

Codification of the Criminal Law: the Australasian parliamentary experience.

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Part 1 Introduction

The "codification" movement has (as far as I am aware) had no comprehensive historian; though the subject is fit for a sustained study. However even the most cursory study runs into problems of definition.

Many proponents of "codification" were non-lawyers who sought in codification a way to make the law more accessible to laymen and, not incidentally, to lessen the privileged position of lawyers as the profession which relied, or was perceived to rely, on the very mystery of the law as the key to its professional success. Such lay advocates of codification not infrequently referred to the Code Napoleon of France, which had rationalised and restated the abstruse law of 18th century France in a relatively short and intelligible compass. Those with a classical education (which of course included many influential persons on either side of the debate) may also have been influenced by knowledge of Greek or Latin consolidations or "Codes" of law. Of the Bills considered in this paper only the Hearn code in Victoria can be thought to fit this theoretical model in any way.

However it appears to me that the successes of the codification movement owe little to the lay advocates of reform - except insofar as particular factions of lawyers seeking change could mobilise them to give parliamentary support to bills opposed by other factions of lawyers. Successful, and unsuccessful, codes were the work of lawyers; their success or failure seems to have depended on the balance between opposition from other lawyers, and support from laymen.

We must distinguish between three conceptually different kinds of measures, - all of which were sometimes labelled as "codification" - indeed some 'codes' contained elements of all three. The simplest form of so-called "codification" is what might better be called "consolidation" - the bringing together *without substantive change* of relevant statutory provisions which were otherwise scattered over a number of statutes or where amending legislation had been passed but was not collated with the original. The collations of many English offences into five statutes in 1861 furnish a convenient example of this kind of "codification".¹ Parliament was again moved to action in 1861, when five major statutes dealt with offences against the person, malicious damage to property, larceny, forgery and coinage offences and accessorial liability.

¹ Coinage Offences Act 1861; Larceny Act 1861; Forgery Act 1861; Offences Against the Person Act 1861; Malicious Injuries to Property Act 1861.

Secondly there are those statutes which were designed as statutory restatements of settled common law principles. Statutes as the Bills of Exchange Act 1882(Imp),² the Sale of Goods Act 1893(Imp) and the Partnership Act 1890(Imp) merely sought to put into an accessible statutory form the relevant common law rules laid down by the courts. These English “codes” were widely re-enacted throughout the Empire.

Lastly there are the measures which can truly be described as “codes” – an attempt to combine the existing statutory law – in some cases with rationalisation or piecemeal reform of problem areas – together with a reduction to statutory form of at least a substantial element of the common law. The various Criminal Codes we are considering fall most naturally into this latter class, but it must be remembered that they included significant elements of consolidation and restatement along with some reform.

2. Codification of the Criminal Law in England

The history of the attempts to codify the English criminal law is well-known, and need only be sketched here.³ The first element of “codification” was the legislation of the 1820s, sponsored by Sir Robert Peel which repealed many of the obsolete statutes which cluttered up the criminal law, and removed the death sentence from many offences of little weight.

In the 1830s Commissions were appointed to draft a code for the Criminal Law, but no true “code” resulted in England, though the moves bore fruit with the statutes already mentioned in 1861, where five major statutes dealt with offences against the person, malicious damage to property, larceny, forgery and coinage offences and accessorial liability, and others dealt with procedural matters. These Acts mostly consolidated earlier law, but in some areas, such as theft, there was an element of reform. The work of the reformers in the 1820s and subsequent years was drawn on by Macaulay for his draft Indian Penal Code, written in 1835, promulgated in 1858 but not in effect until 1862. It seems to me possible, though this is speculation, that the relative success of the Indian statutory codes, and the experience of them that some parliamentarians and civil servants acquired, may have been a factor in encouraging support for codification in England itself.

The best-known, and most far reaching, attempt at codification in England is the “Stephen” code. Sir James Fitzjames Stephen first drafted a bill to state the law relating to murder, but later broadened his aim to propose a code which would largely replace the unwieldy, indeed often near incomprehensible, mixture of common law and statute which stated both the criminal offences and regulated prosecutions for them. In the words of the New Zealand Criminal Law Commissioners in 1883, the object of the Stephen Code was:

“to produce a collection of lucid and intelligible definitions, derived both from the common law and the statutes, of the ordinary crimes punishable on indictment, and to arrange, collect, and amend the rules of practice and procedure in such cases.”⁴

Stephen attracted significant support, and his proposals, were referred to a royal commission (on which Stephen sat) which supported codification, largely in the form Stephen proposed but with some modifications.

² McGinnis, “Statute Law and the Owl of Minerva: the Bills of Exchange Act 1882” (1986) 24 Alberta LR 275, 276–278, gives a good account of the process of reform which led to the 1882 Act.

³ For an extensive discussion of the nineteenth century reforms, see Bentley *English Criminal Justice in the Nineteenth Century* (London, Hambledon Press, 1998).

⁴ Memorandum para8

Although bills based on the Commissioners' draft Code were regularly introduced into the British parliament from 1879,⁵ they all failed in the face of fierce opposition from the more conservative factions among the lawyers and judges, most notably from Lord Cockburn, the Chief Justice. A rival code, the work of E D Lewis, a London solicitor, was introduced in 1880, but failed to progress.⁶

2.1. Other Colonies

I have mentioned the Indian Penal Code. This was not the only example of British interest in creating a suitable body of 'code' law for its colonies. In 1870 The Colonial Office commissioned Robert Wright⁷ to draft such a code – originally intended for Jamaica - which was circulated to those colonies which did not have responsible government,⁸ after scrutiny by Sir James Stephen, whose role in the English proposals for codification of the criminal law has been discussed earlier. It was adopted in a few of the West Indian colonies.⁹

The Colonial Office had also, in the 1860s, sent material on codification to the colonies, as with the despatch of copies of David Dudley Field's Civil Code and Penal Code for New York. Such material was likely, but not certain, to end up in the Parliamentary Library.¹⁰ This was not the only way such material was received, as in some cases the authors circulated copies on their own initiative, as with Field, who sent a later version of his codes to South Australia in 1873, where the Governor sent them to the Chief Justice.¹¹

2.2 Canada

Although the question of codification of the law generally, and of the criminal law in particular in Canada falls outside this paper, we should note that Canadian efforts to codify the statute law had commenced at an early date – Baker indicates as early as the 1850s in Upper Canada¹² - and that many provinces had adopted a process of regular revision and re-enactment of their statutes. The most notable element of codification is the Criminal Code Act passed by the Canadian parliament in 1892,¹³ though its passage was not the subject of any specific reference at all in any Australasian discussion of a criminal code.

⁵ For a detailed account of the differences between the draft Stephen Code and the English Criminal Code Bill as introduced, and for the parliamentary history of the Bill, see A H Manchester, "Simplifying the Sources of the Law: An Essay in Law Reform. Part II - J.F. Stephen and the codification of the Criminal law in England and Wales" *Journal Reference* (1973) 2 *Anglo-American LR* 527

⁶ See Stephen White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 *VUWLR* 353, 357.

⁷ M Friedland, "R S Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 *Oxford Journal of Legal Studies* 307.

⁸ Taylor, Henry "*Autobiography*" (London, Longmans Paul, 1885) Vol.2, p.281. Taylor indicates that the Colonial Office later suggested colonies wait for the enactment of the Stephen Code.

⁹ R S O'Regan *New Essays on the Australian Criminal Codes* (Law Book Co Sydney 1988) p 108, n19.

¹⁰ See for example Bowen to Carnarvon, despatch 21/67, 6 May 1867, CO 234/18.

¹¹ Musgrave (Governor) to Hansen 12 Oct 1873, file GRG 2/19 1874-77, South Australian Public Record Office.

¹² G Blaine Baker "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and History Review* 219

¹³ The literature on the Canadian Criminal Code is extensive. The most accessible account is Graham Parker "The Origins of the Canadian Criminal Code" in David Flaherty (ed) *Essays in the History of Canadian Law* (U of Toronto 1981) vol 1. Useful articles in the legal journals include: G Crouse "A Critique of Canadian Criminal Legislation" (1934) 12 *Can Bar Rev* 545, 601; A W Mewett "The Criminal Law 1867-1967" (1967) 45 *Can Bar Rev* 726; A Hooper "Some Anomalies and Developments in the Law of Homicide" (1967) 3 *UBCLR* 55; J J Atreus "The Mental Element in Theft" (1967) 3 *UBCLR* 113; W S Johnson "Extra-territorial Criminal Legislation" (1935) 13 *Can. Bar. Rev.* 137.

3. New Zealand and the Criminal Code Act 1893

3.1. Phase 1 – 1883 – 1886

New Zealand showed little, if any originality, in the field of criminal law until the 1880s. New Zealand inherited English law as at 1840, but made little change to it apart from adopting the English reforms of 1861 (though this was not done until 1867). It must be noted that “police” law or summary offences and regulatory offences did receive more attention, and apparently more legislative resources, than truly “criminal” law, although again the form of these provisions owes much to English legislation. For many years such petty offences were controlled by provincial legislation, and no national statute was passed until 1884.¹⁴

New Zealand appointed Alexander Johnston, a judge of the Supreme Court, and Walter Reid,¹⁵ the Solicitor-General, as Criminal Code Commissioners in 1879¹⁶ following the pattern required by the Statutes Revision Act 1879. That act is itself worthy of mention. In 1878 New Zealand enacted the Reprint of Statutes Act 1878, which allowed commissioners (Johnston, Reid and an assistant) to collate the statutes for re-printing. These commissioners then reported that mere collation by way of re-printing would be wasteful and unhelpful, and the Government responded by a new bill to allow the commissioners to consolidate the existing law without changing its statutes. It is one measure of the limited aim of the 1879 Bill that it went through the Legislative Council, and its first reading in the House of Representatives, as the “Reprint of Statutes Bill 1879”; it did not become the Statutes Revision Bill until the second reading. The Principle of consolidation in this form received general support, but it is also notable that one MP, Stewart, drew the Government’s attention to the writings of W E Hearn in Melbourne, and his intention to codify the entire law.¹⁷ That, suggested Stewart, was the model which the government should follow.

The labours of Reid and Johnston in the criminal law field, and the history of the drafting and aspects of the passage of the Act have been discussed by Stephen White¹⁸, to whose writing I am indebted, although I would perhaps not concur entirely with the manner in which he has edited some of his citations from the parliamentary debates¹⁹

The Commissioner’s memorandum set out the history of their labours and of the English Bill. In words which were to be repeated regularly by opponents of the CCB, they said of the merits of the Bill:

“We are not prepared to undertake the responsibility of expressing a decisive opinion on the propriety of adopting at once the English Bill of 1880 with the necessary modifications. We are still of opinion that it might be better to defer the enactment of the code in the colony till the English Parliament has finally dealt with the subject”²⁰

Nor were the Commissioners prepared to express their own opinion of the merits of the proposal, incorporated in the English Bill of 1880, that the accused be able to give evidence at his or her own trial.

¹⁴ The Police Offences Act 1884.

¹⁵ For details of Reid’s life, see *DNZB*, vol 2, 221.

¹⁶ Their memorandum accompanying the Bill of 1883 (hereafter “Memorandum”) is reproduced in the 1908–31 Reprint of the New Zealand Statutes, vol 2, 176–181

¹⁷ (1879) 34 NZPD 783, 8 December 1879.

¹⁸ “The Making of the New Zealand Criminal Code Act of 1893: A Sketch” (1986) 16 VUWLR 353.

¹⁹ Eg at p357 White cites two criticisms of flogging etc , without acknowledging the extent to which these are quite unrepresentative of the whole debate, and that contrary views ere expressed.

²⁰ Memorandum ,para 3, reprinted in the 1908–31 Reprint of the New Zealand Statutes, vol 2, at pp 176-177.

They were more ready to express the definite view that the English Bill's proposals for a more structured system of criminal appeals and re-trials should not be adopted, as they considered the new Zealand experience had shown no significant defects with the extant procedures (which were essentially those used in England to allow judges to reserve points for the opinion of the other judges in the Court of Crown Cases Reserved).

The Commissioners largely worked from the English Bill of 1880, but with some changes to fit it for New Zealand conditions. They acknowledged that the CCB did not reproduced all the existing statute, law, as they had omitted offences "...which may be deemed historical monuments of the political and religious struggles of former times, and can hardly be called parts of the ordinary criminal law"²¹ as well as statutes "which were passed under special circumstances no longer existing", or which were covered by other specific legislation such as customs offences. Imperial statutes expressly stated to be in force in New Zealand were also omitted.

The major changes to earlier law which were proposed were:

(a) the abolition of the distinction between felonies and misdemeanours;

(b) the definition in statute of offences formerly only defined by the common law, and of a number of offences which appeared in older statutes (in particular homicide, theft and fraud were simplified).

(c) Along with this many common law defences ("matters of justification and excuse") were also encapsulated in the statute, and were made available both to proceedings under the new Act or in summary trials etc.

(d) the abolition of the common- law presumption that a married woman committing an offence in the presence of her husband was acting under compulsion.

(e) the Bill effected a very drastic simplification of the rules of criminal procedure , although much of the English Bill of 1880 dealing with the preliminary steps had already been passed in the Justices of the Peace Act 1882 (NZ).

The Commissioners did recommend adoption of significant elements of the English Bill of 1880 regarding the drafting of indictments, change of venue applications and the like, along with one or two new provisions, such as a power for Justices of the Peace to make inquiry into suspected offences where no particular person was charged (cl 366) – this particular clause being the subject of some criticism in later debates, although its origins in the Commissioners' recommendations was not then accorded prominence.

The New Zealand CCB may thus be seen as largely a consolidation,, though some elements were clearly codifications of the common law and there were several truly reformist elements, such as those regarding the accused's right to testify.

The first introduction to the New Zealand Parliament of the CCB was in June 1883, only a matter of 11 days after the Commissioners had finished their labours.

It appears that the CCB was an official government measure. It was introduced by the then premier, Frederick Whitaker , much of whose second reading speech was directed at the benefits

²¹ Memorandum, para 9. Some such legislation remained, at least theoretically in force until the passage of the Imperial Laws Application Act 1988, including the Fifth of November Observance Act 1606, which required bishops, on pain of a monetary penalty, to preach a sermon of thanksgiving for James VI and I's escape from the Gunpowder Plot of 1605.

of codification generally. Whitaker specifically mentioned the success of both the French and the New York codes, although he took the view that codification would have to proceed in stages.²² At this first opportunity for debate the CCB met with a lukewarm, though not entirely unsympathetic hearing, although the Premier's political opponents sought more time to digest the Bill. One constant feature of the debates on the CCB did arise at this first occasion – the recital of the Commissioners refusal to recommend passage of the bill, and their suggestion that new Zealand should await the passage of the English Bill.²³

Some weeks later the Bill was back before the legislative Council, on a motion that it proceed to committee stage. Among the objections urged to immediate passage of the bill was a concern, later often resuscitated, about the inclusion of a statutory offence of blasphemous libel, with concerns on the one hand that this law might have to be administered by a judge and jurymen “not of the Christian faith”²⁴. Other opponents focussed on other defects, real or imagined, in the Bill, such as the, false, view that allowing the accused to give evidence would mean the accused could be interrogated, “in the French style” by the trial judge,²⁵ or the more reasoned objections of a conservative lawyer, Mr Brandon, who not only did not agree with the introduction of a clause allowing the judge to discharge an accused committed for trial, but also found fault with some of the sentencing provisions.²⁶ This debate, too, saw the only call made during the entire decade's debate on the Bill for the Bill to be submitted to the profession and the judiciary for their views.²⁷ The bill did not proceed, as a week later Whitaker announced he was withdrawing it as there was no time to deal with it in that sitting.

In the following year the Bill was again introduced, as a government measure, but was discharged from the order paper only a week after the first reading.

A very significant change took place in 1885, when the Bill was introduced for a third time, but on this occasion by a more committed backer, Patrick Buckley, the Colonial Secretary and a successful lawyer, later to be Attorney-General and briefly a judge of the Supreme Court Buckley, who had sought more time to study the bill in 1883, seems now to have become fully convinced of both its utility and the quality of the draft. The Bill again met with a mixed reception, with concern again being expressed as to the blasphemy offence²⁸ and as to the provision allowing the accused to give evidence, it being alleged the latter would effectively remove the benefit of the presumption of innocence because liars would readily give false evidence where honest but less confident accused would not testify at all.²⁹ The is reception thus mixed concerns the bill was too much a consolidation in that it included elements of existing law which should be discarded, with concerns it was too reformist.

When the Bill again came to the committee stage in July, there occurred a vignette which encapsulates another feature of the repeated debates on the CCB, the lack of solid cross-party support for the Bill at any stage. Frederick Whitaker, a political opponent of Buckley, made a strong speech in favour of the Bill – which of course he had introduced in 1883 - arguing the consolidation case that:

²² (1883) 44 NZPD 44 June 20 1883

²³ (1883) 44 NZPD 444-45; June 20 1883, speech of Mr Wilson MLC.

²⁴ (1883) 45 NZPD 578; 14 August 1883, speech of Mr Wilson MLC.

²⁵ (1883) 45 NZPD 578; 14 August 1883, speech of Mr Holmes MLC

²⁶ (1883) 45 NZPD 579; 14 August 1883, speech of Mr Brandon MLC

²⁷ (1883) 45 NZPD 578; 14 August 1883, speech of J C Richmond MLC

²⁸ (1885) 51 NZPD 57; June 19 1885 speech of Captain Fraser MLC .

²⁹ (1885) 51 NZPD 56; June 19 1885 speech of Mr Hart MLC.

“... that law which must be sought out by lawyers – for other people were not able to look for it – and which was distributed through such a large number of books. The object of the Code was simply to put into the smallest space possible the whole of the law with regard to indictable offences”³⁰

but then voted against the bill progressing further.

Other critics of the Bill argued there was too great a degree of overlap with the Police Offences Act 1884 (which generally provided significantly lower penalties for similar criminal conduct)³¹ or returned to the inclusion of blasphemy;³² or canvassed the ever convenient arguments that N/Z should wait for England to legislate, or that Lord Cockburn’s views meant the CCB should not be adopted although:

“No doubt it would be some advantage to have a code, and to get the statutes into a small and portable shape.”³³

The Bill survived, but by the very close margin of 19 votes to 18. It passed its third reading more comfortably, (with Whitaker reversing his stand and voting for it), and with only the blasphemy issue raising concerns.³⁴

The Bill was then sent to the House of Representatives where it had its first reading on 28 July, but languished for some weeks before the second reading on 1 September. It was there moved by Joseph Tole, the Minister of Justice, whose lengthy speech set out very fully the history of the moves for codification, and claimed that the CCB would result in the repeal of fifty or sixty statutes in addition to the more than one hundred consolidated in the English Acts of 1861 which had been adopted in the colony in 1867.³⁵ Tole drew particular attention to the provisions for admissibility of evidence from the accused or his or her spouse, but, perhaps overly intransigently, informed the House that as this was a ‘technical’ bill, he would withdraw it if the House sought to debate it clause by clause rather than passing it as a whole and leaving it to the Law officers (Attorney-General and Solicitor-General) to check it. He summed up the argument for this thus :

“It has been described as a work of high literary art, and should be the production of almost a single master-mind, possessing a very rare combination of qualities. In other words it is a law-book, and parliament can not more write a law-book than it can paint a picture”.³⁶

There ensued probably the best informed and most wide-ranging debate on the Bill to occur in New Zealand - or perhaps even in any of the Australasian legislatures considering Code bills. A very able speech by W Downie Stewart, a Dunedin lawyer, criticised much of the bill, but on principled or reasoned technical grounds.³⁷ Downie Stewart, after characterising the French code as “the most complete criminal code in operation” also referred to the merits of the Indian Penal Code of 1860. He then pleaded for the introduction of a French-model Public Prosecutor or an official similar to the Scots Procurator Fiscal. He then turned his attention to the provision allowing an accused to give evidence. He welcomed the concept but, citing a study he had done on American law when travelling there ten years earlier; urged the adoption of a provision, widespread in the American states, that failure to give evidence could not be commented on by

³⁰ (1885) 52 NZPD 206; July 24 1885, speech of Frederick Whitaker MLC.

³¹ (1885) 52 NZPD 206; July 24 1885, speech of Mr Brandon MLC.

³² (1885) 52 NZPD 208; July 24 1885, speech of JC Richmond

³³ (1885) 52 NZPD 207; July 24 1885, speech of Mr Wilson MLC.

³⁴ (1885) 52 NZPD 277 – 278; July 28 1885 speeches of Mr Wilson MLC and Mr Pharazyn MLC.

³⁵ (1885) 53 NZPD 407-08; 1 September 1885

³⁶ (1885) 53 NZPD 409; 1 September 1885

³⁷ (1885) 53 NZPD 410-412; 1 September 1885.

prosecution counsel or by the judge – an opinion which appears to have been heeded as such protections were later enacted.³⁸

Downie Stewart he concluded this tour of the Act by urging the need for a good appellate process. Another speaker wanted changes to the Bill to reflect the raising of the age of consent to 16 in England.³⁹ These speeches, of course focuses most on the reformist elements of the bill.

They may be contrasted with the concern that too much old law was consolidated -, as with Mr Moss's concern was that the Bill provided for the retention of the punishments of whipping and flogging.

“Those customs and those laws which are applicable to an old country like England are not applicable to us. I say in this country we have no criminal class, no class to be regarded as fit to be flogged; and we know that in England there is a large and permanent criminal class”.⁴⁰

After an adjournment, and a most remarkable paean of praise for the Bill from a government supporter from Mr Pyke – whose effusion included such statements as :

“... it is the utmost perfection of Bill-drawing ever laid before the legislature For pure English, for clearness of expression, the impossibility of raising legal quibbles on any of the clauses, there is nothing to equal it “ “ it is a work of art; it is utterly homogeneous. It cannot be altered without destroying it”.

but who nevertheless did make a serious comment on the need for spouse to be able to testify both for and against each other⁴¹ - the Bill passed its second reading, but it appears that lack of parliamentary time for the committee stage caused the Bill to be abandoned. It was several years before any version of the CCB would make it as far through the parliamentary process.

The Government tried again the following year, with Mr Tole moving the Bill in the House of Representatives in May, early in the session. In the second reading debate, on 23 June 1886, Mr Moss returned to his opposition to flogging as a basis for opposing the Bill; a stance which did draw forth from a more conservative MP the response that he:

“could not but protest against that false humanitarian feeling which seemed to be growing up against flogging and capital punishment.”⁴²

Other concerns emerged – the age of consent issue was again raised, along with new matters such as Downie Stewart wanting an end to private prosecutions⁴³ while others raised the Bill's provisions relating to criminal libel. One major concern, emerging here for the first time but to become a recurrent refrain in later debates, was the extent to which the Bill provided for certain matters to be dealt with a questions of law for the judge rather than matters of fact for the jury.⁴⁴ These may be seen as a critique of the bill as not truly consolidatory and as reforming matters in an unpopular way.

Much of the opposition was clearly purely party politicking, and this drew into the debate the Premier, Sir Robert Stout, who argued the Bill was both well-drafted as to criminal libel and that

³⁸ Criminal Evidence Act 1889, s4; Criminal Code Act 1893, s400.

³⁹ (1885) 53 NZPD 413; 1 September 1885, speech of Mr Fulton.

⁴⁰ (1885) 53 NZPD 413; 1 September 1885

⁴¹ (1885) 53 NZPD 417 September 1 1885, speech of Mr Pyke .

⁴² (1886) 55 NZPD 67; 23 June 1886, speech of .Mr Joyce.

⁴³ (1886) 55 NZPD 70; 23 June 1886.

⁴⁴ (1886) 55 NZPD 76.

any concerns as to particular provisions (as with the blasphemy provision which he opposed) could be dealt with at the committee stage.⁴⁵

A motion to send the Bill to committee stage where only 14 nominated clauses would be considered was passed, but when the Bill came to the Committee stage support for it had waned, and the conservative opposition was able to muster sufficient numbers to defeat it in committee 33 votes to 30. Much of the debate at the committee stage concerned criminal libel, but the debate is notable for a further set of references to American law. Mr Moss abandoned his corporal punishment hobbyhorse to criticise the drafting of the offences relating to sedition and treason, arguing that these were much better defined in the California Code, of which he had the 1872 edition.⁴⁶ Moss's references were perhaps the more apposite because Stout had cited several American legal journals as favouring the English draft Code.⁴⁷

3.2 Phase 2 1887 – 1890

With this defeat there ended the first phase of attempts to pass the CCB; it had by that stage passed the legislative Council twice, and had been through the second reading and committee stages of the House without passing into law. This history may have influenced the government not to make great efforts to seek its passage, but a more likely explanation is that political power returned, briefly, to the conservative factions in parliament, and the CCB had few if any supporters there,.

No version of the CCB was moved in 1887, and in 1888 it was only introduced on the motion of Buckley, its quondam champion, who made it clear he was moving it in place of the Attorney-General, (Whitaker was then Attorney-General in a relatively conservative ministry), although Buckley hoped the Bill would receive government support in "another place" (the House of Representatives). Buckley's speech moving the first reading referred to the history of the Bill; dealt with matters which had changed such as a provision to raise the age of consent, and referred again to the need to provide for an accused to give evidence.⁴⁸ Without further debate the Bill passed its first reading and was sent to a Select Committee. Following the report of that Select Committee, the Bill was more fully debated at its second reading, where attention once again focussed on the blasphemy provision, with Mr Pharazyn recounting to the Council a case prosecuted in New York at a time when he visited that city.⁴⁹ The Bill passed its second reading by 20 votes to 15, and later received its first reading and was then introduced in the House of representatives only to be discharged from the order paper almost two months later without a second reading.

No proceedings on the Bill took place in 1889 or 1890, although the Criminal Evidence Act 1889 did allow an accused to give evidence and in 1890 a Bill was introduced for a Court of Criminal Appeal, though that did not progress.

3.3. Phase 3 1891 1893

Things changed dramatically in 1891, as the Liberal party gained power with a significant majority in the House of Representatives. The conservative faction in the Legislative Council held up reform legislation for a couple of years, but under threat of "swamping" the Council ceased to offer vigorous resistance to Government measures. It is this change in political fortunes that led, in my opinion, to the passage of the CCB in 1893.

⁴⁵ (1886) 55 NZPD 70 and 73.

⁴⁶ (1886) 55 NZPD 456; July 9 1886

⁴⁷ (1886) 55 NZPD 454-55; July 9 1886.

⁴⁸ (1888) 60 NZPD 196-99; 23 May 1888.

⁴⁹ (1888) 61 NZPD 143; 19 June 1888. See also the speech of Mr McLean MLC at p 142.

The first attempt under the Liberal government took place in June 1891, with Buckley – now Attorney-General and Colonial Secretary, and second in seniority to the premier, Balance, in Cabinet – again introducing the Bill. The Bill received little discussion, and was referred to the Statutes Revision Committee, and within a fortnight had passed both committee stage and its third reading.

The Bill was then introduced into the House of Representatives, where most of the debate is of a partisan character. Some discussion did take place of the substance of the bill – with mentions of bigamy and libel provisions as unsatisfactory, and repetition, by Mr Hutchison, of claims that the New York and Californian codes were better drafted. Hutchison also alleged that only three changes had been made by the Statutes Revision Committee in three hours discussion – over a provision as to assault on teacher of ethical religion; arson of grasslands and the punishment of hanging an executed convict in chains as a deterrent to others. More cogently, he argued that the Grand Jury should be abolished.⁵⁰ Others revived the perennial debate over criminal libel.

The interesting speech is that of Mr Hogg, who first argued the not particularly novel case that the Bill contained a dreadfully severe range of penalties, and then went on to the unique argument that the whole criminal law was futile because if there were no gaols, gaol contractors and judges there would be no criminal class.⁵¹ He appeared unaware of the fact that penalties he criticised were all in the existing law, a matter pointed out with some asperity by government members.

Although the Bill passed that reading, it was a casualty of the early termination of the session consequent on the Legislative Council's rejection of other measures.

In 1892 the Bill was introduced yet again, in the House of Representatives, this time with Richard Seddon in charge. Seddon's second reading speech recounted at length the history of the CCB, and argued vehemently for codification as a good principle – though few would now accept his statement that:

”I will say that Napoleon gained a greater name by his codification of the laws of his country than he did as a general”⁵²

The debate on the Bill rarely touched on any matters of substance. The CCB did however die in the Committee stage, for reasons which are obscure, though it appears the Liberal cabinet all voted for it to proceed.

In 1893 the Liberals once again sought to pass the Bill, clearly as a government measure. Buckley introduced it in the Legislative Council, where it passed through its various stages with only perfunctory debate.

The Bill came to the House of Representatives in September 1893, and after one last wrangling debate passed its second reading comfortably. Little new emerged in the debate, although Mr Hutchison did point out that infanticide provisions struck out in 1892 had re-appeared, and Mr Hogg was able once again to inveigh against the criminal justice system as ineffective.⁵³ William Pember Reeves, moving the Bill, gave perhaps the most unusual reason ever for law reform – that the costs of re-printing such a substantial Bill each year were unreasonable!⁵⁴ The Liberal majority crushed attempts at committee stage to delete clauses dealing with procedural

⁵⁰ (1891) 72 NZPD 322.

⁵¹ (1891) 72 NZPD 326.

⁵² (1892) 77 NZPD 104; 16 August 1892.

⁵³ (1893) 81 NZPD 591 and 595, respectively; 4 September 1893.

⁵⁴ (1893) 81 NZPD 590; 4 September 1893.

aspects of the bill, and the bill passed its third reading on 27 September 1893, a little over three weeks from its introduction in that chamber.⁵⁵ The Legislative Council agreed on the following day to amendments made by the House of Representatives, and eight days later the Bill received the Royal assent; after more than ten years of legislative debate and accident.

It is notable that detailed issues of significance in the definitions of offences were rarely discussed – it is perhaps notable that while the Stephen Code required as a part of the mental element of theft that an accused intend to deprive the owner *temporarily or permanently* the Canadian, and the New Zealand Codes both required an intention to deprive permanently.⁵⁶ However there is much debate as to other matters which can be seen as representing different, if unarticulated, viewpoints as to the degree to which the CCB was consolidatory or reformist.

White has argued that the key reason for the passage of the Bill is that the leading lawyers of the time, persons who were generally in positions of power, supported the Bill.⁵⁷ This is to a certain extent true, but it takes no account of either the opposition to the Bill shown by other lawyers, nor the rather ambiguous role played by Whitaker. Nor does it explain in any way the problem that it was on several occasions a shortage of parliamentary time which led to Bills not passing; these leading figures might, one would have thought, be able sufficiently in command of the parliamentary agenda to be able to ensure that time be made available.

My own view is that, while the support of leading lawyer figures is important, the long-drawn out passage of the Bill must be seen very much in the context of a partisan political period, where after Whitaker's early and lukewarm support of the Bill, the proponents of the Bill are almost entirely drawn from the ranks of the Liberals, and the opponents largely from more conservative political groupings. The liberal governments of 1883-1886 almost managed to pass the Bill; the overwhelming strength of the Liberals in 1893 guaranteed its passage. It will be noted that at no time was there any formal process in New Zealand for further consultation with the profession and the judiciary, although White makes it clear that the judges were consulted.⁵⁸

4. Victoria

As with other Australasian colonies, Victoria had taken steps to “consolidate” at least some of its statute law. One round of “consolidation” took place in the mid 1860s and a second round of such consolidations took place in the late 1880s. George Higinbotham, a leading figure in the colony featured largely in both.⁵⁹

However the most substantial, if not the most successful, attempt at statutory reform in Victoria was the attempt by W E Hearn⁶⁰ to codify the entire statute and common law of general application, that is the law other than that “applicable to particular persons or classes of persons”.⁶¹ Hearn laboured over a draft code, drawn in part from the Victorian consolidations, and also from English statutes and the Indian Contracts Act and Indian Succession Act, for more

⁵⁵ (1893) 82 NZPD 785; 27 September 1893

⁵⁶ Criminal Code Act 1893 (NZ) s 218; Canadian Criminal Code Act 1892 s305, and see J J Atreus "The Mental Element in Theft" (1967) 3 UBCLR 113.

⁵⁷ Stephen White⁵⁷ “The Making of the New Zealand Criminal Code Act of 1893: A Sketch” (1986) 16 VUWLR 353, at p 374.

⁵⁸ Stephen White “The Making of the New Zealand Criminal Code Act of 1893: A Sketch” (1986) 16 VUWLR 353, 365. White refers to J C Richmond’s opposition to the Bill, but not to his earlier parliamentary speeches against it, see 27 above.

⁵⁹ E E Morris, *A Memoir of George Higinbotham* (MacMillan & Co, London, 1895), pp 290 –294; see also Alex Castles *An Australian Legal History* (1982) pp 480-481.

⁶⁰ D B Copland, *W E Hearn, First Australian Economist* (Melbourne UP 1935) gives details of Hearn’s life but does not discuss his legal activities.

⁶¹ W.E. Hearn, 1884 46 VPD 1311.

than a decade, assisted for the last two years by seven Government-funded lawyers.⁶² A copy of Hearn's 1885 Draft Code for Victoria 1885, bearing Hearn's annotations for 1886-87, is preserved in the Australian National Library in Canberra.

Hearn had divided his Code into a number of Bills, the first of which - on "the duties of the people" - was introduced into and passed through the Victorian Legislative Council in 1884⁶³ A second part of his draft code, a Bill on "particular rights and duties" did not progress beyond its second reading in the legislative Council. These bills then are "codes" in their narrowest and truest sense - a restatement of all existing law in a narrow compass.

The Bill with which we are particularly concerned, as it contained a very substantial component of Criminal law was the Substantive General Law Consolidation Bill 1884 which was introduced in August 1884.⁶⁴ In his second reading speech W Hearn explained that his aim as a codifier was to "...declare the common law, to consolidate the statute law and make such changes as naturally follow from this process".⁶⁵

The Bill was deigned to codify all serious criminal offences and much of the law of wrongs, but did not deal with the relevant procedural law. The Bill also therefore tried to state in statutory language the defences which existed at common law, in more exhaustive form than did the Stephen Code or its progeny.

Hearn said he had built on Stephen's draft Code, but he had also sought comment from the Victorian profession - he had sent copies of his draft to all the Judges of Supreme and County courts, all police magistrates and crown prosecutors. Hearn urged the Legislative Council not to send the Bill to a committee of judges - as this had been urged on him as a desirable procedure but he considered that consideration of it required a clear and refreshed mind, which judges could not hope to bring to it as addition to their ordinary work.⁶⁶

The Bill was welcomed by other Councillors, and was after its second reading sent to a select Committee, which reported back on 11 November.⁶⁷ Unfortunately the details of that report are not available, but it is clear the Bill had not received sympathetic consideration, and many amendments had been suggested, so much so that Hearn himself withdrew the Bill the following day.⁶⁸

Nothing further came of Hearn's Code, although there were later suggestions that something more should be done toward codification.⁶⁹ No doubt much of the reason for the lack of action was Hearn's death in 1888.⁷⁰

⁶² Higinbotham supported Hearn's proposed General Code in principle - wanted to see full codification of common law - but did not agree with Hearn's scheme of arrangement. Morris, E E *A Memoir of George Higinbotham* (MacMillan & Co, London, 1895), pp 293.

⁶³ Alex Castles *An Australian Legal History* (1982) p 482

⁶⁴ (1884) 47 VPD 935 12 August 1884.

⁶⁵ (1884) 47 VPD 1310 9 September 1884.

⁶⁶ Ibid, 1313.

⁶⁷ 1884) 47 VPD 2065 11 November 1884.

⁶⁸ (1884) 47 VPD 2098 12 November 1884..

⁶⁹ See for example a motion in favour of codification on the line of Hearn's proposals which passed the Legislative Council in 1885, (1885) 48 VPD 1976 24 November 1885.

⁷⁰ Alex Castles *An Australian Legal History* (1982) p483.

Part 5: QUEENSLAND

In this company I need not say much of Griffith. We should note his extraordinary productivity - James Thomas estimates that in the same years that Griffith drafted the Criminal Code and re-drafted the Supreme Court rules, he wrote perhaps six times as many judgments as any of his contemporaries on the Queensland Supreme Court bench.⁷¹

It is also not necessary to trace the intellectual history of Griffith's own labours on the CCB,⁷² save to note that he himself acknowledged his indebtedness to the new York and the Italian penal codes. He said little or nothing of the New Zealand code; but it seems impossible to believe he was not fully conversant with it.

As McPherson notes "where the Queensland code differently from others is that it embodies an exhaustive statement of the principles of criminal responsibility applicable to all offences"⁷³ Other attributions of elements of the Queensland Act to Griffith may not be so securely based, as with the claim by J V Barry⁷⁴ that Griffith first introduced a statutory defence of provocation, as the author does not appear to be aware that the New Zealand Code provided an earlier model, and at least possibly influenced, Griffith here.⁷⁵

O'Regan⁷⁶ has also given the credit to Griffith for drawing up provisions which encapsulated the common law rules as to the criminal liability of children, as well as providing that a male under 14 was presumed incapable of carnal knowledge. This too may not be free from an unacknowledged New Zealand influence. The first and the third appear in the New Zealand code of 1893; the provision as to criminal liability of those under 14 is significantly differently drafted, in that it requires knowledge the conduct was wrong, rather than a mere capacity to comprehend the act.⁷⁷

The Griffith Code, then, while clearly in large part a consolidation, actually went further in the direction of codification than did the New Zealand Act, as more of the common law was reduced to statutory form.

However, as far as I know, no scholar has yet given any scrutiny to the parliamentary process by which Griffith's labours came to reach the statute book. The passage of the CCB incorporating Griffith's Code through the Queensland Legislative Assembly presents a most remarkable comparison with the drawn out process in New Zealand. The Attorney-General, Mr Rutledge, moved on 20 September 1899 that the House consider that it was desirable to establish a code of criminal law. The Criminal Code Bill passed its third reading on 24 October that same year – or in just under five weeks.

One key to this speedy passage was undoubtedly that the CCB enjoyed a reasonably broad degree of support within the Assembly. At the time of Rutledge's first motion, a Mr Dawson, who appears to have been of a different political persuasion, merely enquired whether the A/G would make copies of the CCB available that afternoon as

“...it was such a big question that if they were going to take the second reading tomorrow there would be very little time for honourable members to master the

⁷¹ James Thomas "Griffith at work (1893-1903): A Snapshot" pp 207-208 in Michael White and Aladin Rahemtula (eds) *Sir Samuel Griffith: the Law and the Constitution* (Sydney, Lawbook Co, 2002).

⁷² For a most useful and scholarly account see Robin O'Regan "Griffith and the Queensland Criminal Code" in Michael White and Aladin Rahemtula (eds) *Sir Samuel Griffith: the Law and the Constitution* (Sydney, Lawbook Co, 2002).

⁷³ B H McPherson *A History of the Supreme Court of Queensland* (Butterworths, Sydney 989) p 270.

⁷⁴ J V Barry "The Defence of Provocation" (1949) 4 Res Judicata 129 at 134-137.

⁷⁵ Criminal Code Act 1893 (NZ), s58 (provocation in respect of assaults); s165 (provocation in respect of homicide).

⁷⁶ R S O'Regan, "Immature Age and Criminal Responsibility under the Griffith Code" (1982) 14 UWALR 354.

⁷⁷ Criminal Code 1899 (Qld) s31, Criminal Code Act 1893 s22 and s191.

bill – if they could do it at all – and the hon gentleman should give them as much time as possible by having the bill circulated that afternoon”⁷⁸

The second reading duly occurred the following day , with the A/G both praising codification in general:

“All the civilised nations of the world except some English speaking ones have reduced their criminal law to the form of a code. The exceptions include the United Kingdom itself and the Australasian colonies , with the exception of New Zealand which, fortunately, has preceded us in this respect in the work of reform and has a code. Most if not all of the United States of America have enacted such codes”⁷⁹.

and downplaying the difficulty of the task before the Assembly.

“I must ask members not to be alarmed at its voluminous character. The work of putting it through this House I can assure hon gentlemen need not be a work of such formidable difficulty as it may appear.”⁸⁰

Rutledge laid out the history of the move for codification and mentioned Griffith’s own statement he had drawn on the Italian and New York codes. Rutledge specifically mentioned one matter not featuring in the debates on other bills, a provision allowing the Queensland courts to have jurisdiction where any element of the offence took place in that colony – specifically instancing the problem of cross-border crimes.⁸¹ He also mentioned the provision for provocation as a defence for assaults.⁸²

In all this Rutledge is clearly following and echoing Griffith’s own draft. Yet it is clear that not everything in the Bill reflected Griffith’s own thinking. Rutledge referred later to the penalty provided for:

“... an offence that, considering the occupation of the galleries I shall not name; hon members will understand it; it is an offence at the present is punishable by death [one infers sodomy]

The CCB proposed to make to remove capital punishment for sodomy – as this was Rutledge’s own view, and would also bring Queensland’s law into line with that of South Australia, Western Australia, New Zealand, Tasmania and Great Britain itself. Rutledge noted Griffith and another Commissioner did not agree with the relaxation.⁸³ However abolition of the death penalty for other offences would, he said be resisted.⁸⁴

The debate then adjourned for almost a week, at which time a number of members ventilated, generally in lay terms, such points as the Crown’s power to stand aside jurors; the desirability of keeping a sentence of solitary confinement and the problems of false pretences offences in country districts where cheques were the normal medium of exchange. There was only one speech of real substance, in which a Mr Lesina, firstly criticised extensively the punishment of flogging which was provided for various offences, and secondly argued for the abolition of capital punishment on the basis of various supposed miscarriages of justice leading to the execution on an innocent.⁸⁵ ..

⁷⁸ (1899) QPD 86, 20 September 1899.

⁷⁹ (1899) QPD 104-05; 21 September 1899.

⁸⁰ (1899) QPD 104; 21 September 1899.

⁸¹ (1899) QPD 108; 21 September 1899

⁸² (1899) QPD 109; 21 September 1899

⁸³ (1899) QPD 112; 21 September 1899

⁸⁴ (1899) QPD 113; 21 September 1899

⁸⁵ (1899) QPD 149; 27 September 1899.

The Bill entered the committee stage on the 28th September – a week after its second reading began and eight days from its introduction – itself a most remarkable matter. Rutledge suggested that he would move all 708 clauses of the Bill as one block, unless members wished to nominate specific provisions in which case these would be put aside for later debate.⁸⁶ The proposal; did not find favour with the Assembly, and in the end the Assembly began to work through the Bill clause if not clause by clause at least cluster of clauses by cluster of clauses. There was some significant offence about offences relating to obstructing the course of justice and the like – clearly motivated by partisan feeling as a recent case in which one MLA had been jailed briefly for assaulting a JP in the street because of the JP’s decision in a case in which the MLA was involved.⁸⁷ In total that day the Assembly passed 21 clauses of the CCB, a rate which cannot have boded well for competition within the session.

However when the Assembly resumed the Committee stage debate on 3 October, progress was much faster and more than 50 clauses were passed – with for the first time substantial numbers (up to 14 in one case) being passed as a block. The only matters occasioning debate were whether it was necessary or desirable to have the death penalty for capital treason by killing the sovereign and, less dramatically but perhaps more relevantly, whether the possibly restrictive or unfair effect of the unlawful assembly provisions in relation to labour disputes.⁸⁸

The following day saw a resumption of the Committee stage debate, and by this time it is clear there was no intention at all of debating matters clause by clause. Only the piracy provisions received any substantial mention, and large parts of the text were put through as blocks of, in one case 23 clauses, and in another 55 clauses.⁸⁹ Progress was even more rapid on the following day, when over 170 clauses went through the committee stage, with only four matters being raised for any real discussion. Rutledge himself moved amendments to reduce the penalty for “unnatural” offences from life to 14 years imprisonment, and to reduce the penalty for adult female committing incest from 7 years to 3 so it could be dealt with as a misdemeanour.⁹⁰ There was some discussion as to the vagueness of the obscene publications provisions, and more sustained debate as to the use of arms by police against persons resisting arrest. Rutledge defused criticism of the Bill in that regard by drafting an amendment during debate – the only occasion on which the mover of a Bill did so in any of the debates I have seen.⁹¹

The CCB continued in committee stage on 10 October – which appears from the vagaries of the record to have been the fifth day of committee deliberations and over three hundred clauses were dealt with – more or less in that day. One may say “more or less” because the entire property offences section was passed as a block without debate, and most of the procedural sections received scant consideration either. More might have been achieved before the quorum was lost at 1.30 am had not there been some substantial debate, for and against, the provision for the imposition of flogging as a punishment, which drew more attention than any other clause in the bill.⁹²

The sixth and last committee stage day was on 19 October 1899, and the last 42 clauses were dealt with quickly.⁹³ The bill was then set down for its third reading on “Tuesday next” (24 October) at which it passed uneventfully.

⁸⁶ (1899) QPD 180; 28 September 1899

⁸⁷ (1899) QPD 196-200; 28 September. If anyone knows further details of this, I’d welcome them!.

⁸⁸ (1899) QPD 222-225 and 228 ff respectively; 3 October 1899.

⁸⁹ (1899) QPD 265 et seq; 4 October 1899.

⁹⁰ (1899) QPD 280; 5 October 1899.

⁹¹ (1899) QPD 281; 5 October 1899.

⁹² (1899) QPD 325 et seq.; 10 October 1899. The flogging issue is discussed at pp332-335.

⁹³ (1899) QPD 522 et seq.

Thus the CCB had passed through the Assembly entirely in 34 days, of which six were completely or partially taken up with the committee stages. There was little substantial debate at second reading, or elsewhere as to the merits of the Bill – except for Rutledge’s regular references to the work of Griffith and the fact the Bill largely represented his work. Thus the rhetoric is of consolidation; any debate is whether too much has been retained, rather than whether the attempt should be made to codify at all.

Discussion of the Queensland experience would not be complete without mentioning the debates on, and passage of, a “clean up” Criminal Code Amendment Act 1900 which sought to rectify errors seen in the Bill by the judiciary who had been asked to comment on the version as passed by the Assembly. Most of the discussion involved a number of technical amendments moved by Rutledge, but there was some more substantive, if still brief, discussion as to whether there should be some requirement for trial within 6 months of an arrest; and as to the offence of “drilling” [forming of unofficial quasi-military units] and the possible application of that offence to labour disputes.⁹⁴

Part 6: Western Australia

It is trite to say that The Western Australian Criminal Code owed an enormous debt to the Griffith code. Yet there was significant local input in the consolidation of earlier Western Australian law, a task largely performed by T F Sayer, former Secretary of the Law Department and Commissioner of Titles, later MP for Claremont, and later still Parliamentary Draughtsman for Western Australia. It is also correct to note that the strong support of the Premier, George Leake and of the influential parliamentarian and future premier Walter James KC, was essential in the bill’s speedy passage of the Bill.⁹⁵ However it does appear that support was generally widespread rather than based solely on the “government” party – insofar as one can say there was a government party given the instability of that particular parliament.

The process of debate on the Bill shows there was by no means a blind and unquestioning acceptance of the Queensland model, and a number of distinctly local views were ventilated as the Bill progressed. It should also be noted that some of the matters which drew comment in other colonies – such as the raising of the age of consent,⁹⁶ provision for the accused to give evidence⁹⁷ and a court of criminal appeal⁹⁸ had been ventilated in earlier years so they do not re-appear in the debates on the Code.

The CCB was introduced by Walter James in the Legislative Assembly on 3 September 1901; it completed the legislative process on 7 February 1902. It can, easily be argued that the Western Australian legislature spent the least time in serious deliberation on the CCB, although the bi-cameral legislature meant there were more sitting days where the Bill passed through some stage or other than was the case in Queensland.

The first substantive debate took place at the second reading in the Legislative Assembly, with both Walter James and George Leake making much of the contribution made by Sayer, but there

⁹⁴ (1900) QPD 1119 et seq and 1218-1226; 9 October 1900.

⁹⁵ Enid Russell *A History of the Law of Western Australia* (UWA Press 1980), p234 attributes the passage of the Bill to James, whom she describes as the Premier. In fact James held no office at the time of the Bill’s passage, though he became Premier later in 1902. George Leake was premier for most of the period during which the Criminal Code Bill was under consideration, although there was a hiatus in November-December 1901 where two other administrations briefly held office..

⁹⁶ (1900) 18 WAPD 1295; 25 October 1900.

⁹⁷ (1899) 14 WAPD 727 8 August 1899.

⁹⁸ (1899) 14 WAPD 808; 9 August 1899.

was relatively discussion of the substance of the Bill. James claimed that the only significant departure from the Queensland Criminal Code Act was in the virtual abolition of solitary confinement as a punishment. At this stage it is clear the emphasis of the speeches was to portray the CCB as a consolidation of existing law.

Thus Leake said he hoped Sayer would speak to the Bill:

“...because I am satisfied no hon member will think of reading this voluminous bill through, clause by clause, particularly when they understand that it is really a consolidation of the law as it stands at present”.⁹⁹

Sayer took a similar line, stressing the difficulty of ascertaining the law when some of it was from English statutes in force in the state :

“... if we desire our criminal law to be a written law, we should pass this code and enable any person to ascertain what the law is, which he could not do except by getting textbooks and copies of the English statutes”.¹⁰⁰

With a last plea from James for any suggested amendments to be placed on the notice paper the bill passed its second reading after what can at best be called perfunctory discussion.

The Bill then proceeded to committee stage, where it passed with scant amendment after but two full days of debate (on 3 and 8 October 1901). It is clear from the start that large parts of the Bill were being moved en bloc, and often passed with little debate. On the first day in committee, only two issues occasioned any serious debate. The first was concerned the criminal liability of, and maximum penalty which could be imposed upon, spectators at a prize fight,¹⁰¹ a clause replicating English law. The second, which was not resolved when the Assembly rose for the day, concerned the preservation or otherwise of local provisions dealing with corrupt electoral practices.¹⁰²

When the Committee stage resumed, so did the debate on the electoral practices, with attention being drawn to the Queensland law on the point (which, it appeared, concerned the neat, if perhaps unattractive principle of one candidate seeking to obtain a monopoly of hire vehicles , taxis etc on election day so as to prevent the other candidates mobilising their voters)¹⁰³.

James sought to focus attention on getting the bill through, rather than allowing extensive debate. If a provision was in contention, it should be left out unless all were agreed on the amendment:

“if a long discussion took place on the amendment then the Bill would never get through. The main object of the Bill was to place on the statute book one Bill which contained all the criminal law for the time being; but if any particular clause could be amended without undue discussion, then let that be done; yet the main object was to get a bill though The object ... of having the criminal law placed within the four corners of one statute”.¹⁰⁴

It is notable that it is in this discussion there came the first appeal to authority of Griffith as a draftsman – a claim that the aim of the provision was “to substitute the clear language of Sir Samuel Griffith for the language of the present law”.¹⁰⁵

⁹⁹ (1901) 19 WAPD 1103; 24 September 1901.

¹⁰⁰ (1901) 19 WAPD 1101-1103; 24 September 1901.

¹⁰¹ (1901) 19 WAPD 1363-64; 3 October 1901.

¹⁰² (1901) 19 WAPD 1364; 3 October 1901.

¹⁰³ (1901) 19 WAPD 1401-02; 3 October 1901.

¹⁰⁴ (1901) 19 WAPD 1399; 8 October 1901.

¹⁰⁵ (1901) 19 WAPD 1401; 3 October 1901.

A new and much more substantial issue was then raised, as to provisions relating to “bawdy houses” and whether it was necessary to outlawing brothels. Here, as with the prize fight discussion, much is made of the point that here the relevant clauses of the Bill were identical with that currently in force in England.¹⁰⁶

From there the debate moved to gaming houses, with critics of the Bill claiming it created heavier penalties than anywhere else in Australia. Gambling in other forms was also discussed, with some members pointing out that a totalisator could be used for formal race-meetings while other forms of betting were being made illegal, and the position of lotteries was also questioned.¹⁰⁷ A number of other parts of the Bill passed without discussion, and then

There then ensued a fairly wide-ranging debate which covered a number of matters where members questioned provisions of the Bill. It was noted that the offence of “garrotting” (disabling to enable robbery) was punishable by whipping though not, as in Queensland, by whipping on three separate occasions.¹⁰⁸ Members then raised the offence of desertion of children by parents. The Western Australian CCB provided that this was unlawful if the children were less than 14 years of age, and it was pointed out that Griffith’s original draft provided for an age of 16 (it being claimed that the Queensland parliament had altered the figure). An amendment quickly agreed to raised the age to 16.¹⁰⁹ Griffith’s authority was again invoked on the subject of criminal defamation, with statements that law the Bill represented Griffith’s reform of earlier Queensland law.¹¹⁰

The debate, which throughout appears to have been characterised by a remarkably friendly and co-operative spirit, concluded with discussion of two matters which owed nothing to Griffith or, in one case to any earlier law.

Members raised the form and effect of clause 384, the offence of concealing mining royalties (that is, disguising the quantum payable) – a matter of importance in a state with substantial mining districts. Members were assured that the clause was “practically identical” to the New South Wales section, but as noted below this did not ultimately prove a sufficient assurance to ensure acceptance of the clause.¹¹¹

The last matter raised in committee was a suggestion, clearly unanticipated by the promoters, - and probably the most radical proposal in any of the debates on codes in any Australasian legislature - that the Bill should be modified to allow for majority verdicts of 8-4 or 9-3. The principal proponent of change., a Mr T F Quinton claiming :

“it was very difficult to get twelve men to agree where the parties were pretty well known or had some money at their command”.

Quinton was however convinced not to press his amendment – perhaps more by Sayer’s assurance the change should be to the Juries Bill than by George Leake’s blunt “It would not be right to put such a provision in the bill”.¹¹² That exchange effectively concluded the passage of the lengthy bill through its committee stage in a mere two days of sitting.

¹⁰⁶ (1901) 19 WAPD 1404-05; 3 October 1901.

¹⁰⁷ (1901) 19 WAPD 1406-07.; 3 October 1901

¹⁰⁸ (1901) 19 WAPD 1407; 3 October 1901

¹⁰⁹ (1901) 19 WAPD 1408; 3 October 1901. The author’s reading of the Queensland debates could not identify any such amendment, but as committee stages were not fully reported it is possible.

¹¹⁰ (1901) 19 WAPD 1409; 3 October 1901.

¹¹¹ (1901) 19 WAPD 1409; 3 October 1901.

¹¹² (1901) 19 WAPD 1411; 3 October 1901

However the Legislative Assembly was not quite finished with the CCB, as on 15 October 1901 Sayer moved its recommittal to make some amendments to matters raised in the committee stage. He successfully proposed three matters. Firstly that the Bill be amended in relation to the electoral offences relating to monopolisation of vehicles by returning to the earlier Western Australian statutory wording; secondly that the gaming house provisions be clarified so the operation of totalisators was more clearly controlled and a change to the mining royalties offence. None of these appear to have drawn any significant debate.¹¹³

The third reading took a few days later on 24 October 1901, so that the CCB had passed through the lower house in seven weeks, though only debated or voted on at some point of seven sitting days in that period.

The passage through the Legislative Council was to take rather longer, though the period included a Christmas recess, and to be somewhat less straightforward than had been the case with the Legislative Assembly. The CCB had its first reading in the Council on the 12th of November – a surprisingly long time after the third reading in the Assembly by comparison with the New Zealand processes - and did not come on for its second reading until 22 January 1902. The delay between first and second reading may be attributed to the fact that Leake's government fell in November 1901, and two other ministries tried in vain to attain a working majority before Leake was reinstated as premier at the end of December. The degree of political upheaval which occurred makes the co-operative atmosphere of the debates all the more remarkable.

The second reading debate in the Council, although very short is notable for two things. The first and lesser point is the speech by the Hon A Jameson, Minister of Lands, in moving the Bill, which speech bears a remarkable similarity of style to that used by Rutledge in introducing the CCB into the Queensland Parliament, saying that the Bill was :

a measure which simplifies and codifies our criminal law, and thus is entirely in accordance with the progressive spirit of our time. Indeed I think all progressive countries have a criminal code. I know that this remark applies to France and Italy and to all the Northern States of America. Both New Zealand and Qld have a criminal code.”¹¹⁴

He then emphasised that the Western Australian Bill largely embodied Griffith's work.

More importantly it was at this reading that there was the first, and only, substantial challenge in the Western Australian debates to the wisdom of enacting the Bill at all (there had been none at all in Queensland).. A Mr H S Haynes pointed to the lengthy labours of the English Code Commissioners and the failure of Bills there, and objected to the Bill as attempting:

“...something which has never been undertaken before; either in England or in any of the Australian states, namely to define what the crimes are”¹¹⁵

Haynes argued that the Bill should have gone to a committee of some form which could have consulted with leading lawyers about the Bill, and successfully moved that the Bill be now sent to a Select Committee consisting of himself, and two other Councillors A James, and F Stone, the committee to report back a week later.¹¹⁶

¹¹³ (1901) 19 WAPD 1574; 15 October 1901.

¹¹⁴ (1902) 20 WAPD 2446; 22 January 1902.

¹¹⁵ (1902) 20 WAPD 2447; 22 January 1902.

¹¹⁶ (1902) 20 WAPD 2450; 22 January 1902.

If Haynes had hopes the Select Committee would succeed in either delaying the Bill or effecting substantial change, he was clearly disappointed. On 30 January he moved for the discharge of the Committee:

“The members of the select committee were of opinion that if they undertook the task of reporting to the House on this Bill they would naturally hereafter be held responsible if there were any defects in the law; and it would be impossible for any committee to give a guarantee to the House when such a short time was at the disposal of the Committee”¹¹⁷

The members therefore recommended any changes be made by the Council itself at Committee stage. That Committee stage then took place on 30 January.

Only a few matters were discussed at any length. There was a substantial, if not particularly logical, debate on the provision which removed the death penalty for rape, substituting life imprisonment, with or without whipping. One MP sought its re-instatement; others opposed this move because they claimed juries would never convict of rape if it was a capital offence. Some of the proponents of this view seemed to couple their opposition to the death penalty with a belief that few rapes actually occurred and most allegations of rape were false, but nevertheless saw a life sentence as appropriate.¹¹⁸

There was an amendment on a technical matters as to appeals, since the Bill allowed only Judges to reserve points of law, but some trials in remote areas were conducted by magistrates acting as Commissioners of Courts; it was speedily resolved that they too could reserve points for the Court of Appeal.¹¹⁹ The last stage of the debate came with an attempt, ruled out on procedural grounds, by a Legislative Councillor from Kalgoorlie to re-open the question of bawdy houses, on he claimed, the initiative of the Kalgoorlie Municipal Council.¹²⁰

Some days later the Bill was re-committed to allow some minor amendments to be made – not least the necessary change in the nomenclature of the Act to 1902!

J D Connolly, again claiming to represent the views of the Kalgoorlie Municipal Council sought inclusion of a provision to forbid prostitutes soliciting in a public place. This proposal drew a range of responses, some sympathetic in principle but arguing the Police Offences Act was the proper legal vehicle, others that such a provision was not necessary, or was not fair to women.¹²¹ The proposed amendment was lost. Other minor changes included some tinkering with the electoral offences, an increase in the penalty for defacing brands on stock and minor alterations to procedural aspects of carrying out of the death sentence. All were moved by Jameson and passed without serious comment.¹²² At this point it is fair to say the legislature and the Ministers are no longer treating the CCB as having some special status as a code; the debate is essentially one of ‘tidying up’ and minor legislative revision as might have occurred on any criminal law measure.

The final acts of the process took place with the Legislative Council passing the third reading on 5 February 1902, and the Assembly accepting the Council’s amendments two days later.

¹¹⁷ (1902) 20 WAPD 2643; 30 January 1902

¹¹⁸ (1902) 20 WAPD 2644-45; 30 January 1902.

¹¹⁹ (1902) 20 WAPD 2646; 30 January 1902

¹²⁰ (1902) 20 WAPD 2647; 30 January 1902

¹²¹ (1902) 20 WAPD 2768; 4 February 1902.

¹²² (1902) 20 WAPD 2769; 4 February 1902.

Part 7. South Australia

I should mention a further draft code, for discussion of which I am heavily indebted to a recent article by Greg Taylor¹²³ Pennefather was an English barrister who sojourned in Australasia without any degree of permanent success, even though he was at one time a Professor of law in Adelaide and at another a temporary Supreme Court judge in and New Zealand. Pennefather's code, written on a commission by the South Australian Government, was introduced into the South Australian Legislative Council in October 1903, but was never actually debated; in large part because of a change in the Attorney-Generalship, with the new incumbent being unsympathetic to the measure.¹²⁴

From Taylor's description (I have not seen the code myself) it seems Pennefather followed the Stephen Code more closely than had other Antipodean draftsmen, and had left much more to the operation of the common law. The Bill therefore appears to me much more at the consolidation end of the spectrum of "codes", with little attempt to reduce to statutory form the judge-made law.

Taylor considers that the opposition of J P Boucaut may have been most influential in persuading the authorities not to persevere with the code. This is not surprising, as Boucaut was not himself a great believer in codification.

"... for myself I am no believer in Codes in our shifting condition tho' an occasional consolidation is doubtless desirable."¹²⁵

Taylor also suggests that Pennefather had considerable support from Chief Justice Way, but this may perhaps reflect the innate character of Way rather than the true merits of the Pennefather code, which, from Taylor's description, falls well short of Griffith's code in simplicity and completeness, and Way had ranked Griffith's code highly.

"With the possible exception of Doctor Hearn's Code, it is the most scientific and most complete Digest of the Criminal Law that has been made in Australia".¹²⁶

¹²³ Greg Taylor "Dr Pennefather's Criminal Code for South Australia" (2002) 31 Common Law World Review 62.

¹²⁴ Taylor, op cit n58, pp 74 and 78.

¹²⁵ Boucaut to Griffith 9 December 1896, Papers of Samuel Walker Griffith, file MSQ.189, Dixson Library, Sydney.

¹²⁶ Way to Griffith, 10 December 1896, Papers of Samuel Walker Griffith, file MSQ.189, Dixson Library, Sydney

Part 8 – Comparisons and conclusions

As can be seen for the above account, the history of codification of the criminal law in Australia is quite disparate. On one hand there are the failed attempts, as with Hearn's code in Victoria and Pennefather's in South Australia. At the opposite end of the spectrum lie the very rapid enactment of the Criminal Codes of Queensland and Western Australia. New Zealand lies somewhere between these two, given that eventually the Criminal Code was enacted, but the ten years it took clearly differentiate the New Zealand experience from the other Code jurisdictions.

These remarkably different parliamentary histories suggest that speedy codification was only likely where there was a broad consensus in favour of the legislation. The Queensland and the Western Australian debates each display both a very general harmony of purpose and a strong cross-party consensus on the need for at the very least consolidation of the law, with 'codification' of the unwritten law as an acceptable concomitant.

By contrast, there is until the 1890s no broad consensus in New Zealand over the need to enact consolidating legislation ahead of England, and there is a very considerable debate over the degree to which the Code struck an acceptable balance between retention of old provisions and new or reformist elements. A significant factor here is the degree to which the Code Bill became an element in party politics. The New Zealand debates regularly descend into political point-scoring. In the latter climate, enactment of the code required both political will and political might; not until 1893 were the two sufficiently allied. The level of likely opposition to calls for reform may also have contributed to the generally much fuller arguments in the New Zealand parliamentary debates, and especially to the not uncommon reference to overseas developments, such as the regular and informed references to American law which have no counterpart in the Australian debates.

Beyond that it is difficult to generalise, but I suggest we should look for similarities within the discourse in the parliaments. The difference in timing of the legislation masks the common concern that the law be reformed to allow an accused to give evidence, and the widespread sentiment that some proper form of appellate review of convictions was needed.

It is clear that in none of the Code jurisdictions did the legislators seek to scrutinise the conceptual framework of major crimes against persons or property – except in those cases where the age of consent for sexual offences was in issue – although penalties for offences were often questioned. There is in all cases some element of concern as to the offences which covered interaction between society and state – unlawful assembly, drilling and sedition were all clearly capable of giving rise to concerns as to the limits of legitimate political action. The concern in New Zealand and Western Australia as to criminal libel may be similarly categorised. The remarkable New Zealand concern with blasphemy I regret I can not explain, except to suggest that it may have been an element of an ongoing argument as to the proper place of established religion in a new society (a debate which needs to be examined further by looking at the Police Offences Act 1884 and the anti-clerical tone of the speech of Robert Stout).

There was clearly a widespread concern as to the nature and severity of punishment appropriate to criminal offending, although it is clear attitudes within the legislatures varied widely. Rutledge in Queensland appears to have been more "progressive" in this regard than his equivalents in other jurisdictions, yet it is not clear how widely his views were shared.

However, one must come back at last to the question – why did the codification movement find backers in New Zealand, Queensland and Western Australia, and not in the other jurisdictions?

Clearly the influence of certain leading proponents and influential lawyers is important – in Queensland Rutledge, and indeed Griffith himself, Buckley in New Zealand, Sayer in Western Australia. Yet other jurisdictions had leading lawyer figures, and no such reform occurred.

I suggest, as very much a speculative conclusion, that the Code jurisdictions combined two different factors which together made codification a sufficiently appealing concept to attract political backing of the requisite nature.

Firstly the Code jurisdictions at the time of enactment have governments or legislatures of a distinctly progressive or liberal hue. Codification in advance of England required a willingness to assert the intellectual force and independence of the colonies, a cast of mind which was more likely to be found among radicals and liberals than among the conservatives.

Secondly, the code jurisdictions are relatively socially and economically decentralised. In each, - though obviously far more markedly so in Queensland and Western Australia than in New Zealand - the political and legal capital did not also enjoy the degree of economic social and cultural hegemony that Sydney did in New South Wales or Melbourne in Victoria. The reality of a decentralised population, government and legal system was that capital intensive resources – such as law libraries and the like - could not be widely distributed, but distances meant justice must be administered locally. A mindset favouring consolidating and compacting the law is, in these circumstances, likely to be strong.

Thus, I suggest the Code jurisdictions passed their laws because of the interplay of political and social philosophy, underlying if unarticulated regional concerns and the coincidence of strong leaders who could guide the debate over codification. Without that conjunction, the obstacles provided by inertia or deliberate opposition were too strong.