1-1-2002

Criminal responsibility under the South Pacific codes

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Recommended Citation
Eric Colvin. (2002) "Criminal responsibility under the South Pacific codes".

CRIMINAL RESPONSIBILITY UNDER THE SOUTH PACIFIC CODES

Summary
This paper examines principles of criminal responsibility in those jurisdictions of Melanesia, Micronesia and Polynesia with a heritage of English law. Their criminal codes fall into two main groups. One group follows, to varying degrees, the model of the New Zealand Crimes Act, lacking statements of general principle about responsibility and relying heavily on the common law to supplement the provisions creating particular offences. The other group follows the model of the Queensland Criminal Code, copying its statements of general principle about responsibility. The general principles of the Queensland code effectively base responsibility on objective negligence, in contrast to the subjective principles of the contemporary common law. This paper argues, however, that the divergence of principles rarely translates into differences in the scope of particular offences. The reasons why the elements of offences tend to converge are explored. In the result, the primary significance of the divergence of general principles is methodological rather than substantive. Similar conclusions might be drawn about the differences between those Australian jurisdictions with Queensland-like codes and those drawing on common law principles of responsibility.
With respect to principles of criminal responsibility, the South Pacific codes fall into two main groups. One group comprises the codes of Cook Islands, Niue, Samoa and Tokelau. These follow, to varying degrees, the model of the New Zealand Crimes Act, lacking statements of general principle about responsibility and relying heavily on the common law to supplement the provisions creating particular offences. The other main group comprises the codes of Fiji Islands, Kiribati, Nauru, Papua New Guinea, Solomon Islands and Tuvalu. These follow an Australian model: that of the Criminal Code of Queensland. The Queensland code was designed to make the common law redundant and therefore does include statements of general principle about responsibility. The Tonga and Vanuatu codes do not fit neatly into either group. The Tonga code is closer to the group which has acquired the New Zealand model. It does not include general statements about criminal responsibility. On the other hand, its offence descriptions generally include mental elements. Although these elements reflect the common law, they avoid the need to rely on common law principles. Vanuatu has a unique code. It covers matters of responsibility through statements of general principle, but in a way quite different from that of the Queensland code.

This paper examines the differences between these models. The principles of the contemporary common law of criminal responsibility differ sharply in some respects from those of the Queensland code. In particular, common law principles generally require that an accused intended to commit the offence or was aware of the risk of doing so; in contrast, the Queensland code effectively embodies a general principle of liability for objective negligence. The principles of the Vanuatu code are closer to the common law than to the Queensland code. Principles are, however, always subject to exceptions. When the exceptions on both sides are explored, the divergence of principles becomes less pronounced. It translates into marked differences in the scope of only a few particular offences. Among serious offences, the most important differences in practice may arise in cases where an accused, facing a charge of rape or some form of assault, alleges a belief that there was consent to physical contact but there were no reasonable grounds for such a belief. Common law principles are more tolerant of unreasonable mistakes than are the principles of the Queensland code.

In the result, the divergence of general principles may be more important methodologically than substantively. Even though the elements of responsibility for specific offences are largely the same, the divergence of principles means that those elements are often determined in different ways. Although the present discussion focuses on the South Pacific jurisdictions, similar conclusions could be drawn about the differences within Australia between those states where the law on criminal responsibility is found in codes like that of Queensland and those where it is drawn from the common law.

**DIVERSITY: THE SOUTH PACIFIC CODES**

The New Zealand Crimes Act has been a model for the criminal codes of Cook Islands, Niue, Samoa and Tokelau. Tonga also follows the model in some respects, although differing in others. The New Zealand statute was based on a draft code prepared for England by Sir James Stephen, in 1878, and revised as a

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2 Crimes Act 1969 (Cook Islands); Niue Act 1966 (NZ), Part V ‘Criminal Offences’, as preserved by Constitution of Niue, Art 71; Crimes Ordinance 1961 (Samoa); Tokelau Crimes Regulations 1975 (NZ), adopting the criminal law provisions of Niue Act 1966 (NZ).

3 First enacted as the Crimes Act 1893 (NZ). See now Crimes Act 1961 (NZ).

4 Penal Code, Cap 17 (Fiji Islands); Penal Code, Cap 67 (Kiribati); Criminal Code, Cap 262 (Papua New Guinea); Penal Code, Cap 26 (Solomon Islands); Penal Code, Cap 8 (Tuvalu). Nauru does not have a separate code. Nauru adopted the Criminal Code (Qld), with amendments in force on 1st July, 1921, through the Laws Repeal and Adopting Ordinance 1922-67 (Nauru) s 12.

5 Criminal Code Act 1899 (Qld) Schedule 1.

6 Criminal Offences Act, Cap 18 (Tonga).

7 Penal Code, Cap 135 (Vanuatu).


9 Crimes Act 1969 (Cook Islands); Niue Act 1966 (NZ), Part V ‘Criminal Offences’, as preserved by Constitution of Niue, Art 71; Crimes Ordinance 1961 (Samoa); Tokelau Crimes Regulations 1975 (NZ), adopting the criminal law provisions of Niue Act 1966 (NZ).
draft Bill by a Royal Commission in 1879. The Stephen code was designed as a partial codification of criminal law. It was intended to deal comprehensively with the conduct elements of offences but not with the question of criminal responsibility for that conduct. There were provisions on some, but not all, defences. In addition, mental elements were expressly included for some, but not all, particular offences. There were, however, no general statements of principles of criminal responsibility. General principles of criminal responsibility were left to be derived from the common law. The elements of particular offences and the full range of defences were to be determined in light of these common law principles as well as the statutory wording of the offences. The Stephen code was never enacted in England but it became the basis for the codes of Canada and New Zealand. The model was then exported by New Zealand in varying versions to its South Pacific dependencies: Cook Islands, Niue, Samoa and Tokelau. The independent state of Tonga enacted a code with some similar features.

Courts have rarely sought to justify the practice of referring to the common law in interpreting codes of the Stephen model. If express justification is wanted, it might be found in a general provision, found in most of these codes, preserving common law justifications, excuses and defences. The Cook Islands version is as follows:

All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

In almost the same words, this provision is found in the codes of Canada, New Zealand, Niue, Samoa and Tokelau, although not that of Tonga. The words of the provision, particularly the reference to 'a defence', are broad enough to provide a general mandate for referring to the common law to resolve issues of responsibility. In any event, entitlement to invoke the common law on matters of responsibility would almost certainly be assumed by implication.

Codes which follow the Stephen model need to be read in light of three foundational principles of the common law of criminal responsibility:

1. The conduct must have been ‘voluntary’, in the sense of being the product of a choice made by a conscious mind. This is a minimal requirement which is compatible with ignorance of or a mistaken belief about the character of what was being done.
2. The conduct must have been matched by ‘mens rea’. The concept of mens rea refers to a (presumptively) culpable state of mind respecting the conduct, such as intention to do it or recklessness respecting what would occur. The principle is, however, confined to serious offences, sometimes called ‘true crimes’ as opposed to ‘regulatory offences’. For these more serious offences, there is said to be a presumption of mens rea. Less serious offences involve either ‘strict liability’ or ‘absolute liability’. These two terms have sometimes been used interchangeably. In recent years, however, a distinction has generally been drawn between strict and absolute liability. The former permits a defence of either due diligence or at least reasonable mistake of fact but the latter excludes any such defence. There is a presumption against absolute liability, so that it needs to be expressly imposed by statute.
3. There must be neither justification for what was done, nor an excuse of such magnitude as to make criminal responsibility inappropriate.

11 First enacted as the Criminal Code 1892 (Can). See now Criminal Code, RSC 1985, c C-46.
12 Crimes Act 1969 (Cook Islands) s 23(1).
13 Criminal Code, RSC 1985, c C-46, s 7(3); Crimes Act 1961 (NZ) s 20(1); Niue Act 1966 (NZ) s 238 (also in force in Tokelau); Crimes Ordinance 1961 (Samoa) s 9.
The Stephen model leaves the principle of voluntariness entirely to the common law. None of the South Pacific versions of the Stephen code addresses the matter.\(^\text{15}\) Mens rea is handled through specific provisions for some offences, such as murder and theft,\(^\text{16}\) but for others, such as rape and assault, it is left largely to the common law.\(^\text{17}\) Justifications, excuses and other defences are covered to varying degrees. The codes closest to the New Zealand *Crimes Act*, those of Cook Islands and Samoa, deal expressly with most matters of justification and excuse, including the exclusion of ignorance of law as an excuse.\(^\text{18}\) The Tonga code includes a limited range of defences. Infancy, insanity and intoxication are covered,\(^\text{19}\) but not some important matters such as duress and defensive force. The Tonga code also leaves the rules on ignorance of law to the common law. Niue and Tokelau leave defences entirely to the common law.

Issues of responsibility are approached differently under the South Pacific codes which have followed the model of the Queensland *Criminal Code*:\(^\text{20}\) that is, the codes of Fiji Islands, Kiribati, Nauru, Papua New Guinea, Solomon Islands and Tuvalu.\(^\text{21}\) Nauru has inherited the Queensland code itself and the others have versions of it. The Queensland code was prepared by the then Chief Justice of the State, Sir Samuel Griffith, in 1897. Unlike the Stephen code, the Griffith code was designed as a complete codification of criminal law. It included a general scheme of provisions on criminal responsibility. This was intended to make the whole of the common law of responsibility redundant. Soon after its introduction into Queensland, the Griffith code was adopted by Western Australia.\(^\text{22}\) It was exported by Australia to its dependencies in the island of New Guinea\(^\text{23}\) and in Nauru. It was also adopted as a model by the British Colonial Office,\(^\text{24}\) which introduced it (with amendments) into many parts of Africa and also into Fiji Islands, Solomon Islands and the then Gilbert and Ellice Islands (now Kiribati and Tuvalu).

The codes following the Griffith model in the South Pacific incorporate two key provisions, in the same wording everywhere. The first establishes the defences of lack of will and of accident and also makes the intention accompanying conduct immaterial unless there is an express provision to the contrary:

\[
\text{Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.}
\]

\(^{15}\) There is a provision in the Tonga code to the effect that a person who intentionally or negligently causes ‘any involuntary agent’ to do something is deemed to cause that event: *Criminal Offences Act*, Cap 18 (Tonga) s 23. However, there is no provision expressly exempting involuntary actors from liability.

\(^{16}\) *Crimes Act 1969* (Cook Islands) ss 187, 242; *Niue Act 1966* (NZ) ss 134, 188 (also in force in Tokelau); *Crimes Ordinance 1961* (Samoa) ss 63, 85. See also *Criminal Offences Act*, Cap 18 (Tonga), ss 87, 143.

\(^{17}\) *Crimes Act 1969* (Cook Islands) ss 141, 216; *Niue Act 1966* (NZ) ss 157, 162 (also in force in Tokelau); *Crimes Ordinance 1961* (Samoa) ss 47, 78. With respect to assault, the Samoa code prescribes intention as the mental element for the application of force but is silent on a mental element for lack of consent. The offences of assault and rape in the Tongan code both include specific provisions on the mental elements of the offences: *Criminal Offences Act*, Cap 18 (Tonga), ss 112, 118.

\(^{18}\) *Crimes Act 1969* (Cook Islands) ss 24-28, 50-58; *Crimes Ordinance 1961* (Samoa) ss 10-19.

\(^{19}\) *Criminal Offences Act*, Cap 18 (Tonga), ss 16-17, 21.

\(^{20}\) *Criminal Code Act 1899* (Qld) Schedule 1.

\(^{21}\) *Penal Code*, Cap 17 (Fiji Islands); *Penal Code*, Cap 67 (Kiribati); *Criminal Code*, Cap 262 (Papua New Guinea); *Penal Code*, Cap 26 (Solomon Islands); *Penal Code*, Cap 8 (Tuvalu). Nauru does not have a separate code. Nauru adopted the *Criminal Code* (Qld), with amendments in force on 1\(^\text{st}\) July, 1921, through the *Laws Repeal and Adopting Ordinance 1922-67* (Nauru) s 12.


\(^{24}\) See Robin O’Regan, ibid, 107-13.
Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.\(^{25}\)

The second deals with the defence of mistake of fact:

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 he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.\(^{26}\)

The defence of lack of will covers involuntary conduct.\(^{27}\) The defences of accident and of mistake of fact were designed to replace the common law doctrine of mens rea for offences lacking specific mental elements. Sir Samuel Griffith himself said with respect to his code: ‘it is never necessary to have recourse to the old doctrine of mens rea’.\(^{28}\) The Griffith model also seeks to deal comprehensively with justifications, excuses and other defences.\(^{29}\) There is no general provision preserving a role for the common law in this respect and the courts have declined to imply any such role.\(^{30}\)

The orthodox Australian theory for the interpretation of the Griffith code insists that ‘its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law’.\(^{31}\) Reference to the common law is permitted only in cases of ambiguous or technical language.\(^{32}\) At first sight, there may appear to be a conflict between this Australian approach and a general rule of construction introduced into the codes of those jurisdictions which acquired the Griffith model through the British Colonial Office: Fiji Islands, Kiribati, Solomon Islands and Tuvalu. The Fiji Islands version provides:

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and, except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.\(^{33}\)

English criminal law includes common law. There are, however, several reasons why this provision should rarely change the interpretation of code provisions. First, it is one of ‘the principles of legal interpretation obtaining in England’ that priority should be given to the natural meanings of words in codes.\(^{34}\) Secondly, the orthodox Australian theory permits reference to the common law to be made in cases of technical language, and this includes language with a common law history. There has been a trend towards

\(^{25}\) Penal Code, Cap 17 (Fiji Islands), s 9; Penal Code, Cap 67 (Kiribati), s 9; Criminal Code, Cap 262 (Papua New Guinea), s 24; Penal Code, Cap 26 (Solomon Islands), s 9; Penal Code, Cap 8 (Tuvalu), s 9. For Nauru, see Criminal Code (Qld) s 23. In Queensland itself, s 23 of the code has now been amended in some minor particulars. The original version, however, operates in the South Pacific jurisdictions.

\(^{26}\) Penal Code, Cap 17 (Fiji Islands), s 10; Penal Code, Cap 67 (Kiribati), s 10; Criminal Code, Cap 262 (Papua New Guinea), s 25; Penal Code, Cap 26 (Solomon Islands), s 10; Penal Code, Cap 8 (Tuvalu), s 10. For Nauru, see Criminal Code (Qld) s 24.

\(^{27}\) See R v Falconer (1990) 171 CLR 30.

\(^{28}\) Brennan v The Queen (1936) 55 CLR 253, 263.

\(^{29}\) Stuart v The Queen (1974) 134 CLR 426, 437.

\(^{30}\) This is a general principle for the interpretation of codes in all fields of law: see The Governor and Company of the Bank of England v Vagliano Brothers (1891) AC 107, 144, 145.
distinguishing between, on the one hand, common law principles or doctrines (such as the general requirement for intent) and, on the other hand, common law meanings of particular words or phrases (such as the meaning of ‘intent’). The Griffith code supplanted the former but not the latter. A judge of the High Court of Australia has said: ‘Clearly it is permissible to look to such [common law] decisions to throw light on the terminology of the Code, to explain expressions…’35 Thirdly, where language with a technical meaning embodies a common law principle or doctrine, that too can be implied. Thus, it has been said that ‘when the Code employs words or phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law…including decisions subsequent to the Code’s enactment.’36

In the result, there is a rhetorical quality to the orthodox Australian theory of how the Griffith code should be interpreted. Where the language of the code can be sensibly interpreted in accordance with the common law, it is. The orthodox theory does, however, affirm that the language of the code cannot be distorted to fit common law principles. Where these principles conflict with the language of the code (such as with respect to the significance of intent for responsibility), the code must prevail. This position is unchanged by the general rule of construction in the codes of Fiji Islands, Kiribati, Solomon Islands and Tuvalu.

To complete this overview of the criminal codes of the South Pacific, mention should be made of the Vanuatu code, which is quite different from the other codes of the South Pacific. Prior to independence in 1980, Vanuatu had been the Anglo-French condominium of the New Hebrides, with plural legal systems. Following independence, a criminal code was enacted.37 This was based on a draft prepared in the late 1970s by A G Chloros, formerly Professor of Comparative Law at King's College, University of London. It contains a comprehensive scheme of criminal responsibility, unlike the Stephen code. The design of the scheme, however, differs from that of the Griffith Code and reflects modern developments in the law of criminal responsibility. Its key provisions are as follows:

6. (1) No person shall be guilty of a criminal offence unless he intentionally does an act which is prohibited by the criminal law and for which a specific penalty is prescribed. The act may consist of an omission, or a situation which has been created intentionally.

(2) No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.

Section 6(1) covers the principle of voluntariness. It uses the term ‘intentionally’. Nevertheless, the context, including the contrast with s 6(2), indicates that nothing more is meant than that the act must have been directed by an intention to do something (that is, by a conscious mind), not necessarily by an intention to do that particular act. Awareness of the nature of what was done is covered by s 6(2). This second provision covers the same ground as the common law principles respecting mens rea.38 Section 6(3) provides that any exception to the requirement for intention must be express or arise by ‘necessary and distinct implication’. The Vanuatu code appears also designed to be comprehensive in its coverage of justifications, excuses and other defences.39

DIVERSION: PRINCIPLES OF RESPONSIBILITY

There are many similarities between the principles of criminal responsibility operating in those South Pacific jurisdictions with versions of the Stephen code and those with versions of the Griffith code. There are also some differences stemming from the reliance on common law principles in the former but not the latter. The major differences between common law principles of responsibility and those of the Griffith Code concern the common law doctrine of ‘mens rea’. The content of this doctrine has long been controversial. It may be that there was no great difference between the principles of the Griffith code and the conception of mens rea which prevailed in the era of its design. However, no attempt will be made here.

35 The Queen v Falconer (1990) 171 CLR 30, 65 (Toohey J).
36 Boughey v The Queen (1986) 161 CLR 10, 30 (Brennan J).
37 Penal Code, Cap 135 (Vanuatu).
38 See also, ibid, ss 6(3)-(5), 12, 16.
39 See ibid, ss 11-27.
to assess how closely the Griffith code reflects the common law doctrine of the late nineteenth century. What matters for the purposes of this paper is the divergence between the Griffith code and the modern interpretation of the common law doctrine.

It has become an axiom of the common law of crime that responsibility for serious offences is to be determined subjectively rather than objectively. There is strong modern authority in support of a principle of subjective awareness for mens rea, that is, a principle that the accused must have appreciated the nature of what was done, including any circumstances, consequences or risks forming part of the definition of the offence. As it was put in a leading Canadian case, mens rea consists of ‘some positive state of mind such as intent, knowledge or recklessness’. Recklessness in this context means the unjustifiable taking of a known risk. Contemporary common law principles reject liability for negligence, in the sense of a failure to live up to objective standards of reasonable conduct, and therefore reject liability for inadvertent conduct.

Similar general principles are expressed in the Vanuatu code. That code requires intention or recklessness unless there is an express or necessarily implied exception. It also expressly excludes liability for negligence unless the offence consists of an omission.

In contrast to the subjective principles of the common law, the general tests for criminal responsibility under the Griffith code are objective in character. These general tests are contained in the provisions relating to the defence of mistake of fact, in relation to circumstances, and the defence of accident, in relation to consequences. When either of these provisions apply, the accused is held responsible, not because of a state of mind which is blameworthy in itself, but rather because of a blameworthy failure to live up to an objective standard of thought and behaviour. Thus, a mistake of fact must generally be reasonable if it is to provide a defence under the Griffith code, even for a serious offence. In addition, the test for a defence of accident is that the event must have been not only unforeseen but also objectively unforeseeable. In positive terms, an accused can be held responsible for events that were either foreseen or foreseeable. The general threshold of criminal responsibility is therefore negligence: unreasonable mistakes are negligent mistakes and unjustifiably risking foreseeable harms is negligent conduct. Intention to commit an offence is said to be required only where it is ‘expressly declared to be an element’.

The differences between subjective and objective principles of responsibility lie at the heart of one of the most controversial issues in modern criminal law: whether a mistaken belief in consent to sexual interaction should provide a defence to an offence such as rape or indecent assault even if the mistake was unreasonable. This question received a positive answer from a majority of the House of Lords in Morgan. The charge was rape and the elements of responsibility for the offence fell to be determined as a matter of common law. The reasoning of the majority was that common law principles of responsibility required intention or subjective recklessness with respect to the absence of consent, and that neither of these states of mind would be present if there was an honest belief in consent. It would therefore be immaterial whether or not a mistake was reasonable.

42 See text accompanying n 37.
43 Penal Code, Cap 135 (Vanuatu), s 6(4).
44 See above, n 26 and accompanying text.
45 See above, n 25 and accompanying text.
46 The leading statement on the scope of the defence of accident was made by Gibbs J in Kaporonovski v The Queen (1975) 133 CLR 209, 231, interpreting Criminal Code (Qld) s 23: ‘It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.’
48 See above, note 25 and accompanying text.
The decision in *Morgan* has generally been followed by courts in Commonwealth jurisdictions which rely on common law principles to determine responsibility for offences of sexual violence. The result for such offences has been reversed by legislation in Canada and New Zealand. Under the Canada and New Zealand codes, a mistake about consent must now be reasonable if it is to provide a defence. There have, however, been no such amendments in the Stephen-model jurisdictions of the South Pacific. In Cook Islands, Niue, Samoa and Tokelau, the significance of mistakes about consent is still governed by the common law principles articulated in *Morgan*. The result in *Morgan* would also have been the same in Tonga and Vanuatu, where statutory provisions govern the elements of rape. The Tonga code includes a specific mental element for the offence: knowledge of lack of consent to sexual intercourse or recklessness as to whether there is consent. Under the Vanuatu code, the general provisions on responsibility apply. The general requirement for intention or recklessness would be sufficient to permit a defence of honest albeit unreasonable mistake about consent. In addition, however, s 12 expressly states: ‘A mistake of fact shall be a defence to a criminal charge if it consists of a genuine, even though not reasonable, belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.’

An unreasonable mistake about consent would not provide a defence in the jurisdictions with versions of the Griffith code. In those jurisdictions, there is the defence of ‘honest and reasonable, but mistaken, belief’. No provision, however, is made for unreasonable mistakes to negative responsibility. Moreover, such a defence cannot be read into the code by implication. That would be inconsistent with the code’s comprehensive coverage of defences and with the provision declaring intention to be immaterial unless there is an express declaration otherwise. In the aftermath of the decision in *Morgan*, its significance for Griffith code jurisdictions was referred to the Western Australia Court of Criminal Appeal in Attorney-General’s Reference No 1 of 1977. The ruling was that the code permitted mistake to be a defence to rape only if the mistake was reasonable.

The intoxication rules of the Pacific region may accentuate the divergence between those jurisdictions using common law principles and those operating under the Griffith code. Claims for mistaken beliefs will usually be implausible unless the mistakes were, under the circumstances, reasonable. In the absence of reasonable grounds for a mistake, the conclusion will probably be that the mistake was never actually made. That outcome may change, however, if there is evidence that the accused was intoxicated. Intoxication is probably the most common factor explaining unreasonable beliefs and giving an air of reality to a defence of unreasonable mistake. In Australia and New Zealand, modern decisions have ruled that the common law imposes no special restrictions on using evidence of intoxication in this way. These decisions have rejected some complicated rules which traditionally restricted the use of evidence of self-induced intoxication to a special category of offences of so-called ‘specific intent’. For other offences, called offences of ‘general intent’, inferences about the accused’s state of mind were drawn on the assumption of sobriety, however much the evidence was to the contrary. Rape and assault have been among those classified as offences of ‘general intent’. The restrictive rules still operate in some jurisdictions, such

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51 In Canada, a mistaken belief in consent has now been excluded as a defence to the offence of sexual assault unless the accused took reasonable steps to ascertain whether there was consent: *Criminal Code*, RSC 1985, c C-46, s 273.2(b). In New Zealand, a mistaken belief has been excluded as a defence to the offence of sexual violation unless the mistake was reasonable: *Crimes Act 1961* (NZ) s 128(2).
52 *Criminal Offences Act*, Cap 18 (Tonga), s 118(3): ‘…a man commits rape if at the time of sexual intercourse with a woman he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.’
53 *Penal Code*, Cap 135 (Vanuatu), s 6(2). See above, text accompanying n 37.
54 See above, n 26 and accompanying text.
55 See above, n 25 and accompanying text.
56 [1979] WAR 46.
57 See *R v Kamipeli* [1975] 2 NZLR 610 (CA); *R v O’Connor* (1980) 146 CLR 64.
If they were still to operate in the South Pacific, they would minimise the differences between the handling of unreasonable mistakes in the various jurisdictions. Under the approach taken in Australia and New Zealand, however, a defence of honest albeit unreasonable mistake is more often likely to be viable. Which approach the South Pacific courts will adopt has yet to be finally resolved, although there has been some support for the Australia and New Zealand approach.

Tonga has a legislated version of the intoxication rules. This is in line with the approach taken in Australia and New Zealand. The Tonga code provides: ‘Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence.’ The same provision is contained in the codes of Fiji Islands, Kiribati, Solomon Islands and Tuvalu; that is, in the codes of those jurisdictions which acquired the Griffith model through the British Colonial Office rather than directly from Australia. In the context of the Griffith model, liberalising the intoxication rules matters little for an offence such as rape, because only a reasonable mistake about consent can afford a defence in any event. The impact is more significant for a code like that of Tonga, which includes a subjective mental element in the offence of rape.

As in other respects, the Vanuatu code is unusual. The general principles of that code permit an unreasonable mistake about consent to operate as a defence. Moreover, the intoxication rules do not limit the use of self-induced intoxication to any particular category of offences. They do, however, contain another restrictive element: ‘Voluntary intoxication shall not constitute a defence to any charge unless the offence charged is one in which criminal intention is an element and the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention.’ This appears to be a version of an old rule that evidence of intoxication cannot be used to support a simple defence of lack of mens rea for any offence. Even where evidence of intoxication can be taken into account, the evidence must be that the accused was so intoxicated as to have lacked the capacity to form mens rea. This restrictive rule may once have formed part of the common law rules on self-induced intoxication. It has, however, been now been abandoned almost everywhere. Its survival in Vanuatu is an anomaly. It means that there is much less scope for a defence of unreasonable mistake than there is in other South Pacific jurisdictions which subscribe to subjective principles of criminal responsibility.

CONVERGENCE: ELEMENTS OF OFFENCES

Resort to general principles of responsibility is unnecessary where offence descriptions include specific fault elements. For example, the elements of the offence of murder are spelled out in all the South Pacific codes. In the ‘Stephen’ group of Cook Islands, Niue, Samoa, Tokelau and Tonga, there are three main forms of murder: intentional killing; killing accompanied by an intention to cause bodily injury and knowledge that death was likely; killing by an act done for an unlawful objective if it was known or ought to have been known that death was likely to be caused. In the ‘Griffith’ group, there are two models.

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58 See DPP v Majewski [1977] AC 443 (HL). In Canada, the restrictive rules have now been given statutory form: Criminal Code, RSC 1985, c C-46, s 33.1.
59 See Olo v Police, SC 1980 No 5092 (Samoa).
60 Criminal Offences Act, Cap 18 (Tonga), s 21(4).
61 Penal Code, Cap 17 (Fiji Islands), s 13(4); Penal Code, Cap 67 (Kiribati), s 13(4); Penal Code, Cap 26 (Solomon Islands), s 13(4); Penal Code, Cap 8 (Tuvalu), s 13(4).
62 Restrictive intoxication rules were written into the original Griffith code and still apply in Nauru and Papua New Guineau. See Criminal Code (Qld) s 28, which is force in Nauru; Criminal Code, Cap 262 (Papua New Guineau), s 29.
63 Penal Code, Cap 135 (Vanuatu), s 21(1).
65 See eg R v Kamipeli [1975] 2 NZLR 610, 614 (CA); Viro v The Queen (1978) 141 CLR 88, 111-12; R v Robinson (1996) 105 CCC (3d) 97, 104-19 (SCC).
66 Crimes Act 1969 (Cook Islands) s 187; Niue Act 1966 (NZ) s 134 (also in force in Tokelau); Crimes Ordinance 1961 (Samoa) s 63; Criminal Offences Act, Cap 18 (Tonga), s 87. Some other forms of constructive murder are specified but these are of no practical significance.
Papua New Guinea and Nauru have Sir Samuel Griffith’s original scheme, which has two main forms of murder: killing accompanied by an intention to cause death or grievous bodily harm and killing by an act done in the prosecution of an unlawful purpose if the act was likely to endanger life.\textsuperscript{67} This scheme is very similar to that of the Stephen code. The only difference of substance respects the conditions under which an intention to injure but not to kill can provide the fault element for murder. Under the Stephen model, the intention can be to cause any bodily injury but there must also be recklessness respecting the death. In contrast, under the Griffith model no state of mind respecting the death need be proved but the intention must be to cause grievous bodily harm. The differences are much greater in Fiji Islands, Kiribati, Solomon Islands and Tuvalu, which received the Griffith code as amended by the British Colonial Office. These jurisdictions do not have any special form of ‘constructive’ murder, where the killing occurs in course of some other offence. The killing must always be accompanied by ‘malice aforethought’, with that term encompassing intention to cause death or grievous bodily harm, and also knowledge that death or grievous bodily harm will probably be caused.\textsuperscript{68} The last state of mind is a form of recklessness. The common law also permits murder to be based on recklessness without intention to kill or even to cause injury.\textsuperscript{69} Both the Stephen code and the original Griffith code, however, insist on an intentional element for murder. Such an element is also required in Vanuatu. Vanuatu does not have an offence called ‘murder’ but does have an equivalent offence which is confined to intentional killing.\textsuperscript{70}

The differences between these models of murder reflect the longstanding differences of opinion over the appropriate scope for the offence. They have nothing to do, however, with the divergence of general principles between the codes. The Griffith code may enshrine principles of objective responsibility, but the offence of murder in jurisdictions with versions of that code is no less subjective in character than is murder elsewhere.

Another offence with specific fault elements under all the South Pacific codes is theft or, as it is called in the Griffith-model codes, stealing. Moreover, in this instance, the elements are virtually the same everywhere. The parallels are striking. Compare, for example, the Stephen-model Samoa code with the Griffith-model Tuvalu Code. The Samoa version reads:

\begin{quote}
Theft or stealing is the act of fraudulently, or dishonestly taking, or converting to the use of any person, anything capable of being stolen, with intent - (a) To deprive the owner or any person having any property or interest therein permanently of such thing or of such property or interest…\textsuperscript{71}
\end{quote}

The Tuvalu version reads:

\begin{quote}
A person steals who, without the consent of the owner fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof…\textsuperscript{72}
\end{quote}

Both versions specify intention as the fault element and both require that the intention ordinarily be to deprive the owner permanently. Other South Pacific jurisdictions have an offence of theft or stealing in similar form,\textsuperscript{73} except that in Niue and Tokelau the intent to deprive need not be intent to deprive

\textsuperscript{67} Criminal Code 1899 (Qld) s 302; Criminal Code, Cap 262 (Papua New Guinea), s 300. Some other forms of constructive murder are specified but these are of no practical significance.

\textsuperscript{68} Penal Code, Cap 17 (Fiji Islands), ss 198, 202; Penal Code, Cap 67 (Kiribati), ss 193-195; Penal Code, Cap 26 (Solomon Islands), ss 200-202; Penal Code, Cap 8 (Tuvalu), ss 193-195.

\textsuperscript{69} See eg R v Crabbe (1985) 156 CLR 464.

\textsuperscript{70} Penal Code, Cap 135 (Vanuatu), s 106.

\textsuperscript{71} Crimes Ordinance 1961 (Samoa) s 85(1).

\textsuperscript{72} Penal Code, Cap 8 (Tuvalu), s 251(1).

\textsuperscript{73} See Crimes Act 1969 (Cook Islands) s 242; Criminal Offences Act, Cap 18 (Tonga), s 143; Penal Code, Cap 17 (Fiji Islands), s 259(1); Penal Code, Cap 67 (Kiribati), s 251(1); Criminal Code, Cap 262 (Papua New Guinea), s 365(2), (4); Penal Code, Cap 26 (Solomon Islands), s 258(1); Penal Code, Cap 135 (Vanuatu), s 122. For Nauru, see Criminal Code (Qld) s 391.
permanently. Thus, in all the South Pacific jurisdictions, the offence involves subjective responsibility. As
with murder, its elements do not reflect the divergence of general principles of responsibility under the
codes.

Despite the objective principles of responsibility which are stated in the Griffith code, subjective fault
elements are generally specified for offences against property. Stealing is not alone in this respect. Thus,
for obtaining by false pretences, the Griffith code requires intent to defraud and either knowledge or
recklessness with respect to the falsity of the representation. For receiving, there must be knowledge that
the property was obtained through the commission of an offence. For offences involving damage to or
destruction of property, an offender must have acted ‘wilfully’. That term has been interpreted to mean
intentionally or recklessly.

The objective principles of responsibility under the Griffith code operate mainly in relation to offences
against persons. Murder is one of the exceptional instances where subjective fault elements are prescribed.
In addition, although no specific fault elements are prescribed for common assault, there is some authority
for viewing ‘assault’ as one of the technical terms in the code. On this basis, the term has been taken to
incorporate the common law meaning of an application of force which is intentional or at least reckless.
Nevertheless, objective considerations apply for the additional element in the aggravated offence of assault
causing actual bodily harm. There is no requirement for intention or recklessness in relation to the bodily
responsibility for causing it can only be negatived under the general provision in the Griffith code
relating to the defence of accident. That defence requires the injury to have been not only subjectively
unforeseen but also objectively unforeseeable. In addition, although lack of consent is one of the elements
of any assault, a mistaken belief in consent will provide a defence only if it is reasonable. That result
follows from the application of the general provision on mistakes of fact. For property offences, there is
no need to rely on the general provision because mistakes will be inconsistent with the subjective fault
elements of the offences: mistakes can therefore negative liability whether or not they are reasonable. For
assaults, however, the absence of any specific fault element respecting lack of consent means that a defence
of mistake can be available only under the terms of the general provision. That provision requires that a
mistake be reasonable as well as honest before it can provide a defence.

74 Niue Act 1966 (NZ) s 188(1) (also in force in Tokelau).
75 Penal Code, Cap 17 (Fiji Islands), ss 308-309; Penal Code, Cap 67 (Kiribati), ss 300-301; Criminal
Code, Cap 262 (Papua New Guinea), ss 403-404; Penal Code, Cap 26 (Solomon Islands), ss 307-308;
Penal Code, Cap 8 (Tuvalu), ss 300-301. For Nauru, see Criminal Code (Qld) ss 426-427. The Queensland
code has now been amended to subsume obtaining by false pretences under a wider offence of fraud.
76 Penal Code, Cap 17 (Fiji Islands), s 313; Penal Code, Cap 67 (Kiribati), s 306; Criminal Code, Cap 262
(Papua New Guinea), s 410(1); Penal Code, Cap 26 (Solomon Islands), s 313; Penal Code, Cap 8 (Tuvalu),
s 306. For Nauru, see Criminal Code (Qld) s 433. The Queensland code has now been amended to allow
the offence to be committed when a person had ‘reason to believe’ that the property had been obtained
through the commission of an offence.
77 See especially Penal Code, Cap 17 (Fiji Islands), ss 317, 324; Penal Code, Cap 67 (Kiribati), ss 312,
319; Criminal Code, Cap 262 (Papua New Guinea), ss 433, 436; Penal Code, Cap 26 (Solomon Islands), ss
319, 326; Penal Code, Cap 8 (Tuvalu), ss 312, 319. For Nauru, see Criminal Code (Qld) ss 461, 469.
79 Penal Code, Cap 17 (Fiji Islands), s 244; Penal Code, Cap 67 (Kiribati), s 237; Criminal Code, Cap 262
(Papua New Guinea), s 335; Penal Code, Cap 26 (Solomon Islands), s 244; Penal Code, Cap 8 (Tuvalu),
s 237. For Nauru, see Criminal Code (Qld) s 335. Fault elements are not included in the definitions of assault
in Criminal Code (Qld) s 245; Criminal Code, Cap 262 (Papua New Guinea), s 243.
80 See eg Hall v Fonseca [1983] WAR 309 (Full Ct).
81 Penal Code, Cap 17 (Fiji Islands), s 245; Penal Code, Cap 67 (Kiribati), s 238; Criminal Code, Cap 262
(Papua New Guinea), s 340; Penal Code, Cap 26 (Solomon Islands), s 244; Penal Code, Cap 8 (Tuvalu),
s 238. For Nauru, see Criminal Code (Qld) s 339.
82 See above, n 25 and accompanying text.
83 See above, n 26 and accompanying text.
The Griffith code contains a group of offences against persons for which the primary focus is the infliction of injury rather than the application of force, so that an assault is not a necessary element. Some aggravated forms specify subjective fault elements. There are, however, offences of manslaughter, causing grievous bodily harm, wounding, and causing bodily harm for which responsibility depends wholly on the objective general principles of the code. If the injury is caused by an unlawful act, responsibility for it can only be negatived under the general provision relating to the defence of accident. In the alternative, the offences can be committed through negligent breach of a duty, although Australian authorities have held that the negligence must then be of such a high degree as to amount to ‘criminal negligence’.

The Griffith code is not alone in basing some offences against persons on objective responsibility. Indeed, leaving aside matters of mistaken belief, there are striking parallels between the structure of offences against persons in jurisdictions which follow the model of the Griffith code and jurisdictions which draw upon the common law for general principles of responsibility. There may be a divergence of general principles between the two sets of jurisdictions. The elements of offences, however, tend to convergence for two reasons. One reason, already discussed, is that codes following the Griffith model generally specify subjective fault elements for offences against property. The other reason is that codes drawing upon common law principles generally include some offences against persons for which objective responsibility has been recognised. There is textual support for the objective interpretation in some instances but not in all. Although it may be an axiom of the common law of crime that responsibility is to be determined subjectively, the common law tradition is more complex than that axiom might suggest.

The common law has long permitted manslaughter to be committed through an inadvertent homicide, as long as there is a high degree of negligence in breach of a duty or an unlawful act carrying an appreciable risk of serious injury. These two forms of manslaughter were written into the definition of culpable homicide in the Stephen code and are found in all the South Pacific codes of that model. Moreover, other negligence-based offences involving injury to the person are found in many codes which rely on common law principles of responsibility. Thus, the New Zealand code establishes an offence of injuring a person in such circumstances that, if death had been caused, the offence of manslaughter would have been committed. That offence is copied in the codes of Cook Islands, Niue, Samoa and Tokelau. The Niue version reads:

84 Penal Code, Cap 17 (Fiji Islands), s 198; Penal Code, Cap 67 (Kiribati), s 192; Criminal Code, Cap 262 (Papua New Guinea), s 302; Penal Code, Cap 26 (Solomon Islands), s 199; Penal Code, Cap 8 (Tuvalu), s 192. For Nauru, see Criminal Code (Qld) s 303.
85 Penal Code, Cap 67 (Kiribati), s 220; Criminal Code, Cap 262 (Papua New Guinea), s 319; Penal Code, Cap 26 (Solomon Islands), s 226; Penal Code, Cap 8 (Tuvalu), s 220. For Nauru, see Criminal Code (Qld) s 320. In Fiji Islands, the offence relating to grievous bodily harm was amended in 1969 by the addition of a requirement for the injury to be caused ‘maliciously’: Penal Code, Cap 17 (Fiji Islands), s 227.
86 Penal Code, Cap 17 (Fiji Islands), s 230; Penal Code, Cap 67 (Kiribati), s 223; Criminal Code, Cap 262 (Papua New Guinea), s 322; Penal Code, Cap 26 (Solomon Islands), s 229; Penal Code, Cap 8 (Tuvalu), s 223. For Nauru, see Criminal Code (Qld) s 323.
87 Penal Code, Cap 17 (Fiji Islands), ss 237, 239; Penal Code, Cap 67 (Kiribati), ss 230-231; Criminal Code, Cap 262 (Papua New Guinea), s 327; Penal Code, Cap 26 (Solomon Islands), ss 237-238; Penal Code, Cap 8 (Tuvalu), ss 230-231. For Nauru, see Criminal Code (Qld) s 328.
88 See above, n 25 and accompanying text.
89 See eg Jackson and Hodgetts (1989) 44 A Crim R 320 (Qld CCA).
90 See eg Nydam v The Queen [1977] VR 430 (Full Ct); R v Adomako [1994] 3 WLR 288 (HL).
91 See eg Wilson v The Queen (1992) 174 CLR 313.
92 Crimes Act 1969 (Cook Islands) s 180; Niue Act 1966 (NZ) s 133 (also in force in Tokelau); Crimes Ordinance 1961 (Samoa) s 61; Criminal Offences Act, Cap 18 (Tonga), s 86.
93 Crimes Act 1961 (NZ) s 190.
Every one is liable to imprisonment for a term not exceeding 2 years who by any act or omission causes bodily harm to any person under such circumstances that, if death had been caused, he would have been guilty of manslaughter.\(^\text{94}\)

The reference to manslaughter effectively excludes any implication of subjective mens rea in the elements of the offence. Such an implication is also excluded because these codes contain parallel offences with increased penalties where bodily harm is caused ‘wilfully’.\(^\text{95}\)

Tonga is unusual because it lacks a negligence-based offence relating to non-fatal injuries to the person. Its only offence relating to causing bodily harm requires the injury to have been inflicted ‘wilfully’.\(^\text{96}\) Tonga therefore requires a qualification to the present argument about the convergence of elements of offences between jurisdictions. Its code reflects stronger subjective principles than are found elsewhere in the South Pacific. The Vanuatu code is unusual in another way but it follows the general pattern of incorporating liability for negligent injuries to persons. Its unusual feature is that no distinction is drawn, except for the purposes of penalty, between negligently causing death and other injuries. There is one offence of unintentionally causing damage to the body of another person, either recklessly or negligently, with different maximum penalties for different consequences.\(^\text{97}\)

Another deviation from subjective principles in the common law tradition concerns compound offences, that is, offences comprising an underlying or predicate offence and an aggravating circumstance or consequence which creates a more serious offence. Examples are manslaughter by unlawful act, assault causing bodily harm and indecent or sexual assault. In effect, these are offences of partial mens rea. Mens rea has generally been implied for the predicate offence but not for the aggravating feature. Thus in the Canadian case of DeSousa, it was said: ‘There appears to be a general principle in Canada and elsewhere that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstance.’\(^\text{98}\) The eighteenth-century writings of Blackstone were among the authorities cited for this principle.\(^\text{99}\) As was noted earlier, the Canadian code follows the Stephen model.\(^\text{100}\) The same principle should therefore apply to those South Pacific codes which follow this model. The result is that, with respect to injuries resulting from an assault, there is very little difference in the scope of offences under the Stephen-model codes and the Griffith-model codes. Under either model, the assault must have been intentional or at least reckless.\(^\text{101}\) Liability for the resulting injury is absolute under common law principles but may be negatived by a defence of accident under the Griffith model. That defence, however, will be available only in exceptional cases.\(^\text{102}\)

Admittedly, there is a difference between the Stephen-model codes and the Griffith-model codes in the scope of offences where lack of consent to physical contact is an element: assault, compounds of assault such as indecent or sexual assault, and rape.\(^\text{103}\) The Griffith-model codes widen the scope of liability for

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\(^{94}\) Niue Act 1966 (NZ) s 153 (also in force in Tokelau). See also Crimes Act 1969 (Cook Islands) s 210; Crimes Ordinance 1961 (Samoa) s 81.

\(^{95}\) Crimes Act 1969 (Cook Islands) s 209(2); Niue Act 1966 (NZ) s 152; Crimes Ordinance 1961 (Samoa) s 80.

\(^{96}\) Criminal Offences Act, Cap 18 (Tonga), s 107.

\(^{97}\) Penal Code, Cap 135 (Vanuatu), s 108.


\(^{100}\) See above, n 11 and accompanying text.

\(^{101}\) See above, n 80 and accompanying text.

\(^{102}\) The defence of accident is excluded altogether in ‘eggshell skull’ cases, where the factor making an injury unforeseeable was a pre-existing condition of the victim rather than a subsequent event. See eg Mamote-Kulang v The Queen (1964) 111 CLR 62; Hubert (1993) 67 A Crim R 181 (WACCA). In Queensland, the ‘eggshell skull’ rule was briefly repudiated by the decisions in R v Van den Bemd [1995] 1 Qd R 401 (CA), 179 CLR 137. The rule was, however, restored by statutory amendment: see now Criminal Code (Qld) s 23(1A).

\(^{103}\) See above, ns 49-56 and accompanying text.
these offences by denying a defence of mistaken belief in consent unless the mistake is reasonable. This follows from the divergence between, on the one hand, the provision on mistakes of fact in the Griffith code and, on the other hand, the subjective principles of responsibility at common law. Nevertheless, as it was earlier noted, the practical significance of this divergence of principles depends largely on the intoxication rules which operate in the jurisdictions with Stephen-model codes.104 The impact will be greater if the approach taken in Australia and New Zealand is adopted than if the traditional restrictive rules are maintained.

In principle, this difference in the scope of offences applies wherever a mistake of fact would negative mens rea under common law principles but would be subject to a requirement of reasonableness under the Griffith code. Obvious examples arise from the various situations where mistakes may be made about consent to physical contact: such as sexual interaction, fist fights, contact sports and tactile expressions of comfort or encouragement. It is, however, difficult to conceive of many other examples which are likely to arise with any frequency in practice. In part this is because the distinction between the two sets of principles only matters for the serious offences where the common law would impose a requirement of mens rea. Minor offences of strict and absolute liability at common law operate under the same rules respecting mistakes as those of the Griffith code: if a defence of mistake is permitted at all, it must have been reasonable.

Even among serious offences, it is difficult to think of many examples where the differences of principle produce differences in the practical scope of liability. Mistakes about the age of a sexual partner might have provided an example were it not for special rules operating in the Stephen-model codes. These restrict or deny a defence of lack of mens rea for offences relating to sexual interaction with minors. Such rules can be traced back to the common law.105 They are found in all the South Pacific codes which follow the Stephen model. The specific statutory provisions mainly concern sexual interaction between males and girls.106 In every jurisdiction it is no defence to having sex with a girl under the age of 12 that she was believed to be older.107 The rules respecting mistakes about the age of girls of 12 or above vary between jurisdictions. In the Cook Islands and Samoa, on a charge of sexual intercourse or indecency with a girl between the ages of 12 and 15, it is a defence for a person under 21 to prove that he reasonably believed the girl was older.108 In Niue and Tokelau, where the equivalent offence concerns girls between the ages of 12 and 14, no defence of mistake is permitted.109 In Tonga, the only separate offence for sexual interaction with minors is that applying to carnal knowledge of girls under 12. Where this offence does not apply, there can be a charge of indecent assault for which the Tonga code provides that the consent of a girl under the age of 16 is no defence.110 No express provision is made for mistaken belief that the girl was older. Such a mistake should therefore provide a defence whether or not it was reasonable. If it does, then Tonga would show firmer adherence to subjective principles than other South Pacific jurisdictions, as it does in relation.

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104 See above, ns 57-62 and accompanying text.
105 See eg R v Prince (1875) 13 Cox CC 138 (CCA).
106 Other sexual relationships with minors may fall under general provisions relating to sodomy, indecency or indecent assault. Various provisions state that consent is no defence or that it is no defence where the other party is below a certain age. None of them say anything about mistake belief that the child was older. Such a defence might, however, be subjected to the common law restrictions articulated in cases such as Prince, ibid.
107 Crimes Act 1969 (Cook Islands) ss 145-146; Niue Act 1966 (NZ) s 163 (also in force in Tokelau); Crimes Ordinance 1961 (Samoa) ss 51-52; Criminal Offences Act, Cap 18 (Tonga), s 121, 123. In Tonga, the removal of any defence applies only to the offence of having ‘carnal knowledge’ and not to the offences relating to other forms of sexual interaction. See also Penal Code, Cap 135 (Vanuatu), s 97(3), excluding any defence of mistake of fact in relation to the offence of having sexual intercourse with a girl under 13.
108 Crimes Act 1969 (Cook Islands) s 147(4); Crimes Ordinance 1961 (Samoa) s 53(4).
109 Niue Act 1966 (NZ) s164(2) (also in force in Tokelau). See also Penal Code, Cap 135 (Vanuatu), s 97(3), excluding any defence of mistake of fact in relation to the offence of having sexual intercourse with a girl aged 13-14.
110 Criminal Offences Act, Cap 18 (Tonga), s 124(2).
non-fatal injuries to the person. It is, however, also conceivable that a defence of unreasonable mistake would be excluded by reference to traditional common law doctrine.

There are also some specific provisions in Griffith-code jurisdictions eliminating differences that would have stemmed from applying general principles respecting mistakes of fact. Thus, incest in all jurisdictions, regardless of the model of code, requires knowledge of the relationship. Similarly, although there is some variation in the elements of perjury, it does not concern the divergence of general principles. The difference is merely that the jurisdictions which received the Griffith code through the British Colonial Office permit the offence to be committed recklessly as well as with knowledge of the falsity, whereas knowledge is required in the jurisdictions which received the Griffith code directly from Australia and also in the jurisdictions with Stephen-model codes.

Bigamy is an offence where the elements may have converged because of deviations from general principle in both the Griffith-model jurisdictions and the Stephen-model jurisdictions. Among the Griffith-model jurisdictions, Papua New Guinea is exceptional in making responsibility for the offence wholly objective. For example, a married person who goes through another marriage ceremony in Papua New Guinea does not commit the offence if the first spouse has been absent for seven years but only if there was no reason to believe the spouse was alive during that period. In contrast, responsibility in this respect is subjective under the other Griffith-model codes: the first spouse must not have been known to be alive at any stage in the seven years. There are provisions to the same effect in Cook Islands, Samoa and Tonga, although Niue and Tokelau rely on the common law to cover the matter.

The bigamy provisions in the codes of the Griffith-model jurisdictions, except that of Papua New Guinea, do not deal with other instances where there was a belief that the first spouse was dead. The general provision on mistakes of fact therefore applies and the mistaken belief must have been reasonable as well as honest. There is a specific provision to this effect in Papua New Guinea. There is also a specific provision to this effect in the Tonga code. There is, however, nothing on the matter in the codes of Cook Islands, Niue, Samoa and Tokelau. The common law therefore applies in these jurisdictions. It is, however, arguable that the common law imposes objective responsibility in this respect. The mens rea for bigamy has been a longstanding issue at common law, in part because of the infrequency of cases on the subject. The leading authority is still Tolson, which is also one of the leading nineteenth century cases on the general doctrine of mens rea. In that case, a conviction of bigamy was quashed because of the appellant’s mistaken belief that her first husband was dead at the time of the second marriage. The available defence was expressed as one of honest and reasonable mistake, perhaps reflecting the more objective principles.

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111 See above, n 96 and accompanying text.
112 See R v Prince, above, n 105.
113 Penal Code, Cap 17 (Fiji Islands), ss 178-180; Penal Code, Cap 67 (Kiribati), ss 156-158; Criminal Code, Cap 262 (Papua New Guinea), ss 223-224; Penal Code, Cap 26 (Solomon Islands), ss 163-165; Penal Code, Cap 8 (Tuvalu), ss 156-158. See also Criminal Code (Qld) s 222(1), which is in force in Nauru. See also Crimes Act 1969 (Cook Islands) s143; Niue Act 1966 (NZ) s 172 (also in force in Tokelau); Crimes Ordinance 1961 (Samoa) s 49; Criminal Offences Act, Cap 18 (Tonga), ss 132-134. See also Penal Code, Cap 135 (Vanuatu), s 96.
114 Penal Code, Cap 17 (Fiji Islands), s 117; Penal Code, Cap 67 (Kiribati), s 96; Penal Code, Cap 26 (Solomon Islands), s 102; Penal Code, Cap 8 (Tuvalu), s 96.
115 Crimes Act 1969 (Cook Islands) s 119; Niue Act 1966 (NZ) s 181 (also in force in Tokelau); Criminal Code, Cap 262 (Papua New Guinea), ss 121; Crimes Ordinance 1961 (Samoa) ss 36; Criminal Offences Act, Cap 18 (Tonga), ss 63. For Nauru, see Criminal Code (Qld) s 222. See also Penal Code, Cap 135 (Vanuatu), s 74.
116 Criminal Code, Cap 262 (Papua New Guinea), s 360(3).
117 Penal Code, Cap 17 (Fiji Islands), s 185; Penal Code, Cap 67 (Kiribati), s 163(1); Penal Code, Cap 26 (Solomon Islands), s 170(1); Penal Code, Cap 8 (Tuvalu), s 163(1). For Nauru, see Criminal Code (Qld) s 360(2).
118 Criminal Code, Cap 262 (Papua New Guinea), s 360(2).
119 Criminal Offences Act, Cap 18 (Tonga), s 79(3)(b).
120 (1889) 23 QBD 168.
prevailing in the common law of that era. In dicta in subsequent cases, the formula of an honest and reasonable mistake has been repeated.121 Today, it might be expected that intention or recklessness would be required for the mens rea of bigamy. The House of Lords was invited to make a ruling to that effect in Morgan but the issue was left open.125 An occasion requiring it to be resolved has not yet arisen.

A promising possibility for the differences of principle to have practical impact might seem to be mistaken beliefs that prohibited items, such as drugs, were something else. There are at least no specific provisions eliminating the differences of principle. Yet, although such claims are sometimes made,123 they are rare. Reported cases on drugs offences suggest that accused persons claim ignorance of the presence of substances more often than they claim mistaken beliefs about their characteristics. Even in Griffith-code jurisdictions, ignorance of the existence of a substance provides a defence whether or not the ignorance was reasonable. This is because there is a denial of possession itself rather than a denial of responsibility for it. Control of a thing is one of the essential elements of possession and there can be no control of something without knowledge of its existence.124 It makes no difference whether or not ignorance is reasonable because the rules on responsibility do not come into play. Those rules determine liability only when a person has had possession of a substance but claims a mistaken belief about what it was.

There may well be other offences where the relevance of a mistake of fact could conceivably turn on whether the principles of the common law or the Griffith code apply. With the exception of mistakes about consent to physical contact, however, the likelihood of cases arising in practice seems remote.

**CONCLUSIONS**

At first sight, there appear to be marked differences in the approaches to criminal responsibility under the various South Pacific codes. In particular, there is a division between, on the one hand, those jurisdictions which follow the model of the Stephen code and the New Zealand *Crimes Act* and, on the other hand, those jurisdictions which follow the model of the Griffith code and the Queensland *Criminal Code*. The Stephen-model codes rely extensively on general principles of common law. For serious offences requiring ‘mens rea’, these common law principles now insist on ‘subjective’ responsibility in the form of intention to commit the offence or recklessness respecting its commission. In contrast, the Griffith-model codes incorporate express statements of general principle which effectively base responsibility on ‘objective’ negligence. Vanuatu is a special case. Its code includes express statements of general principle but these are ‘subjective’ in character.

In summary, the argument has been that, although the South Pacific jurisdictions diverge in their general principles of responsibility, this divergence of principles rarely translates into differences in the scope of particular offences. The practical impact of the differences between the subjective principles of the common law and the objective principles of the Griffith code is remarkably narrow. There are several reasons for this convergence. One is that the Griffith code largely abandons objective principles for offences against property. For these offences, Griffith-model and Stephen-model codes alike prescribe specific mental elements of a subjective kind. Another reason is that Stephen-model codes generally contain negligence-based offences against persons (although Tonga is an exception in this respect). In addition, common law doctrine requires mens rea neither for strict and absolute liability offences nor for the aggravating element of compound offences.

The divergence of general principles impacts mainly where mistakes of fact are raised as defences to serious offences other than property offences. The Griffith model requires a belief to be reasonable whereas the Stephen model does not. Even in this context, however, specific statutory provisions or common law doctrines often eliminate the differences which would follow from applying general principles. Few areas

121 See eg *Thomas v The King* (1937) 59 CLR 279; *R v Gould* [1968] 2 QB 65.
123 See eg *Clare* (1993) 72 A Crim R 357 (Qld CA).
124 See eg *Clare*, ibid, 372-4, 381-2.
remain in which cases are likely in practice to turn on the differences of general principle. The only important area in practice may be that of mistakes about consent to physical contact. Over the years since the decision in *Morgan*, consent to physical contact has been a major battleground for competing conceptions of criminal responsibility at common law. In Canada and New Zealand, legislative amendments have overridden the common law and introduced objective responsibility for offences of sexual violence. The South Pacific jurisdictions with Stephen-model codes have not followed that development. Nevertheless, there may still be little scope for a defence of unreasonable mistake if these jurisdictions retain the traditional, restrictive intoxication rules operating in England and Canada. These rules deny an accused the opportunity to use evidence of self-induced intoxication to give credibility, in the absence of reasonable grounds, to a claim of mistaken belief in consent. For defences of unreasonable mistake to have much practical scope in the South Pacific region, the jurisdictions with Stephen-model codes would have to follow Australia and New Zealand in adopting more liberal rules on the use of evidence of self-induced intoxication. Alternatively, they would have to follow Tonga in expressly legislating to allow the use of such evidence to deny any mental element of an offence.

Overall, therefore, the divergence of general principles of responsibility among the South Pacific jurisdictions can be misleading. It masks substantial convergence in the elements of responsibility for particular offences. That does not mean that the divergence of general principles can be ignored except in those few instances where it leads to different outcomes. Even where the outcomes are the same, the divergence often requires that different lines of reasoning be used to reach those outcomes. The primary significance of the divergence is methodological rather than substantive. This is not because of any peculiar features of the South Pacific codes. Similar conclusions might be drawn about the differences between those Australian jurisdictions which have Griffith-like codes and those which draw on common law principles of responsibility. The focus of this paper has been on the South Pacific codes. The paper could, however, also be read as a contribution to a broader understanding of the relationship between the Griffith code and the common law.