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CAPRICIOUS CONSOLIDATION: AN INTRODUCTION TO CRIMINAL LAW IN SOUTH AUSTRALIA AFTER 1876

LEGACIES of the British Empire remain scattered throughout the world in various forms. Amongst these are laws which still reflect their colonial origins, because of their grounding in traditional British attitudes to the role of law in society. Ironically, this situation can still exist in places which are popularly regarded, and not unjustifiably so, as having been at the vanguard of legal innovation and change.

South Australia is a case in point. With the introduction of the Torrens system of land regulation in the 1850s and the electoral enfranchisement of women in 1895, to mention but a couple of examples, South Australia has been at the forefront of legal innovation. Yet important aspects of the criminal law of South Australia appear to belong to an age and a place far removed. Moreover, the fact that it has not been updated belies a colonial conservatism. This article will examine one of the more important stages in the development of South Australian criminal law; the focal point of which was the attempt at consolidation in 1876.

BRITISH ANTECEDENTS

Criminal law received in Australia by operation of "the Laws of Empire" had a dubious pedigree.[1] In Britain there was little avenue for appeal in criminal cases and thus little opportunity for superior courts to develop the law.[2] The nature of assizes mitigated against establishing a centralised system to formulate any particular coherency. Several attempts to codify the

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1 Castles, *An Australian Legal History* (Law Book Co, Sydney 1982) ch1. Those Laws of Empire included British interpretations of the international law of the day.

2 Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 2nd ed 1981) p416.

criminal law in England had failed,[3] and it was a poorly organised system that was exported to the colonial outposts. Blackstone himself recognised this:

> [E]ven here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are obsolete or absurd; and from too little care in attention in framing and passing new ones.[4]

COLONIAL INITIATIVES

However, a number of the Australian colonies made concerted attempts to rectify the shortcomings of the received law which resulted in consolidation and even codification. In Victoria, George Higinbotham, Attorney-General and later Chief Justice, was responsible for two complete consolidations of the criminal law, in 1864-65 and again in 1890.[5] Both were prepared by small teams of draftsmen who were supervised by him because of his belief that only one person "should design the scheme, exercise supreme command over the whole work, and be solely responsible to parliament for the accuracy of the result".[6] Such a utilitarian approach, while not necessarily responsive to a diversity of interests in the community, was certainly a practical and aggressive approach in dealing with inconsistent criminal laws. Similarly, in Queensland, Sir Samuel Walker Griffith coordinated the drafting of the *Criminal Code Act* 1899, which he described as an attempt "to cover the whole ground of what may be called the living Criminal Law, including Procedure, with the exceptions".[7] Griffith found much of merit in Stephen's Draft Code of 1880,[8] and also borrowed from

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3 Manchester, *A Modern Legal History of England and Wales* (Butterworths, London 1980) pp39-47; Radzinowicz, *A History of the English Criminal Law* Vol 1 (Stevens & Sons, London 1948) p574.

4 Blackstone, *Commentaries on the Laws of England* Book IV (Garland Publishing, New York 1978) pp3-4.

5 Morris, *Memoir of George Higinbotham* (MacMillan, London 1895) p287.

6 As above p293.

7 Griffith to Attorney-General of Queensland, 29 October 1897 in Wilson & Graham (eds), *The Criminal Code of Queensland* (Government Printer, Brisbane 1901) piii.

8 As above pv.

the *Italian Penal Code* of 1888 as well as the *Penal Code* of New York State.[9]

On the other hand, South Australia's attempts at the organisation of its criminal law died of neglect; implementation and development of the received law within the framework of the laws and principles of empire was haphazard to say the least. Of the early law, Castles and Harris report:

> While some features ... were contained in judge-made law, a good deal of it was scattered in different statutes, which also directed that some provisions of British statutory law should be operative in the colony.[10]

Thus came the first real attempt at organisation, a consolidation in five bills orchestrated by the Chief Justice, Sir Charles Cooper, that was not passed by the legislature until 1859.[11] Yet by the 1870s the law was again in such a state of confusion that it was felt the time had come for another comprehensive revision. The result was the *Criminal Law Consolidation Act* 1876 (SA) (the *CLCA*),[12] but neither did this manage to provide anything like the revision required. Although it "brought together a total of twenty-three colonial Acts and five British statutes which had become part of the criminal law in the colony",[13] it was incomplete, incoherent, and often irrational. Castles and Harris note that:

> One member of the legislature remarked that he had first thought the bill, as originally introduced, had been produced with 'scissors and paste', but on reflection he considered it was probably 'only a question of scissors'.[14]

Later South Australian attempts proved failures too. Sir Samuel Way did not attempt to emulate his counterparts in Victoria and Queensland.[15] In

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9 As above pix.

10 Castles & Harris, *Lawmakers and Wayward Whigs* (Wakefield Press, Adelaide 1987) p193.

11 As above; SA, Parl, *Debates* HA [1876] at 1369.

12 No 38 of 1876.

13 Castles & Harris, *Lawmakers and Wayward Whigs* p193.

14 As above.

15 Castles & Harris, *Lawmakers and Wayward Whigs* p194. Interestingly though, the title page of the copy of Wilson & Graham (eds), *The Criminal Code of Queensland* held in the University of Adelaide Law Library is inscribed in a neat hand: "The Right-Honourable Sir Samuel Way with compliments from SW Griffith." Similarly, the copy of Griffith, *A Digest of Queensland Statutory*

1900 the Attorney-General of South Australia commissioned Dr FW Pennefather, Professor of Law at the University of Adelaide and one-time Justice of the Supreme Court of New Zealand, to draft a criminal code for South Australia. During the course of its preparation Pennefather took the Queensland Code as a model, yet saw fit to depart from it in several aspects.[16] The resultant document, an enormous 524-section volume, was presented to the Attorney-General in March 1903, and introduced into the Legislative Council on 11 August 1903.[17] However, despite initial enthusiasm for the concept,[18] its length and complexity caused it to be shelved at the end of the session, having received a first reading only. There was also some unrest at its not having been prepared by a South Australian.[19] Although it was to be revived after the recess, attention turned to a bill to amend the criminal law in relation to murder. This bill had originally been introduced before the bill for the Code,[20] as an interim measure against the length of time it would take for the Code to be debated and passed.[21] Yet the murder bill was promptly passed in the next session,[22] while the bill for the Code remained shelved. By 1905, administration of the criminal law was being discussed only in terms of the existing *CLCA* of 1876 and its accompanying aid, Sheridan and Bakewell's *Magistrate's Guide*,[23] a digest of magisterial law as it stood in 1879.

THE LAW IN SOUTH AUSTRALIA

The attempt at codification having failed, the *CLCA* has remained an influential piece of legislation, along with the *Magistrate's Guide*. The latter, although a government publication, is quick to identify with the Benthamite rationalisation as to the scientific nature of law:

> [A]n endeavour has been made to keep abreast with modern English legal thought, the tendency of which was first indicated to jurists by Bentham, who separated Law into the

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Criminal Law (Government Printer, Brisbane 1896) is also inscribed with "The Honourable Chief Justice Way, with the author's compliments".

16 Pennefather, "Explanatory Letter" in *Draft of a Code of Criminal Law, Prepared for the Government of South Australia* (Government Printer, Adelaide 1902) p4.

17 SA, Parl, *Debates* LC [1903] at 64.

18 SA, Parl, *Debates* HA [1902] at 406, 407.

19 SA, Parl, *Debates* HA [1903] at 9, 46.

20 At 142.

21 At 416.

22 SA, Parl, *Debates* HA [1904] at 199.

23 Sheridan & Bakewell, *The Magistrate's Guide* (Government Printer, Adelaide 1879). See, for example, SA, Parl, *Debates* HA [1905] at 410-411.

> two great divisions of *Substantive Law* and *Adjective Law*.[24]

Would that the content of the guide be as rational as its presentation. Several deficiencies can be identified in the state of the post-1876 criminal law, the first of them a particularly burdensome legacy of British attitudes: laws aimed at the protection of property to the exclusion of much else.

The Property Emphasis

The emergence in Britain of extreme legal measures to protect the interests of the propertied during the eighteenth and nineteenth centuries has been comprehensively documented.[25] Suffrage still depended upon ownership of land, so the electors and elected used their power to safeguard themselves and their interests from the growing numbers of what they felt were the dangerous classes. The explosion in the number and type of offences attracting capital punishment is illustrative of the haphazard manner in which this protection was carried out.[26]

The more extreme excesses of the English criminal law in this area had already been modified in South Australia by the 1870s. For example,

> colonial law only provided for capital punishment in three cases: murder, treason, and piracy with violence. In addition, imperial legislation applying in the colony by paramount force made it a capital offence to be convicted of burning or destroying property in any royal dockyards.[27]

However the 'scissors and paste' approach to the drafting of the *CLCA* meant that other forms of this bias in favour of the protection of property remained, some attracting disproportionately severe punishments for no apparent reason. In providing for the protection of livestock the *CLCA*

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24 Sheridan & Bakewell, *The Magistrate's Guide* pv. This division was described by Sheridan & Bakewell as a "scientific distinction".

25 Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, London 1975) p21.

26 Discussion of this theme is found in Thompson, *Whigs and Hunters: The Origin of the Black Act*; Thompson, *The Making of the English Working Class* (Pelican, Harmondsworth 1968) p65; Radzinowicz, *A History of the English Criminal Law* p4; Pike, *A History of Crime in England* Vol 2 (Smith Elder & Co, London 1876) p379; Laurence, *A History of Capital Punishment* (Citadel Press, New York 1960) p13.

27 Castles & Harris, *Lawmakers and Wayward Whigs* p214.

prescribed a maximum penalty of eight years imprisonment with hard labour for

> whosoever shall steal any horse, mare, gelding, colt, filly, mule, or ass; or any bull, cow, ox, heifer or calf; or any ram, ewe, sheep or lamb; or any camel, llama, alpaca, goat or pig.[28]

Yet the theft of a dog only attracted a maximum penalty of 6 months imprisonment with hard labour.[29] Further, such livestock were apparently twice as valuable as truthful testimony in court - wilful and corrupt perjury carried a maximum sentence of only four years imprisonment with hard labour.[30] When the distinctions were questioned in parliament by one member, "[t]he only response he could elicit from the minister in charge of the legislation in the Legislative Council was that this had been copied from English law".[31] It is understandable that livestock were treated as more valuable than domestic animals in a colony that sometimes struggled to feed its own people. However there was no such reason behind the *CLCA*; if there were, it would have made sense to include a distinction between working and domestic dogs. Instead the categorical adoption of such partisan provisions were not a considered attempt to address the needs of the colony but blind plagiarism of British attitudes to property. More worrying still, however, is the fact that the same discrepancies still exist in the *current* provisions of the South Australian criminal law contained in the *Criminal Law Consolidation Act* 1935 (SA), albeit minus the hard labour requirements.[32]

Likewise, offences against the person were not a priority of the *CLCA*. Under the heading of "Malicious Injuries (Property)", six out of fifteen offences provided for a maximum penalty of life imprisonment with hard labour; the rest but one provided for several years, and five of these also provided for whipping.[33] However, under the heading of "Malicious Injuries (Personal)", six out of seventeen offences provided for a maximum

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28 *CLCA* s140.

29 *CLCA* s143; Sheridan & Bakewell, *The Magistrates' Guide* p424.

30 *CLCA* s291; Sheridan & Bakewell, *The Magistrates' Guide* p576.

31 Castles & Harris, *Lawmakers and Wayward Whigs* p193.

32 *Criminal Law Consolidation Act* 1935 (SA) ss136, 139, 239.

33 *CLCA* ss94-101, 107-111, 116, 129, 130; Sheridan & Bakewell, *The Magistrates' Guide* pp499-503. The absent sections are to be found under separate headings in the guide, for example, "Injuries to Cattle" in *CLCA* ss117-119; Sheridan & Bakewell *The Magistrates' Guide* pp203-204. Thus the range of offences of injuries to property is actually far greater.

penalty of life imprisonment with hard labour. The rest of the penalties were comparable to those of the property sections but only one offence provided for whipping.[34] A more rigorous comparison would require examination of each offence and similar offences placed under separate headings, but offences against property were clearly at least as serious as those against the person, and sometimes more so.

Thus the rationalisation of British criminal law is exposed, as well as colonial attitudes toward it. The British law was an unreasoned body of jurisprudence, which is all the more surprising since it underwent major changes during the age of reason, the Enlightenment. Moreover, its subsequent colonial reception and application brought little improvement.

Inconsistencies

The legacy in South Australia of this property emphasis may be further pursued, along with other areas of the criminal law, by way of a close comparison of inconsistencies that existed both within the *CLCA* and between it and other Acts. Section 315 of the *CLCA* read:

> Whosoever shall lewdly expose his person in any street, road, or public place, or within view thereof ... Misdemeanour ... Imprisonment for not exceeding 1 year, with hard labour, and *may* be whipped.[35]

A repeat offence carried the punishment of "imprisonment for 2 years, with hard labour, and *shall* be whipped".[36] However, s57 of the *Police Act* 1869 (SA), in force at the same time, provided that:

> Any individual who shall offend against decency, by the exposure of his person in any street or public place, or in the view thereof ... Penalty not exceeding £10, or shall be committed to gaol, there to be kept to hard labour, for not exceeding one month.[37]

It was clearly far worse to perform lewdly than indecently; a matter of semantics could result in extraordinarily different punishments.

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34 *CLCA* ss27-46; Sheridan & Bakewell, *The Magistrates' Guide* pp494-499.
35 Sheridan & Bakewell, *The Magistrates' Guide* p453.
36 As above.
37 As above p590.

This illustrates the fact that gross discrepancies in punishment often depended on minute, if not meaningless, distinctions depending on the Act which created the offence. Dog stealing was mentioned earlier, which under the *CLCA* carried a punishment of six months. Yet under s60 of the *Police Act,* theft of a dog that was "not being the subject of larceny" carried a penalty "over and above the value of the dog ... not exceeding £20".[38] It is not unusual to find similar sets of offences created in different contexts and in different legislation in South Australian law and elsewhere. However, the above examples have been chosen to illustrate the lack of consistency in identical or near-identical offences, particularly with regard to the great variation in punishments. Moreover, these examples are but a few and a more complete examination of this inadequacy belongs in a longer work.[39]

The definitional chaos within the law (particularly in relation to larceny) will be discussed further below. However, it is already apparent that the *CLCA* failed miserably to become the definitive source of statutory criminal offences, and to draw together offences that did not require separate existences.

Unnecessary Repetition

The *CLCA* devoted a total of ninety eight sections to "Larceny and Similar Offences".[40] This was unnecessary repetition, as Sheridan and Bakewell were only too well aware:

> In fact, larceny, embezzlement, and obtaining money, &c, by false pretences, are but different means of committing what is in reality the same offence. Much useless learning has been expended in distinguishing them.[41]

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38 As above p591.

39 As well as the above examples compare *Police Act* 1869 (SA) s68 which deals with malicious injuries to property and attracted a penalty of £5, with *CLCA* s130, which for an identical offence (the residual provision of the relevant sections discussed above) provides a penalty of 3 months imprisonment and £5 plus compensation to aggrieved party; Sheridan & Bakewell, *The Magistrate's Guide* pp597, 503 respectively. Compare also *CLCA* s156 with *Police Act* 1869 (SA) s69 regarding damaging fences with intent to steal; Sheridan & Bakewell, *The Magistrates' Guide* pp429, 597 respectively.

40 A large section of the guide is completely devoted to just this area: Sheridan & Bakewell, *The Magistrates' Guide* pp417-453.

41 As above p417.

The cases then cited for magisterial reference are legion. The current *CLCA*, while having trimmed some of the excesses, is clearly an ill-considered product of its predecessor; Part V, which is still headed "Larceny and Similar Offences", contains some 81 sections.

Moreover, repetition occurred not only within broad areas of legal thought, but also within the most narrow of fields. The individual larceny offences within the *CLCA* itself must have had good precedent value, as some sections simply repeat the wordy drafting of previous sections merely on account of technical differences. Under s154, theft or damage of flora over the value of one shilling growing "in any pleasure ground, garden or other enclosed land" was to be punished as simple larceny, which under s135 attracted a maximum of two years imprisonment with hard labour. Yet s155 provided a maximum penalty of £5 for an almost identical offence, the only difference being that the section also reads "wheresoever the same may be respectively growing".[42] Unfortunately, similar repetition can again be found in the current *CLCA*.[43]

Judicial Nightmares

It has already been pointed out that the English legislature created offences for the protection of property with little regard for consistency. Further to this, the lack of a uniform judicial approach to the interpretation of these ambiguous offences meant that the common law would be anything but consistent. Kenny's text, *Outlines of Criminal Law*, illustrates the definitional quagmire that resulted from such judicial interpretations. The work pedantically discusses what was "capable of being stolen",[44] and describes in great detail the distinctions between larceny, burglary and housebreaking, embezzlement, fraudulent conversion and false pretences.[45]

The cases cited by Sheridan and Bakewell for this area are prime examples of the ambiguity-engineered "useless learning" to which they refer. Aside from the distinctions outlined above, results could be truly enigmatic:

> Prisoner went into a shop and purchased tobacco, tendering half a crown in payment. Prosecutor's shopman put down two shillings on the counter and was counting out the rest of

42 As above p428.
43 *Criminal Law Consolidation Act* 1935 (SA) ss148, 149.
44 Turner, *Kenny's Outlines of Criminal Law* (CUP, Cambridge, 18th ed 1962) pp280-293.
45 As above, chsXII, XIII, XIV, XV, XVII.

> the change in halfpence, when prisoner took up the two shillings, and pretending to throw them into the till, though in reality he only threw back one, asked for four sixpences instead of them. He received one shilling and two sixpences: *Held* not guilty of stealing the shilling. (*R v Williams,* 7 Cox CC 355)
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> But in a somewhat similar case, where the transaction of exchange was not complete, the prosecutor not having parted company in the florin (the subject of the charge), it was held to be a case of larceny. (*R v McKale*, 37 LJMC 97)[46]

This is a random example of the inconsistent and technical approach to the law. One side of the coin revealed, as above, ambiguities resulting in judicial over-definition; the other revealed the sheer inability of the courts to act because of the convoluted drafting. The offence of larceny was not alone here; under the heading of "Forcible Entry" we find:

> No one from henceforth shall make any entry into any lands or tenements, whether freehold or holden for a term of years, or by elegit, but in case where entry is given by law, and in that case not with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner; and whosoever shall do the contrary ... Misdemeanour.[47]

The *Magistrate's Guide* cites no less than three English statutes from which this section was derived.[48] After commenting that "there is considerable difficulty in the practical application of the English Statutes upon which the above is founded",[49] it delves into an analysis of the cases with extremely complicated results. Yet this is a comparatively short section. In creating an offence for forging private securities, the *CLCA* provided a twenty one line, single sentence section.[50] The current legislation has broken the corresponding section into three subsections, one of which has nine parts.[51] Substantially the same areas are covered, with a little more order, and life imprisonment remains the maximum penalty.

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46 Sheridan & Bakewell, *The Magistrates' Guide* p418.
47 *CLCA* s299; Sheridan & Bakewell, *The Magistrates' Guide* p314.
48 Sheridan & Bakewell, *The Magistrates' Guide* p314; 5 Ric II c8 (1382); 21 Jac I c15 (1624); 31 Eliz c11 (1589).
49 Sheridan & Bakewell, *The Magistrates' Guide* p314.
50 *CLCA* s233; Sheridan & Bakewell, *The Magistrates' Guide* pp318-319.
51 *Criminal Law Consolidation Act* 1935 (SA) s214.

A HISTORY LESSON

In this introductory examination of the state of the criminal law in South Australia after 1876, a selection of various provisions has been used to identify and generalise about deficiencies that existed. However, a more complete study is required. Archaic emphases, legislative inconsistencies, unnecessary repetition, convoluted drafting and haphazard judicial interpretation are some of the problems that have been identified. What is particularly worrying, however, is that the *current* law often appears to rely dogmatically on old provisions that have been shown to have extremely partisan or otherwise questionable origins. Despite some much needed revision in the 1970s, little had been done until 1990 to divorce South Australian criminal law from its rather biased origins. The authors of the *Magistrate's Guide* indicated that the conclusions they reached were not just conjecture based on isolated examples and that they had their own ideas as to the solution, yet no serious effort at reform was made by those with opportunity to do so:

> Many examples of vagueness, prolixity, and inconsistency occur in the Colonial Statute Law ... Individuals are exposed to the most grievous hardships when the Laws of a community are ill-defined or unintelligible, and consequently become, almost unconsciously, enemies rather than friends to the administration of Justice. It is imperatively necessary that the whole of the Law of the colony should be codified, or at least digested, and the objectionable features adverted to pruned away.[52]

However, criminal law reform is now being addressed, and it is important to note one of the first observations of its current architect, Matthew Goode:

> Despite a good deal of hard work by all involved in the criminal justice process, much of the criminal justice system remains firmly based in the formative period of the nineteenth century. Some of the most important of our substantive criminal laws are indeed ancient.[53]

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52 Sheridan & Bakewell, *The Magistrates' Guide* pvii.

53 Goode, *First Interim Report to the Attorney General of South Australia on Reform of the Criminal Law in South Australia, Consistency in Criminal Law Reform at a National Level, and Progress toward a Model Penal Code for Australia* (Government Printer, Adelaide 1991) p3.

Goode and his colleagues are particularly aware of the problems arising from the complexities in relation to theft and like offences, and have recommended a radical departure from the structure of the law as it has stood for so long.[54]

The move toward codification in South Australia is being undertaken with an ultimate view to a national criminal code.[55] No claim is made here that this is necessarily the best solution to the problems that have been identified. Codification is not a guarantee of rectification of all substantive deficiencies and prejudices in the criminal law. Furthermore, by reinforcing the traditional view of a definitive "criminal law", the appearance of a unified code may militate against the need to develop specific criminal laws for specific circumstances.[56] Codification also carries the grave danger, recognised by Goode,[57] that over time the law may become stagnant unless workable mechanisms of change are in place. This is an argument that has dogged proponents of codification consistently:

> It is also common to argue that even if such a standard [of being able to answer every legal question] were obtained, the result would not be beneficial, as it would deprive the law of its 'elasticity'.[58]

The main objectives and principles of codification that Goode identifies are that "the criminal law should be easy to discover, easy to understand, cheap to buy, and democratically made and amended".[59] Achieving these goals certainly requires something of a departure from the current structure of the law. Part of the dilemma is to reconcile the need to resolve the problems that have emerged from South Australia's unquestioning application of the

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54 Aust, Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, "Theft, Fraud and Related Offences" in *Model Criminal Code Discussion Paper* Pt 1 (AGPS, Canberra 1993) p5.

55 As above pp3-4.

56 This traditional view is criticised in, among others, Brown, Farrier, Neal & Weisbrot, "Some Themes" in *Criminal Laws* (Federation Press, Sydney 1990) ch1.

57 Goode, *First Interim Report on Reform of the Criminal Law in South Australia* p18.

58 Griffith to Attorney-General of Queensland, 29 October 1897 in Wilson & Graham (eds), *The Criminal Code of Queensland* ppv, vi.

59 Goode, *First Interim Report on Reform of the Criminal Law in South Australia* p10. The success of the Model Criminal Code in achieving these aims is not addressed here, but the reader is referred to Aust, Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Final Report* (AGPS, Canberra 1993).

laws of Britain with the need to develop a criminal law that is not itself liable to become an anachronism. What must be avoided is the possibility of forcing the criminal law into another time warp, for this has surely been the case with a great deal of the present law. As Goode points out, even Britain has tackled some of the fossils of this era.[60] Whatever the solution, it must be admitted that South Australia's reputation for legal innovation is somewhat tarnished by this unfortunate legacy of its colonial heritage.

60 Aust, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, "Theft, Fraud and Related Offences" in *Model Criminal Code Discussion Paper* Pt 1 p3.