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Excerpt  
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A background image of a topographic map with contour lines, rendered in a light gray tone. The map features a prominent circular contour pattern in the upper left quadrant, suggesting a hill or a specific geographical feature. The lines are more densely packed in some areas, indicating steeper slopes.

# INTRODUCTION

This book presents Australia's criminal law as a vast set of statutory provisions, mostly consisting of provisions defining criminal offences. It examines how to read such offence provisions and how they are applied by and to various people.

Somewhat surprisingly, this is a radically different approach from the ones taken in most criminal law books. It may even be unique.

Here, I explain my reasons for taking this approach and identify the book's main characteristics that flow from its approach. I also set out how this book may be used by a variety of readers, ranging from practitioners to law students.

## The problem of criminal law books

If a non-lawyer was asked to describe the criminal law, she is very likely to say that it consists of 'crimes'. If pressed on where to find those crimes, she would probably say that they are listed in a special crime statute, such as a 'Criminal Code'. This take on the criminal law is probably more accurate than lay views of just about any other area of the law. Nevertheless, criminal law experts know that there is more to the picture.

In particular, **the criminal law's scope**:

- extends well beyond the well-known offences that appear in special crime statutes. It includes a huge and constantly changing array of regulatory offences that are scattered throughout the statute book.
- is not fully defined by offence provisions. Rather, the scope of the provisions can be expanded or contracted in various ways by other, more general criminal law rules in each jurisdiction.
- is dominated in practice by discretions exercised by government officials, among others. Some of these choices are closely constrained by legal rules, while others are almost unregulated.

So, while a layperson might imagine that all criminal law books consist of descriptions of each 'crime', in fact there is no such thing. To be sure, there are 'annotations' available of the major crime statutes in most jurisdictions, but they are a niche product aimed at working lawyers and don't provide either a comprehensive or an accessible description, let alone analysis, of any jurisdiction's criminal law.

How, then, do criminal law books describe the criminal law?

## Crime books

If just about anyone was asked to name the 'crimes' in Australia's criminal law, the list would probably begin with murder, manslaughter, rape, assault, theft and fraud. Every other Australian criminal law book has chapters for each of these **classic crimes** (although there's a lot of variation in how they deal with each). Many devote a very sizeable amount of their text to homicide, which serves triple duty as a way to explain the elements of criminal offences and as an historical study.

This approach has much to recommend it. The classic crimes are:

- important. They are serious offences and they matter a lot to everyone.
- long-standing. They have ancient origins and their history tells a lot of the story of the development of the broader criminal law.
- evolving. They continue to be the subject of regular appellate decisions and/or extensive law reform efforts.
- revealing. They cover a variety of different offence structures: result crimes (homicide), circumstance crimes (rape) and crimes built around standards (theft).
- evocative. Each crime's treatment by the criminal justice system provides great insight into the way the system operates (or fails to operate or muddles through) in practice.

However, there are significant **limitations to the key crimes approach**, as the classic crimes are also:

- extreme. They are all serious offences.
- narrow. They are all offences against people or property.
- boutique. The twin crimes of murder and manslaughter have few analogues elsewhere; rape has unique fault elements; assault has unusual defences; and theft is just plain unusual.
- variable. As a result of constant law reform, their definition varies from jurisdiction to jurisdiction and over time.
- distorting. They have all received enormous attention from appeal courts, to the point where the offence provisions themselves (if they even exist) are almost irrelevant.

In all these respects, they differ dramatically from the overwhelming majority of offences.

Some books seek to overcome these limits by adding chapters on less commonly studied crimes, such as drug and public order offences; however, the treatment is often brief (unless the book is vast) and the majority of the criminal law is still inevitably sidelined. The problem is not (just) the particular offences that are routinely analysed. All offences (or, at least, all offences worth studying in depth) have their own quirks, distortions and narrowness. Rather, the problem is the very notion of studying the criminal law one offence at a time.

## Skills books

This book's alternative approach is to eschew analysing any particular offences, in favour of giving comprehensive treatment to the skills necessary to understand nearly all offences.

Teaching skills is, of course, scarcely original, and most criminal law text writers and teachers would insist that they do teach skills. However, the technical skill that is the focus of the traditional approach – reading, analysing, applying and critiquing appellate decisions – is not, in my view, the most important skill needed to understand Australia's criminal law. Rather, the technical skill that is the focus of this book is **statutory interpretation**.

Obviously, the major reason for examining statutory interpretation is the vast number of statutory offence provisions that define the scope of Australian criminal law. But there are many other reasons:

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- **Significance.** Statutory interpretation, and statutes more generally, are topics of enormous theoretical, practical and political importance. In the criminal law, as elsewhere, the limits of interpretation are a key battleground in turf wars between the judiciary and the legislature.
- **Development.** Despite its reputation as a dry technical skill, statutory interpretation is one of the key ways in which courts and others change the law and, in particular, develop rules on criminalisation and criminal responsibility.
- **Elements.** Australia's general criminal law is built around a sophisticated, robust and challenging method of reading and deconstructing offence provisions. This special approach to interpretation demands and rewards detailed attention.
- **Codes.** Seven of Australia's ten jurisdictions set out their general criminal law in statutes, which all require interpretation. In addition, the three common law jurisdictions are also increasingly codifying or reforming the common law via statutory provisions.
- **Transferability.** Federalism is the curse of Australian books on criminal law, because each jurisdiction has different general criminal laws, as well as many different offences. However, this diversity can obscure a key unifying feature of Australian criminal law: its mainly statutory basis, which is subject to (mostly) uniform rules on statutory interpretation. Statutory interpretation skills can be used in every jurisdiction and to analyse old offences, new enactments and complex amendments.

Naturally, this book's treatment of statutory interpretation has little connection to the Latin maxims that once dominated first-year law courses. It also goes well beyond the common chapter in traditional criminal law books on strict and absolute liability offences. Rather, its scope is both much narrower, detailing the nitty-gritty of giving meaning to the words, sentences and complex schemes that emerge from modern drafting, and much broader, fully exploring the interplay between parliament's constant updating of the body of offence provisions and the courts' role as the guardians of the principles of criminal responsibility.

Many legal stakeholders would probably warmly support a switch in focus from case analysis to statutory interpretation in a significant field of Australian law. Judges, law firms, law schools and law reformers have all called for more emphasis on statutory interpretation in legal scholarship, advocacy and teaching. In 2007, the heads of Victoria's Supreme Court (with the support of the Australian and NSW Chief Justices) called for a review of the law curriculum, arguing:<sup>1</sup>

While some principles or maxims of statutory interpretation may be taught as part of a preliminary or introductory subject in some law schools, statutory interpretation does not seem to be taught as a distinct body of law. It appears often to be taught only indirectly – and often only implicitly – in the context of 'substantive' subjects. It is thus treated as if it were analogous to Jurisprudence or Legal History. This belies its overwhelming significance to a modern legal system.

1 M Warren & C Maxwell, 'Re: Teaching statutory interpretation', 31 August 2007, Attachment B in Law Admissions Consultative Committee, *Approaches to Interpretation*, 2009.

We are writing to propose that [the Law Admissions Consultative Committee] review the present Academic requirements in the light of the prevailing practices in Australian law schools, in order to ensure that the teaching of statutory interpretation is given the prominence and priority which its daily importance to modern legal practice warrants. Indeed, statutory interpretation may be more significant to today's lawyers in practice, government or business than the existing requirement of Civil Procedure. While it is certainly important for students to have a general familiarity with civil procedure, we consider that the law of statutory interpretation has a far stronger claim to a separate, substantive place in the curriculum.

While I share this view of the importance of statutory interpretation, I differ from the judges' apparent preference for teaching this topic in a 'separate' part of the curriculum. This book (although developed to solve a specific problem in teaching criminal law) exemplifies the benefits of integrating the study of statutory interpretation within the existing substantive curriculum, albeit neither 'indirectly' nor 'implicitly'.

Nevertheless, it should be acknowledged that there are **costs of focusing on statutory interpretation** when teaching a substantive subject:

- Case law. Statutes aren't the sole source of law, including the criminal law. While this book, of course, examines cases on how statutes should be interpreted, as well as case law on the general criminal law, it neglects specific areas of the criminal law that are developed through cases with little connection to a statute. Examples include common law offences such as murder and assault (which even in code jurisdictions are often largely defined through historical case law), as well as particular court-focused doctrines such as abuse of process.
- Theory. Working out what a statute means is quite different to working out why it was enacted or whether it should remain on the books. A focus on statutory interpretation sidelines important aspects of the study of criminal law, including its history, its politics and the various attempts to develop descriptive or normative theories of the criminal law, not to mention the venerable task of law reform.
- Critique. Studying how statutes are read is a classic exercise in black-letter law. Although this book examines how statutes are read by non-court officials (such as police and regulators), it stops well short of contemporary criminal law books that combine the study of the law with detailed criminological and critical analysis.

As statutory interpretation is merely the focus, rather than the whole content, of this book, some of the above gaps are filled to an extent by discussion extending beyond the central task of analysing statutes.

However, it would be wrong to pretend that this book covers every nook and cranny of Australian criminal law or is in any respect a treatise on criminal law theory or criminology. The reader is directed to the many other worthy Australian texts on those topics. That being said, those other topics also depend on a thorough understanding of the principal statutory sources of Australian criminal law. This book gives readers a robust fishing rod in place of a rich meal of a few prize fish. Knowing how to use such a rod is surely useful, if not essential, for fully exploring the wider world of sea life and fisher folk.

## How to read this book

Consistently with another trend in legal pedagogy, this book is no case book. In the introduction to their treatise on the criminal law, Bronitt and McSherry observe:<sup>2</sup>

Rather than representing the criminal law through a mass of textual fragments, we have provided readers with *our story* about the criminal law.

This book is, in turn, my story about the criminal law. Like all stories, it is meant to be readable on its own.

Nevertheless, the novelty of the approach might be challenging to some, so the following is offered in the spirit of *Cliff's Notes*.

## Chapters

The book is divided into twelve chapters. However, these twelve chapters are best understood as split into two halves.

The first half consists of these chapters:

- 1 – Words, on how to read statutory provisions
- 2 – Choices, on the role of official discretions
- 3 – Conduct, on conduct elements
- 4 – Results, on result elements
- 5 – Circumstances, on circumstance elements
- 6 – Sentences, on the assessment of offence seriousness by sentencing judges.

These six chapters together comprise the **general approach** of Australian criminal law to offence provisions. Chapter 1 is a straightforward guide to Australia's general law on statutory interpretation, albeit with a particular focus on offence provisions. Chapters 3 through to 5 set out the 'element analysis' approach that is central to Australia's federal code and common law, but is also a useful way of understanding the (differently expressed) approaches in the other Australian codes. That study is bookended by two chapters (2 and 6) on discretionary criminal justice, covering the discretions that precede and follow findings of guilt. It is the combination of statutory interpretation, element analysis and discretions that comprises the general approach to Australian criminal law.

But the general approach is only half the story. The sheer variety of offence provisions and people's behaviour means that offences and prosecutions honour the general approach as much in the breach as in the observance. These **variations** are the subject of the second half of the book, which consists of counterpoints to each of the chapters in the first half:

- 7 – Standards, on whether the nuanced assessments of offending common in sentencing can be used to assess criminal responsibility
- 8 – Groups, on doctrines that allow conviction without proof of a conduct element

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2 S Bronitt and B McSherry, *Principles of Criminal Law*, 2nd edn, Law Book Co., 2005, p. xi.

- 9 – Failures, on doctrines that allow conviction without proof of results (or, indeed, any element of a crime)
- 10 – Exceptions, on exculpatory, rather than incriminating, circumstances
- 11 – Victims, on the subtle role that the choices of lay decision-makers play in the criminal justice system
- 12 – States, on how the governments not only set the rules for crimes or criminal responsibility but can be directly implicated in criminal behaviour.

Chapter 7 explores ways of defining offences that fit poorly with traditional element analysis. Chapters 8 through to 10 set out the general criminal law's own exceptions to traditional elements analysis. Chapters 11 and 12 look beyond prosecutors and defendants to examine two other significant players in criminal justice. Together, these six chapters introduce the reader to the much more complex world of criminal law that lies just beneath the apparent comprehensiveness of the general approach set out in the first half.

Every one of the twelve chapters is novel in one or more ways. However, some cover **non-traditional topics** for a criminal law text and merit further explanation.

Chapters 1 and 7 focus on statutory words. While Chapter 1's subject matter is the broad field of statutory interpretation, Chapter 7 focuses on a specialised but important feature of many offence (and defence) provisions: definitions that depend on applying standards, rather than characterising facts.

Chapters 2 and 6 focus on discretions, respectively (pre-trial) decision-making and (post-trial) sentencing. They don't purport to cover the fields of criminal process or punishment, which require books of their own. Rather, these chapters are concerned with the interaction between substance and process, including how official discretions can change the scope of the criminal law and how assessments of offence seriousness can reinforce or sideline the way offences are defined and criminal responsibility is determined. Including these chapters in a book on substantive criminal law ensures coverage of cross-over doctrines that are typically neglected (e.g., regulatory decision-making and the rule in *De Simoni*).

Finally, chapters 11 and 12 examine two groups of people of central importance to criminal justice but often treated as peripheral to the criminal law: victims and governments. While these topics are often considered in works on criminal process and sentencing, these chapters examine how the behaviour of victims and states can have an impact on the substantive criminal law, matters that are rarely considered in cases, articles or other books. These are topics I never planned to write on when I embarked on this textbook, but which emerged naturally from my thinking about the more traditional doctrines. Their presence demonstrates the liberating effect of eschewing the in-depth study of particular crimes.

## Structures

Structure is crucial to both the criminal law and this book. The book emphasises the **importance of structure** not only in its division into twelve chapters, but within each chapter.

All chapters have starting and closing sections: an introduction and a summary. The balance of most of the chapters is divided into the following main sections:



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- The problem. Each chapter commences with an overview of the need for laws or further analysis of the topic under consideration. In other words, each explains why understanding and applying Australian criminal law involves more than simply reading the relevant offence provision.
- The general approach. The middle of nearly all the chapters sets out the fundamental response of the law to the problem outlined in the ‘problem’ section. It does so by explaining and analysing the key rules applicable to the subject matter of the chapter. In many instances, the final subsection of this middle section looks at boundary issues affecting the scope and operation of each rule.
- Exceptions to the general approach. The criminal law is traditionally analysed in terms of offences and defences. This book treats most individual issues in the criminal law as divided between general rules and qualifications of those rules.

This tripartite division is not intended to reflect doctrinal distinctions in the criminal law, but rather to identify the textbook’s different analytical approaches. Understanding any legal rule involves appreciating its purpose, shape and qualifications. The division avoids the confusion that flows from trying to cover these simultaneously.

While structure is a good servant, it is a bad master. The precise distinction between the sections varies from chapter to chapter to suit the subject matter. For example, some ‘problem’ sections focus on practical concerns, while others focus on doctrinal foundations; some ‘exception’ sections focus on formal defences, others identify important scenarios that simply fall outside the scope of the usual rules. Finally, some chapters (notably 2, on choices, and 7, on standards) partially abandon the division. In all sections, subsections divide each treatment according to doctrinal or conceptual distinctions. To make the text flow, no further subheadings are used. Instead, key phrases in passages that identify important subtopics are placed in bold text throughout this book. The book also uses ‘box topics’ to discuss discrete issues (often current or technical ones) that are of interest, but not essential, to understanding Australia’s criminal law.

The law, of course, provides its own structure. A recurrent difficulty for textbooks on Australian criminal law is that each jurisdiction has its own **general criminal law** (i.e., body of legal rules that purport to apply to all offences). Other federal countries face similar problems, but the problem in Australia is especially extreme because doctrinal divisions divide the country roughly into thirds:

- The Commonwealth itself, and the two territories with their own legislatures (the Australian Capital Territory and the Northern Territory) and an external territory with its own statute book (Norfolk Island) have their general rules set out in recently enacted ‘Criminal Codes’ that follow the Model Criminal Code drafted by a multijurisdictional committee in the 1990s. (The new territory statutes are gradually being widened to cover all offences in each jurisdiction.)
- Queensland, Tasmania and Western Australia also each have ‘Criminal Codes’, but these have been in place for about a century (and are referred to in this book, without pejorative intent, as ‘traditional codes’). The Tasmanian code differs from the other two and only applies to more serious offences in that jurisdiction.
- New South Wales, South Australia and Victoria are common law jurisdictions, where many (but not all) of the general rules are set out in cases, rather than statutes.



This variation is so challenging that it is typical for Australian criminal law texts to focus wholly or mostly on a single type of general criminal law or a particular jurisdiction. Such an approach carries the benefit of providing in-depth treatment of one jurisdiction and certainly eases the burden of the reader (and the writer!). However, it carries dramatic costs, as crimes, lawyers and even laws can easily cross borders. In a book that focuses on a unifying feature of all Australian criminal law – offence provisions and statutory interpretation – a focus on just one jurisdiction isn't acceptable.

Discussing all jurisdictions' general criminal laws one at a time would carry many of the costs of discussing offences one by one. Instead, this book discusses the three doctrinal approaches simultaneously, identifying commonalities and differences as it goes. The necessary structure and focus is achieved by framing the discussion of the general criminal law (notably in chapters 3 to 5 and 8 to 9) around the *Criminal Code Act 1995* (Cth). The reasons for this choice are straightforward: **the federal code** is the only general criminal law that applies throughout Australia; it is the most modern of Australia's general criminal laws; and its drafters drew on concepts from both of the older Australian general criminal laws. In addition, the choice is a counterpoint to an unfortunate neglect of the federal code in traditional Australian texts, given their focus on key crimes that are mainly prosecuted at the state and territory levels. The growing number of High Court decisions on the federal code suggests that the time is propitious for such a focus.

The federal focus carries costs, however. It is not the law in any Australian state and therefore is not the law that governs offence provisions set out in state laws – that is, most of the nation's crimes and prosecutions. Also, the federal code itself is so new that many of its details are yet to be fully sorted out (although similar uncertainties apply to the state laws, which are weighed down by a burden of decades of ambiguous judgments). As well, while the drafters of the code purported to draw from both the common law and traditional code approaches, the federal code is undoubtedly heavily weighted towards the former, something that will add to the suspicions of Queenslanders, Tasmanians and Western Australians (also augmented by my own residence in a common law state) that this text will, like so many other supposedly nationwide texts, give their codes short shrift.

While I believe that these dangers can be overcome, or at least reduced, with sufficient care on my part, the success of that endeavour is for others to judge. Apologies are due, however, to the Australian Capital Territory, Northern Territory and Norfolk Island. The book refers throughout to the 'federal code', rather than the territory codes, although footnotes will direct territory (and Fiji) readers to the different numbering of provisions in their statutes. Moreover, the book's commitment to discussing jurisdictional variations from the federal model does not extend to covering variations within each territory. On the other hand, the federal focus means that this book is much more relevant to the territories than many Australian texts, on the criminal law or otherwise. A further bonus of the federal focus is the book's relevance to an important neighbouring country, Fiji, whose *Crimes Decree 2009* closely follows Australia's federal code.

The seven statutory general criminal laws of Australia are set out in the following statutory provisions:

- Commonwealth – Schedule to the *Criminal Code Act 1995* (Cth)
- Australian Capital Territory – *Criminal Code 2002* (ACT)

- Norfolk Island – *Criminal Code 2007* (Norfolk Island) (continued by the *Norfolk Island Act 1979* (Cth), s16A(1))
- Northern Territory – Schedule 1 to the *Criminal Code Act 1983* (NT) (with the federal code provisions set out in Part IIAA)
- Queensland – Schedule 1 to the *Criminal Code Act 1899* (Qld)
- Tasmania – Schedule 1 to the *Criminal Code Act 1924* (Tas)
- Western Australia – Appendix B to the *Criminal Code Act Compilation Act 1913* (WA)

For convenience, the text refers to these provisions simply as the *Criminal Code* for that jurisdiction, for example, *Criminal Code* (WA). The full text of Chapter 2 of the *Criminal Code* (Cth) is set out in the Appendix to this book.

## Examples

It is common for studies of the criminal law to distinguish between its ‘general part’ (i.e., the general rules that apply to all offences, referred to in this book as the ‘general criminal law’) and its ‘special part’ (the definitions of every individual offence, such as traditional texts’ treatment of homicide, sexual offences and the like). This book’s lack of chapters on particular offences might give the impression that it is only concerned with the general part and neglects the special part.

That is not the case. The study of general rules, without detailed specific applications, is one of the law’s least rewarding endeavours. Concepts like voluntariness, or fault, or exceptions, or discretion are impossible to understand without applying them to actual crimes. More importantly, this book’s focus on the skill of statutory interpretation would be impossible without very many detailed examples of offence provisions and other statutes to apply them to.

The device this book adopts to properly explore Australian criminal law’s special part is the use of **running examples** for each book chapter:

- 1 – Words, anti-social behaviour
- 2 – Choices, public places
- 3 – Conduct, driving offences
- 4 – Results, environmental harm
- 5 – Circumstances, trafficking
- 6 – Sentences, sexual offences
- 7 – Standards, slavery
- 8 – Groups, unsafe practices
- 9 – Failures, money laundering
- 10 – Exceptions, abortion
- 11 – Victims, domestic violence
- 12 – States, land offences.

In each instance, the particular choice of running example follows from the subject matter of the chapter and, often, the subject matter of key cases on that topic. As can be seen, the