However, plainly enough, s 24 of the Queensland Code is not a completely accurate statement of the general rule as it was described by his Honour immediately before. It is submitted that his Honour was speaking broadly about the 'general rule' and the 'embodiment' of the general rule in s 24, his Honour not having to decide the matter in that case. His Honour's comment that those code provisions state the common law with 'complete accuracy' has been picked up and repeated, without any analysis, in subsequent cases,[102] it is submitted, in error. While it is accurate to say that s 24 renders a person 'not criminally responsible' where they are relevantly mistaken about a fact,

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96 For example, *R v Prince* [1875] LR 2 CCR 154, JBA Vol. 6, 1537; *Bank of NSW v Piper* (1897) AC 383, JBA Vol. 6, p 1302.

97 See also for example, *R v McMahon* (1891) 17 VLR 335; *R v Adams* (1892) VLR 566; *cf R v Wheat* (1921) 2 KB 119.

98 *Thomas v The King* (1937) 59 CLR 279, JBA Vol. 5, p 982.

99 The common law jurisdictions of Australia are New South Wales, South Australia and Victoria. The Code jurisdictions are the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia.

100 *Thomas v The King* (1937) 59 CLR 279, 305, JBA Vol. 5, p 1008.

101 *Thomas v The King* (1937) 59 CLR 279, 305-306, JBA Vol. 5, p 1008-9.

102 *Ostrowski v Palmer* (2004) 218 CLR 493, [9]-[10] (Gleeson CJ and Kirby J), [28]-[29] (McHugh J).

that is not a completely accurate statement of the rule in s 24, because s 24 only excuses an act or omission to the extent of the mistake. In the alternative, it is submitted that his Honour's statement about s 24 of the Queensland Code stating the common law with complete accuracy, was with respect, per incuriam for the following reasons.

58. Firstly, *Thomas v The King* did not involve secondary offences (secondary offences were not an issue directly relevant to the issues before the Court). The comment was strictly therefore obiter. Secondly, there were no submissions made by the parties about whether s 24 is stated consistently with common law doctrine. Thirdly, his Honour's comment referred collectively to all three criminal code provisions on 'ignorance of the law' and 'mistake of fact', namely, Queensland ss 22 and 24, Tasmania ss 12 and 14, and Western Australia ss 22 and 24. The provisions are plainly not all identical to their counterpart, Tasmania's provisions being quite different to Queensland and Western Australia.

59. Doubt has been cast on Dixon J's opinion that those provisions state the common law with complete accuracy. In *Walden v Hensler*,[103] which was an appeal to the High Court from the Supreme Court of Queensland concerning s 22 of the Criminal Code, Brennan J observed that s 22 does not have the same application as the common law defence, expressly contrasting his opinion with the opinion to the contrary of Dixon J in *Thomas*. Brennan J stated that that was because of the 'difference in operation, the offences to which the common law defence applies do not necessarily correspond with the offences to which s 22 applies.'[104]

60. In the same case, Dean J quoted Dixon J's comment in *Thomas v The King* that s 22 of the Code states the common law "with complete accuracy" and then said, '[t]he comprehensiveness of his Honour's statement is, however, open to question … Be that as it may, the section plainly had its origin in, and is to be construed in the context of, the common law'.[105]

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103 (1987) 163 CLR 561.
104 *Walden v Hensler* (1987) 163 CLR 561, 570. JBA Vol. 5, p 1152.
105 *Walden v Hensler* (1987) 163 CLR 561, 580, see also 591 (Dawson J). JBA Vol. 5, p 1162. Internal citations omitted.

61. Additionally, in *R v Mrzljak*,[106] in the Queensland Court of Appeal, it was observed that s 24 is 'unlike the element of mens rea required at common law'[107] and 'is not on all fours with the common law defence of honest and reasonable mistake of fact'.[108]

PART V: Time estimate

62. It is estimated that 30 minutes will be required for presentation of oral argument.

Dated 27 April 2021.

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ANNEXURE: Statutes and Statutory Instruments referred to in the submissions

1. *Criminal Code Act 1899* (Qld) Sch 1, s 24.

106 [200] QCA 420; [2005] 1 Qd R 308.
107 *R v Mrzljak* [2005] 1 Qd R 308, 315[21] (McMurdo P)
108 *R v Mrzljak* [2005] 1 Qd R 308, 326[75] (Holmes J).