

AN ENDURING INFLUENCE: SIR SAMUEL GRIFFITH AND HIS CONTRIBUTION TO CRIMINAL JUSTICE IN QUEENSLAND

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I INTRODUCTION

The recent centenary of Federation celebrations in 2001 have provided an opportunity to look back at the events of 1901 and consider the impact of this time in history, and the changes which have ensued in the subsequent century. One of the major participants in the story of Federation in Australia was the distinguished Queenslander Sir Samuel Walker Griffith, (1845-1920), who at various times in his long career in law and politics was Premier of Queensland (from 1883-88 and again from 1890-93), Chief Justice of Queensland (1893-1903), and Chief Justice of the High Court of Australia (1903-19).

Sir Samuel made an extraordinary contribution to the law and politics, both in Queensland and Australia, but it is in the context of Federation and the drafting of the Australian Constitution that his contribution is most consistently recognised. Griffith however made an equally great contribution to criminal justice, both in drafting important legislation, and as a barrister and judge in criminal matters. This article examines and analyses Sir Samuel Griffith's contribution to criminal justice in Queensland, and argues that it is this contribution which has been one of the most significant, and remains so, one hundred years after his *Criminal Code* came into operation in the year of Federation, 1901. His other significant pieces of criminal justice legislation, the *Justices Act* of 1886, and the *Offenders Probation Act* of 1886, both of major significance, are also briefly examined. When put in the context of his life and work in the law, a greater understanding can be gained of the origins of some of Queensland's and indeed Australia's most influential criminal legislation. As will be seen, Griffith's life and background was to have an important influence on his work in the law.

II AN ORDERLY LIFE

Sir Samuel Griffith was born in Wales in 1845, the second eldest of nine children in a Congregational Church family, his father a minister in the church.¹ His major

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biographer, the late Professor Roger Joyce, notes that the young Samuel was an avid reader from a very young age, (mainly of religious texts available in the house) and somewhat of a prodigy.² After having won many academic prizes at secondary school;³ in 1860 at the age of 15,⁴ he commenced study for a Bachelor of Arts at the fledgling University of Sydney.⁵

Griffith's Arts degree consisted of three years study of the classics, mathematics,⁶ philosophy and the sciences; and he graduated in 1863 (at the age of 17) with first class honours.⁷ He won many academic prizes at the University of Sydney, and was awarded the Mort Travelling Scholarship to visit Europe and England, which he undertook from late 1865 to early 1867.⁸ This visit to Europe, and consequent knowledge of the Italian language, was to have particular relevance in the adoption of the Italian *Penal Code* of 1889 as the basis for much of the Queensland *Criminal Code*.⁹

Despite his parents having great hopes for him to commit his life to the church, it has been suggested that the time spent travelling Europe and being exposed to new ideas was a significant factor in his move away from any theological vocation, to more worldly pursuits.¹⁰ Griffith's extraordinary academic achievements were no doubt a major catalyst for his movement away from the influence of the church and toward a career in law.

Evidence of Griffith's character points to an academically brilliant, but sometimes difficult man. An early biographer, Douglas Graham, who knew Griffith well having served as his associate, noted that Griffith's quest for perfection meant that he had high expectations of others and little patience, and was sometimes judged as cold and aloof.¹¹ By many accounts he was a vain man,¹² and was said to have had a 'conscious sense of his own superiority',¹³ although the latter comment in one biography was tempered by

¹ See generally Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, St Lucia, 1984) Ch 1.

² Ibid 3; See also A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (The Law Book Co of Australasia Pty Ltd, Brisbane, 1939) 5.

³ Graham, above n 2, 6.

⁴ Joyce notes however that it was not necessarily unusual at that time to matriculate and enter university at that age: see Joyce, above n 1, 9.

⁵ According to one of his biographers, he was one of fewer than 30 students in the entire university: R K Forward, *Samuel Griffith* (Oxford University Press, Melbourne, 1964) 4. Joyce states that he was one of nineteen students who commenced an Arts degree in 1860: Joyce, above n 1, 9. The University of Sydney was established in 1850.

⁶ Joyce makes the observation that the mathematics curriculum studied then would now be regarded as introductory to tertiary level study: see Joyce, above n 1, 10.

⁷ Joyce, above n 1, 10; Forward, above n 5, 4-5. He obtained an MA in 1870, see Forward, 5.

⁸ Forward, above n 5, 5; Graham, above n 2, 8; Joyce, above n 1, 15-19.

⁹ Alberto Cadoppi; Justice Cullinane (translation), 'The Zanardelli Code and Codification of the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 116, 134 and see also later discussion on the influence of the Italian Penal Code on the Queensland *Criminal Code*.

¹⁰ Joyce, above n 1, 20.

¹¹ Graham, above n 2, 77-94. Graham also makes the observation that Griffith might have been an even greater man if life hadn't been so kind to him; as everything had come easily to him, he found it difficult to understand those who had suffered hardship: at 94-95. See also Forward, above n 5, 6.

¹² Forward, above n 5, 6; Joyce, above n 1, 22.

¹³ Forward, above n 5, 6.

the observation that ‘those who knew him well found him gracious, kindly and generous’.¹⁴

Griffith was said to have a great love for order and punctuality, which coupled with his intellectual ability, accounts for his considerable output of work. Graham wrote that Griffith lived by rule, and had an extraordinary productivity rate, which included writing at the rate of 75 words per minute (largely unreadable).¹⁵

III LEGAL PRACTICE

Although he always intended to go to the Bar, Griffith was advised to first undertake articles of clerkship, and therefore completed three years of articles in Brisbane in 1867.¹⁶ He also sat the Bar examination in that year, and became admitted to the Bar in October 1867, as one of 25 Barristers then practising in Queensland.¹⁷ Griffith was recorded by Joyce as becoming busy at the Bar within his first year, and with a small Bar making it impossible to specialise, undertook many criminal matters, including circuits in country towns.¹⁸ Graham notes that Griffith’s success arose from his ‘complete knowledge of all his facts, and the hard precision with which he kept them in view of the jury’, however also makes the observation that ‘he might have been more effective before a jury, if he had sometimes sought to persuade as well as to convince them’.¹⁹ His success at the Bar led however to him becoming noticed in political circles, and almost inevitably, his career moved towards politics.²⁰

IV POLITICS AND LAW

Griffith was elected to the Legislative Assembly of Queensland in 1872.²¹ Although he initially held the seat of East Moreton, in November 1873 he was elected (by 29 electors),²² to the new seat of Oxley.²³ While in politics (a period of 21 years), he continued his busy practice at the Bar, including taking silk in 1876,²⁴ possible conflict of interest notwithstanding.²⁵ This was in fact not uncommon at the time, and would have occurred at least partly for the reason that politics was then a part-time career. It has been noted however that Griffith spent more time on his legal practice than his

¹⁴ Ibid.

¹⁵ Graham, above n 2, 82; see also Forward, above n 5, 6.

¹⁶ See generally Joyce, above n 1, Ch 1.

¹⁷ Ibid 23; Graham, above n 2, 13.

¹⁸ Joyce, above n 1, 24–26. Although Joyce had access to Griffith’s meticulously kept diaries when writing his biography, he does not go into much detail of Griffith’s practice at the Bar, largely due, no doubt, to the size of the manuscript, and the emphasis he placed (understandably) on Griffith’s later life.

¹⁹ Graham, above n 2, 15–16.

²⁰ Joyce, above n 1, 30; Graham, above n 2, 16.

²¹ Joyce, above n 1, 31.

²² Voting was restricted to property owners.

²³ R B Joyce, ‘Samuel Walker Griffith’ in D J Murphy and R B Joyce (eds), *Queensland Political Portraits 1859–1952* (University of Queensland Press, St Lucia, 1978) 147. Ironically, Oxley was also (over 125 years later), to be the name of a Federal seat held for one term by another famous incumbent, Pauline Hanson, who was to become president of the right-wing One Nation Party.

²⁴ Joyce, above n 1, 48.

²⁵ See generally Joyce, above n 1, Ch 2 for a description of his early career in politics.

political career,²⁶ although overwork and the effect of carrying on two careers simultaneously took a toll on his health.²⁷ He was appointed Attorney-General for Queensland in 1874,²⁸ but continued to accept private briefs.²⁹ Griffith became Liberal³⁰ Premier of Queensland from 1883-88; and again from 1890-93.³¹ While Premier, he remained head of the Bar.³² Joyce records that while Griffith was Premier of Queensland (a period of four and a half years), he appeared in 30 cases before the Supreme Court, however none are recorded as being in the criminal jurisdiction.³³ He did however as Premier take an active supervision in criminal matters, which was said to be ‘remarkably high for a Premier’,³⁴ and intervened in matters of remission of sentence.³⁵

Amazingly, (at least by today’s standards), while Attorney-General Griffith continued to accept defence briefs in criminal matters, including in 1874 a minor assault case under appeal.³⁶ In 1880, he led the defence case in an appeal against a murder conviction where the death penalty had been imposed.³⁷ An argument in that case as to jurisdiction, based on the validity of Letters Patent over the islands in the Torres Strait (where the murder had taken place), was unsuccessful. In contrast, in an earlier case of piracy in 1875, where Griffith QC acted for the Crown in his capacity of Attorney-General, the conviction was quashed.³⁸ This duality appears not to have been a concern, and in fact Griffith QC features heavily as counsel in the Supreme Court Reports for the Colony of Queensland, from the years 1873-81, and subsequently in the Queensland Law Journal Reports from 1881-92. Griffith was sworn in as Chief Justice of Queensland on 14 March 1893, a position he held for 10 years. Griffith’s political career, and later judicial appointments, resulted in his detailed knowledge of criminal justice legislation, which must have been a major contributing factor to his awareness of the need for codification and reform.

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²⁶ Joyce, ‘Samuel Walker Griffith’, above n 23, 144-145.

²⁷ Joyce, above n 1, 40.

²⁸ Ibid 47.

²⁹ Ibid. Although Griffith objected, he was ultimately prevented from acting as a private barrister in divorce cases because of his position as Attorney-General: Joyce, 51. It appears however that this impediment was not seen to exist in other types of matters.

³⁰ The Liberal party was not the same conservative party that it is today in Queensland. It was said that the party was the working man’s friend, and that if Griffith were alive today, because of his socialist leanings he would have been Labor party leader: Forward, above n 5, 17. He also undertook some ‘socialist writings’ in 1888 which apparently caused an outcry from the conservatives: *ibid.*

³¹ The Liberal party election success in 1883 was said to be due largely to their White Australia policy: *Ibid* 13.

³² Joyce, above n 1, 119.

³³ *Ibid.*

³⁴ *Ibid* 118.

³⁵ *Ibid.*

³⁶ *Long v Rawlins* (1874) 4 SCR 86.

³⁷ *R v Gomez* (1880) 5 SCR 189.

³⁸ *R v Jimmy* (1875) 4 SCR 130. The conviction was quashed as the prisoner could not legally have been convicted of piracy on a question of territoriality.

CRIMINAL JUSTICE LEGISLATION

Despite Sir Samuel Griffith's notable achievements as a barrister, Attorney-General, Premier, and Chief Justice of both the Supreme Court of Queensland and High Court of Australia, it is as the architect of major criminal justice reforms that he is probably best known to criminal lawyers. Griffith is also of course justly famous as a major participant in the drafting and political acceptance of the Australian Constitution,³⁹ and is known as one of the 'fathers of federation'.⁴⁰

Although the Queensland *Criminal Code* of 1899 is Griffith's major achievement in criminal law, he was earlier responsible (in 1886) for two major pieces of legislation of groundbreaking importance; one introducing probation orders, an important sentencing reform, and the other regulating the criminal jurisdiction of the Magistrates Court. A brief consideration of these two pieces of legislation demonstrates Griffith's early legislative drafting expertise, which he later to put to good use in drafting the *Criminal Code*.

Griffith's *Offenders Probation Act* of 1886, which he drafted and saw through the Parliament, was the first probation scheme in Australia, and one of the earliest in the common law world.⁴¹ With reform as its major objective,⁴² the Act provided for a sentence to be suspended pending the offender's successful compliance with the conditions of their release. If the offender was convicted of a 'minor offence' as defined in the Act, the court had the option to pass sentence, which would then be suspended upon the offender entering into a recognisance conditioned upon good behaviour for the duration of the order. The offender was also obliged to report to police every three months, and if the offence related to property, could in addition be required to make restitution or pay compensation. Upon default of the conditions of the order, the offender would be obliged to serve the sentence of imprisonment.⁴³ The Act therefore provided for a sentencing order which was somewhat of an amalgamation of the present orders of probation and suspended imprisonment.⁴⁴ Probation orders under the 1886 Act were said to have been widely used.⁴⁵ One year after the legislative scheme was in place, 85 prisoners had been put on probation, with complaints of there being 'more probationers than constables' and the matter getting out of hand.⁴⁶ These complaints would not be unfamiliar to contemporary observers of the relationship between the criminal justice system and its critics.

³⁹ See generally, John Macrossan *et al*, *Griffith, the Law and the Australian Constitution* (Royal Historical Society of Queensland, Brisbane, 1998); and in particular, Kay Saunders, 'Sir Samuel Griffith and the Writing of the Constitution' in John Macrossan, Kay Saunders, Sandra Berns, Colin Sheehan and Katie McConnel (eds), *Griffith, the Law, and the Australian Constitution* (Royal Historical Society of Queensland, Brisbane, 1998).

⁴⁰ See Joyce, above n 1, Ch 8; and also discussion by the Chief Justice of Queensland The Hon Paul de Jersey AC, 'Led in, but now Leading: Queensland and Federation' (Speech to Australasian Pioneer's Club Annual Dinner, United Services Club, Brisbane, 4 August 2000).

⁴¹ R S O'Regan, 'Sir Samuel Griffith and the Origins of Probation in Australia' (1992) 66 *The Australian Law Journal* 281, 281.

⁴² *Ibid*, noting the Preamble and Griffith's second reading speech in support of the Bill.

⁴³ See generally R S O'Regan, 'Sir Samuel Griffith and the Origins of Probation in Australia', above n 41, for a full description of the legislation.

⁴⁴ See now Pt 5 Div 1 Probation Orders, and Pt 8 Orders of Suspended Imprisonment, *Penalties and Sentences Act 1992* (Qld).

⁴⁵ See R S O'Regan, 'Sir Samuel Griffith and the Origins of Probation in Australia', above n 41, 283.

⁴⁶ Joyce, above n 1, 119.

Griffith's probation/suspended sentence order from the 1886 Act compares well with the form of modern orders for suspended imprisonment in various jurisdictions. Suspended sentences have received deserved criticism on the basis that as a matter of policy and practice, they achieve little in the way of rehabilitation;⁴⁷ have difficulty being justified on the grounds of just deserts;⁴⁸ and for similar reasons do little in the way of general deterrence (although such orders are clearly intended to have a specific deterrent effect on the individual concerned). As the major factor in the efficacy of suspended sentences appears to be fear on the part of the offender of the consequences of breach, it is hardly surprising that such orders have been subjected to strident criticism.⁴⁹ Sir Samuel Griffith's 1886 legislation at least attached conditions to the order for suspension. Current day probation orders, which typically do not carry the threat of a suspended sentence as an incentive for good behaviour, do however have the advantage in most jurisdictions of properly set up supervision arrangements, so that at least an attempt of rehabilitation of the offender can be undertaken. Although such orders are not linked to a period of suspended imprisonment, they are generally subject to breach procedures which can be potentially harsh in their operation, but which can be ameliorated after having taken into account the circumstances of the offender.⁵⁰ A rethink of the form and scope of modern suspended sentence orders, taking into account the original 1886 model, would be a useful exercise.

Although Griffith's original *Offenders Probation Act* of 1886 has long since been superseded,⁵¹ his other major piece of legislation from that year, the *Justices Act 1886* (Qld) has not. This Act, which governs the criminal jurisdiction of the Magistrates Court of Queensland, is largely procedural in nature, setting out in detail how proceedings for both simple and indictable offences should be commenced and subsequently dealt with. The fact that it continues in operation, 116 years later, with surprisingly little change in effect from the intent of the original legislation, demonstrates the lasting quality of Griffith's skill in legislative drafting.⁵²

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⁴⁷ In that the offender is typically not required to undergo any form of supervision or rehabilitative programmes.

⁴⁸ In that the offender can be perceived by the community as really not undergoing any form of punishment.

⁴⁹ See for example, Mirko Bagaric, 'Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishment' (1999) 22 *UNSW Law Journal* 5.

⁵⁰ See for example in Queensland, Pt 7 Div 2 *Penalties and Sentences Act*, Contravention of Orders. In the case of a breach of probation, the offender is not only resentenced on the original charges, but is also charged with breaching the order (see s 123).

⁵¹ Provisions for probation orders are now found in the *Penalties and Sentences Act 1992* (Qld). Previously they were contained in the *Corrective Services Act 1988*; *Offenders Probation and Parole Act 1980*; and the *Offenders Probation and Parole Act 1959*. The original *Offenders Probation Act* of 1886 drafted by Griffith was superseded by the *Criminal Code* in 1901, which in s 656 made provision for suspended sentences. In time these orders largely fell into disuse, and suspended sentences were "reintroduced" by the *Penalties and Sentences Act 1992* (Qld), Pt 8.

⁵² For commentary on the *Justices Act*, see successively Kennedy Allen, *The Justices Acts (Queensland)* (Law Book Company, Sydney, 1929 (and later editions)); Judge Morley and Glen Martin, *Queensland Magistrates Courts* (Law Book Company, Sydney, 1982 (looseleaf)); Geraldine Mackenzie, *Summary Offences Law and Practice Queensland* (Law Book Company, Sydney, 1995 (looseleaf)).

CODIFICATION

Griffith's enduring legacy to criminal law in Queensland is the Queensland *Criminal Code* of 1899.⁵³ Griffith's identification of the need for codification of the criminal law should perhaps be viewed in the context of nineteenth century moves in other jurisdictions to undertake this task.⁵⁴ Jeremy Bentham has been credited with the origin of the concept of codification.⁵⁵ This mechanism was embraced by reformers of the criminal law, including James Stephen, whose draft English Code was not ultimately adopted in England, but did form the basis for criminal codes in Canada in 1892 and New Zealand in 1893.⁵⁶

The *Criminal Code* 1899 (Qld) continues in use in close to the same format as the original draft presented by Griffith to both Houses of Parliament in 1897.⁵⁷ Griffith began work on the *Criminal Code* in 1896 while holding the office of Chief Justice of Queensland. In order to do so he read widely on the criminal law of many countries, and completed the first draft on 25 March 1897, the final draft being completed on 19 August 1897.⁵⁸

An Explanatory Letter to the Attorney-General dated 29 October 1897 was attached to the draft, wherein Griffith pointed out that the criminal law of Queensland, quite apart from Imperial Acts, was scattered throughout nearly 250 statutes, not to mention the common law principles which also applied.⁵⁹ In the letter, he stated that he had derived assistance from an English Draft Code of Criminal Law, which had not, he observed, become law. Sir Samuel noted however that the English Draft Code was not without criticism.⁶⁰ The Explanatory Letter said that he had derived 'very great assistance' from the 1888 Italian Penal Code, which he considered to be 'the most complete and perfect Penal Code in existence'.⁶¹ He also had frequent recourse to the Penal Code of the State of New York.⁶² Knowledge of Italian, first gained when he travelled to Italy on the University of Sydney Travelling Scholarship in 1865, appears to have contributed in large measure to his enthusiasm for the Italian Code.⁶³

After meetings with the Criminal Code Commission in early 1899, he revised the rules and forms to the *Criminal Code* until August 1899.⁶⁴ The Draft Code presented by Sir Samuel Griffith in 1897 was passed as Schedule One to the *Queensland Criminal Code Act 1899* (63 Vic No 9), and received assent from Sir Samuel himself as acting

⁵³ Hon Dean Wells, 'The Griffith Code – Then and Now' (1994) 3 *Griffith Law Review* 205, 205.

⁵⁴ See generally Cadoppi, above n 9, 123 ff.

⁵⁵ Ibid 123.

⁵⁶ Ibid 123-129.

⁵⁷ Queensland at that time had both a Legislative Assembly and a Legislative Council; the latter upper house was abolished in 1922.

⁵⁸ Joyce, above n 1, 219.

⁵⁹ Sir Samuel Griffith, *Explanatory Letter to Draft of a Code of Criminal Law* (Government of Queensland, Brisbane, 1897) iv.

⁶⁰ Ibid.

⁶¹ Ibid vii. For a detailed discussion of the use by Griffith of the Italian Penal Code in drafting the Queensland *Criminal Code*, see Cadoppi, above n 9.

⁶² Ibid.

⁶³ See Forward, above n 5. Sir Samuel also developed an interest in translation of Italian works, in particular Dante, see Graham, above n 2, 90-92. See also generally Cadoppi, above n 9.

⁶⁴ Joyce, above n 1, 219.

Governor on 28 November 1899.⁶⁵ He continued work on the Rules in 1900,⁶⁶ into which he was said to have invested an ‘extraordinary amount of laborious care’.⁶⁷ The draft *Criminal Code* was a massive undertaking, containing 733 sections, comprehensively covering issues of procedure, criminal responsibility, offences and defences. The Griffith Code was later adopted by Western Australia and Queensland’s close neighbour Papua New Guinea.⁶⁸ Internationally, the influence and adoption of the Griffith Code was far more widespread, being either the basis of, or a very strong influence on criminal codes in Nigeria, (which in turn influenced other African countries), Israel, Fiji, the Solomon Islands and the Seychelles.⁶⁹

The *Criminal Code* continued in use virtually unchanged until the Goss Labor Government, which came into power in Queensland in 1989 promising reform, commissioned a review in 1990.⁷⁰ The review process culminated five years later in the enactment of an entirely new *Criminal Code* 1995, which was intended to replace the Griffith Code of 1899.⁷¹ Although the 1995 Code was enacted, it never came into effect; the Goss Labor Government losing power in 1995 after a by-election. The 1995 Code was eventually repealed in 1997 by the new Coalition Government.⁷² The 1899 Code therefore remains in force in Queensland, but was substantially amended and overhauled by the *Criminal Law Amendment Act 1997*, exactly 100 years after the Draft Code was presented to both Parliaments by Sir Samuel Griffith.⁷³ Further substantial amendments were made in 2000 based on recommendations from the Women’s Taskforce on Women and the Criminal Code, and were enacted in the *Criminal Law Amendment Act 2000* (Qld).⁷⁴

This most recent update of the *Criminal Code* in 2000 adds to the 1997 amendments in helping bring the *Criminal Code* up to date, and particularly takes account of changing community attitudes at the commencement of the twenty-first century. In updating the Code in 2000, significant amendments were made to the provisions on carnal knowledge; obscene publications (including provision for computer generated images); female genital mutilation; rape, including adding a definition of ‘consent’; sexual assault; and kidnapping.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Graham, above n 2, 89.

⁶⁸ *Criminal Code 1913* (WA); *Criminal Code Ordinance 1902* of British New Guinea and subsequent enactments. See generally, Robin O’Regan, *New Essays on the Australian Criminal Codes* (The Law Book Co, Sydney, 1988) Ch 8 ‘The Migration of the Griffith Code’; R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, Butterworths, Sydney, 2000) 5-6. Tasmania and the Northern Territory also adopted criminal codes, but these were not based on the Griffith Code, although it was influential on their development. See *Criminal Code 1924* (Tas), and *Criminal Code 1983* (NT).

⁶⁹ See detailed discussion of the influence of the Griffith Code on penal codes in other jurisdictions in O’Regan, ‘The Migration of the Griffith Code’, above n 68; and Cadoppi, above n 9.

⁷⁰ See details of the commissioned review in Queensland Department of the Attorney-General, *First Interim Report of the Criminal Code Review Committee to the Attorney-General* (Brisbane, March 1991).

⁷¹ See description of this process in Wells, above n 53.

⁷² See *Criminal Law Amendment Act 1997* (Qld).

⁷³ See description of the lengthy “reform” process in Sally Kift, ‘How Not to Amend a Criminal Code’ (1997) 22 *Alternative Law Journal* 215, including a detailed description of the 1997 amendments.

⁷⁴ See Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (Office of Women’s Policy, Government of Queensland, Brisbane, 1999).

Despite these two major amendments in 1997 and 2000, the *Criminal Code* remains in need of further overhaul, the confusing and difficult to apply self defence provisions of ss 271 and 272 a case in point. It is fair to make the general observation that successive Queensland State governments have been slow in amending the Code to maintain currency with community standards. A penal code drafted in 1897 in Victorian times will inevitably need amending from time to time to reflect changing attitudes to criminal offences. Examples of provisions which should not have survived for the time they did, are treason and mutiny offences (Part 2, not repealed until 1997, despite these clearly being in the Commonwealth jurisdiction since 1901); defamation of foreign princes: s 53 (not repealed until 1997); smuggling offences: ss 67, 68 and 76 (not repealed until 1997, despite the fact that the Commonwealth took responsibility for customs matters at federation in 1901); pretending to exercise witchcraft or tell fortunes: s 432 (not repealed until 2000); and Chapters 18 and 19: offences relating to the coin, and posts and telegraphs respectively, not repealed until 1997 despite the fact that these were clearly within the jurisdiction of the Commonwealth, and had been for many years.

Perhaps even more incredible is the fact that it is still illegal (in 2002) under the *Criminal Code* in Queensland to challenge to fight a duel (s 73); or fight in a prize fight (s 74). That these offences, which could only be described as colonial relics, remain on the statute books illustrates the fact that there is a need for penal codes to be regularly overhauled, preferably away from political considerations which can easily overshadow the process.

VII JUDICIAL OFFICE

Although arguably Griffith's greatest contribution to criminal justice was as the draftsman of the Queensland *Criminal Code*, he also made a lasting contribution as both Chief Justice of the Supreme Court of Queensland (1893-1903), and as the first Chief Justice of the High Court of Australia (1903-19).⁷⁵ As a judge he was said to have 'few equals', and to have a mastery of the law which places him among the two or three leading lawyers in Australia of all time.⁷⁶ He was 47 when he became Chief Justice of Queensland, and retired from the High Court in 1919 just before his death in 1920 at the age of 75, and therefore much of his career was spent as a senior member of the judiciary.

As Chief Justice of Queensland he was said to be a dominating figure on the Bench, and had the ability to go straight to the heart of the case before him.⁷⁷ Although he was obliged to take a substantial drop in income in accepting the position, he undoubtedly deeply appreciated the social prestige and trappings of the office.⁷⁸ Joyce records that of the 413 reported cases over which Griffith presided as Chief Justice, 56 were in the

⁷⁵ See C L Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Journal* 275; and also Hon John Macrossan, 'Queensland Judicial Perspective - A Century On' (1994) 3 *Griffith Law Review* 194.

⁷⁶ B H McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure* (Butterworths, Sydney, 1989) 191. (Mr Justice McPherson is a justice of the Supreme Court of Queensland (Court of Appeal division) and well placed to make such a judgment.)

⁷⁷ Graham, above n 2, 60.

⁷⁸ See generally Joyce, above n 1, Ch 9.

criminal jurisdiction.⁷⁹ There is no doubt that Griffith made a major contribution to criminal jurisprudence in the early years of the State, particularly in the early interpretation of his *Criminal Code*.

An early example of Griffith's interpretation of the *Criminal Code* can be seen in the case of *R v Corbett*,⁸⁰ a report of Griffith CJ's directions to the jury in a case of intoxication under s 28 of the Code. His direction to the jury that the defence of intoxication was only available when the accused person became intoxicated under circumstances for which they could not be fairly held responsible, remains the applicable test today for involuntary intoxication.

Griffith's contribution as Chief Justice of the High Court of Australia was also a distinguished one, but not without occasional controversy. His appointment was of particular significance as he was a Queenslander, and very few other appointments from Queensland have been made, in the near century of the High Court's existence.⁸¹ All three initial appointments to the High Court in 1903 had distinguished careers before taking their positions on that Bench. In addition to Sir Samuel Griffith, Sir Edmond Barton had served as the first Prime Minister of Australia, and Richard O'Connor had been Solicitor-General and Minister for Justice in New South Wales. Griffith is said to have had cordial relations with the other two original members of the court, with the three concurring in almost all decisions, which were frequently written by Griffith.⁸² This harmonious state did not continue after 1906, when a further two appointments were made to the court, Isaac Isaacs and Henry Higgins; with Griffith complaining that they were long-winded in giving their dissenting judgments,⁸³ and Griffith and Isaacs being involved in a contest to see who could do their work best.⁸⁴ Griffith's judicial ability is not in dispute, but one aspect of his work as a judge is said to have caused particular consternation among other judges. Graham (as noted above a former associate of Griffith's), observed that Sir Samuel was in the habit while on the Queensland Supreme Court Bench of giving lengthy oral judgments without the aid of notes, and only with the assistance of the Law Reports in front of him.⁸⁵ Although it is said that his first judgment on the High Court was delivered in like fashion, (with the other two judges concurring), they reportedly demanded that he stop the practice, as they felt quite unable to deliver half hour oral judgments on complex issues.⁸⁶

VIII A LASTING CONTRIBUTION

Griffith retired from the High Court in 1919 after the effects of a stroke left him with very little use of his right hand, and a lasting deleterious effect on his health. He was unable to attend his final sitting of the High Court in Brisbane, and his retirement

⁷⁹ Ibid.

⁸⁰ [1903] St R Qd 246.

⁸¹ It is interesting to note that three of these Queenslanders have also been appointed as Chief Justice, Griffith himself, Sir Harry Gibbs and Sir Gerard Brennan.

⁸² Joyce, above n 1, 261.

⁸³ Forward, above n 5, 26.

⁸⁴ Graham, above n 2, 65.

⁸⁵ Ibid 66.

⁸⁶ Ibid.

speech was read by the Chief Registrar.⁸⁷ He died one year later at home in Brisbane at the age of 75.

Griffith made an extraordinary contribution to public life, primarily to law and politics, but also to education.⁸⁸ Of his many achievements in the law, it is a justifiable claim that his contribution to criminal justice was one of the most significant. His foremost pieces of criminal justice legislation, the *Offenders Probation Act*, the *Justices Act* and the *Criminal Code*, were major achievements by any measure and the legal concepts as expressed by those pieces of legislation have stood the test of time. Undoubtedly he was a brilliant lawyer and judge, and his development of the criminal law through his judgments in both the Supreme Court of Queensland and High Court of Australia furthered his contribution. No other Queenslanders can lay claim to such a lasting and major impact on criminal law continuing from the late nineteenth century through into the twenty-first.

⁸⁷ See *ibid* 101-105 on the period after his retirement and leading to his death.

⁸⁸ Griffith's many achievements in education are discussed in Joyce, above n 1, Ch 3. Griffith sat on the Board of Trustees of Brisbane Grammar School from 1871-1904, and helped found Brisbane Girls Grammar School in 1874 (he sat on the board of BGGGS from 1882). While in politics he attempted (unsuccessfully) to pass a Bill to introduce a university in Queensland, and Griffith University is now named after him: see Macrossan, above n 75, 199-200.