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OFFENCES OF A PUBLIC NATURE : A REVIEW OF CRIMINAL OFFENCES DEALING WITH PUBLIC SECTOR CORRUPTION AND ABUSE OF POWER AND THE ADMINISTRATION OF JUSTICE

1. THE PUBLIC OFFENCES PART OF THE *CRIMINAL LAW CONSOLIDATION ACT* 1935 (SA)

ONE part of the *Criminal Law Consolidation Act* 1935 (SA) clearly stands out as being in need of reform. It is that part called "Offences of a Public Nature" and it contained, as we shall see, many weird and wonderful criminal laws. It is also remarkable for what it does *not* include. That, too, will be discussed in this paper. The point for present purposes is that this part of the *Criminal Law Consolidation Act* 1935 (SA) is the part which contains, such as they are, the provisions of the general criminal statute law of South Australia dealing with public sector corruption and, for want of a better word, misbehaviour.

This part of the *Criminal Law Consolidation Act* 1935 (SA) contains the following offences and provisions:

- Section 237: Compounding
- Section 238: Rescuing Murderers
- Section 239: Perjury and Subornation
- Sections 240-241: Exacting Fees from Prisoners
- Section 242: Unlawfully Administering Oaths

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- Section 243: Forcible Entry
- Sections 244, 245: Riots
- Sections 246-252: Criminal Libel
- Section 253: Trafficking in Public Offices
- Section 254: Nuisance by Fireworks
- Section 255: Lewdness
- Section 256: Infectious Diseases
- Sections 257, 258: Interrupting Religious Worship and Molesting Preachers
- Sections 259, 259a: Witches and Fakes
- Sections 260-266: Industrial Offences.

Some of these offences are self-explanatory and some are not. All are interesting - even fascinating - in their derivation and history. All pose modern challenges. For example, consider the offence of "compounding". The origin of this offence lies in the very beginning of the criminal justice system.[1] The offence in the *Criminal Law Consolidation Act* 1935 (SA) can be traced back to "An Act to Redress Disorders in Common Informers" enacted in 1576.[2] But its origins go far further back than that. The necessity for the offence can be said to derive from two factors: the policy of the Crown first systematically pursued by Henry II in the twelfth century was to replace the local and personal system of justice characterised by private remedies with a centralised public system of justice characterised by the notion that offences against the public peace were offences not only against the individual but also against the State (the Crown),[3] and the fact that, until the formation of organised police forces in the early nineteenth century, effective enforcement of criminal justice relied heavily on the work and testimony of private informers.[4]

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1 The original offence was limited to larceny and was known as "theft-bote". See, for example, *Burgess* (1885) 16 QBD 141.

2 18 Eliz c5, ss3 and 4. See also 56 Geo 3 c138, (1816) - "An Act to Abolish the Punishment of the Pillory except in certain cases".

3 These reforms were not entirely motivated by thoughts of the public good. A centralised legal system implied centralised power for the Crown in its never-ending battle to control local and regional aristocratic power. It also implied a source of revenue for the crown - fines and forfeited property.

4 A good illustration is *Rudd* (1775) 1 Leach 115; 168 ER 160.

The combination was hard to control - many abuses of the system were rife.[5] One of these was the use of the existence of a public system of justice by private informers to *reinforce* the system of private justice - for example, a person whose relative had been killed by another might start criminal proceedings against the malefactor in order to persuade them to pay a blood price. This had to be stopped if one wished to maintain the policy of replacing the private system with public one - and the compounding offence was one weapon brought into play.

It is obvious that the original imperatives which dictated the perceived necessity for these offences no longer exist. The centralised system of public criminal justice is so well entrenched that, in the interests of costs and expediency, it might be thought to be in the public interest that the agreement between the shopkeeper and the shoplifter be encouraged rather than repressed. Indeed, public policy now encourages neighbourhood mediation, alternative dispute resolution, and like initiatives so that scarce criminal justice resources may be brought to bear on those cases which are thought to justify them. In many cases, some "composition" between the offender and the victim to expiate the commission of what might be considered on the face of it a quite serious offence is in the public interest. The enforcement of the criminal law is now and will become a different thing from the days in which the predominant interest was in the vindication of a centralised public order system in a context in which that system relied upon private policing. The conservation of scarce public justice resources is an increasing influence too; just as it is now recognised that, in a number of situations potentially involving the criminal law, the invocation of the full panoply of the criminal justice system will be counter-productive to a problem oriented resolution of the underlying causes of the behaviour involved.

It is clear that this offence is still relevant to modern South Australia, but that it needs to be reconsidered and re-enacted to cope with more modern policy imperatives. There is the additional consideration that it overlaps with the offences of being an accessory after the fact and the ancient offence of misprision of a felony, both of which still exist in South Australia. The existence and scope of these offences is controversial. The

5 See, for example, Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921).

scope of these combined offences requires rationalisation, modernisation, and restatement.

Where did these "Offences of a Public Nature" come from? In general terms, when South Australia was settled as an English colony in 1836, it inherited by operation of law all of the English common law and all Imperial statutes applicable to the conditions of the new colony. There is a deal of law on what was and what was not received under that formula, but that is clearly a topic for another time.[6] In addition, the colony, as it matured, passed laws in relation to various matters according to the powers granted to it for self-governance, so that local statute law was added to the list. Typically, the local law did not replace the received common law, seen as the foundation of the legal system, and could not constitutionally replace applicable Imperial statute law.

Most of the offences contained in ss237-266 of the *Criminal Law Consolidation Act* 1936 (SA) derive in the first instance from the first *Criminal Law Consolidation Act* (No 38 of 1876) (SA). As its name implies, a principal purpose of the first Consolidation Act was to bring together in one piece of legislation all major offences in force in the colony.[7] In many cases, the offences have been substantially unchanged since that time - indeed, many have remained unchanged from much earlier times, having been taken in 1876 from earlier legislation.

In the case of this group of offences, many derived from "An Act to Consolidate Indictable Offences of a Public Nature", No 2 of 1859. This latter legislation, when introduced, was said to be much the same as a Bill introduced by the Lord Chancellor into the House of Lords in 1856,[8] and it

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6 See, for example, the sequence of reports by the Law Reform Committee of South Australia, *Relating to the Topics of Property, Trusts, Uses, Equity and Wills* (Fifty-Fourth Report, 1980); *Relating to the Inherited Imperial Statute Law on Practice and Procedure in this State* (Fifty-Fifth Report, 1980); *On the Inherited Imperial Statute Law with Regard to Proceedings in Summary Jurisdiction* (Fifty-Eighth Report, 1981); *In Respect of Imperial Laws Application within this State in Relation to the Criminal Law* (Fifty-Ninth Report, 1980); *Relating to the Inherited Imperial Law* (Eightieth Report, 1984); *Dealing with the Inherited Imperial Law between 1751 and 1780* (Eighty-Fifth Report, 1984).

7 The Bill was introduced by Sir Henry Ayres as a measure of consolidation and reform.

8 Research has failed to find any resulting Act of the UK Parliament.

was designed to consolidate in one measure a number of offences inherited from English statutes upon colonisation. This was part of a more general scheme, in which other such offences such as offences against the person and offences against property were similarly consolidated and then brought together in the 1876 measure.[9] The situation is further complicated by the fact that the consolidators did not repeal the inherited legislation, nor did they repeal, in most cases, the underlying common law which the inherited statute sought to state or modify.

The other major source of these offences relates to the industrial offences in ss260-266. It was the *Conspiracy and Protection of Property Act* 1878 (SA). The necessity for these provisions lies in the history of the crime of conspiracy and of the rise of the trade union movement. Take, for example, s260, which abolishes certain common law conspiracies. At common law, it is possible to be convicted of conspiring to commit an act which, if done by one person alone, would not be a criminal offence of any kind.[10] This still represents the law in South Australia. There is considerable doubt at common law concerning whether or not one of those categories was conspiracy in relation to "trade disputes", such as strikes.[11] Having the law in this disputatious state was not agreeable to the English upper classes, who were terrified of the French Revolution and extremely anxious about the growing tendency of the labouring classes to get together and act in a united way to the detriment of their privileged position. So, in 1797, the English Parliament enacted the first of a series of *Combination Acts*,[12] which were designed to outlaw trade union activity, employing the notion of criminal conspiracy to achieve that end.

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9 In 1861, the UK Parliament did much the same thing with 24 & 25 Vic c xvi (larceny), c xvii (offences against property), c xcviii (forgery), xcix (coinage) and c (offences against the person). They did not take the next step and consolidate the consolidations.

10 There is considerable dispute about the extent to which this proposition is true, but no dispute that it is true. See, generally, Fisse, *Howard's Criminal Law* (Law Book Co, Sydney, 5th ed 1990) pp356-363.

11 An authoritative account is Wright, *The Law of Criminal Conspiracies and Agreements* (1873). Interestingly, Wright's book was a piece of advocacy as well as a piece of scholarship: he wanted to show that the then current views of the scope of the common law on conspiracy, which were systematically used to oppress any nascent working class movements, were misconceived.

12 37 Geo 3, c123.

In the 1870's, legislation began to appear repealing the *Combination Acts*. In England, the relevant legislation was the *Conspiracy and Protection of Property Act* 1875 (UK). It was necessary to both repeal the combination legislation and to declare that the common law did not criminalise conspiracies to strike. In South Australia, the *Criminal Law Consolidation Act* 1876 (SA) contained offences dealing with union related activity but in 1878, the Government introduced and had passed the *Conspiracy and Protection of Property Act* 1878 (SA) in order to "put the law on the same footing as in the old country". Section 3 of that Act is the direct ancestor of s260.

2. PUBLIC SECTOR CORRUPTION OFFENCES IN THE "PUBLIC OFFENCES" PART OF THE *CRIMINAL LAW CONSOLIDATION ACT* 1936 (SA)

The statute contains two sets of provisions relevant to misbehaviour in the public sector. They are ss240-241 dealing with exacting fees from prisoners and s253 dealing with trafficking in public office.

(a) Exacting Fees from Prisoners

Section 240 of the *Criminal Law Consolidation Act* 1936 (SA) provides:

> Any person who, being an associate, clerk of a court or any other officer, exacts any fee or gratuity from any prisoner on his entrance or commitment to or discharge from prison, or from any person charged with any felony or misdemeanour before any court of criminal jurisdiction, and who on his trial is acquitted, or discharged in any other way, shall be guilty of a misdemeanour, and liable to be imprisoned for any term not exceeding one year.

Section 241 provides:

> Any person who, being a gaoler, exacts from any prisoner any fee or gratuity on account of the entrance, commitment, or discharge of such prisoner, or detains any person in

> custody for non-payment of any fee or gratuity, shall be guilty of a misdemeanour and liable to be imprisoned for any term not exceeding one year.

These offences derive from legislation enacted in 1815.[13] That legislation introduced the novel idea that the gaol keepers should be paid out of the public purse. Before that, as any reader of the literature of the period knows, gaols were private enterprise organisations, and prisoners had to pay for such things as food, drink, the right to have visitors and so on. These offences were designed to outlaw that appalling practice and replace it with regular payments to gaol keepers from the public purse. It is evident that that reason for these offences has vanished.

The Mitchell Committee recommended that, if it was thought that these offences still had some work to do, they should be placed in the equivalent of regulations made pursuant to the *Correctional Services Act* 1982 (SA).[14] That seems a sensible course. In the meantime, however, South Australia retains both its own statutory offence and the received Imperial statute.

(b) Trafficking in Public Office

Section 253 of the *Criminal Law Consolidation Act* 1936 (SA) provides:

(1) Any person who -

(a) sells, or agrees to sell, or takes, or agrees to take, any reward or profit from the sale;

or

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13 55 Geo 3, c50, s13 - "An Act for the Abolition of Gaol and other Fees, connected with Gaols in England". This Act did not attract the attention of the SA Law Reform Committee's consideration of inherited statutory law.

14 Commonwealth Criminal Law Review Committee, *Review of Commonwealth Criminal Law* (Fourth Interim Report, 1990) p281.

(b) purchases, or agrees or promises to purchase, or gives, or agrees or promises to give, any reward or profit for the purchase

of any office, or any appointment to or resignation of any office, or any consent to any such resignation or appointment, shall be guilty of a misdemeanour, and liable to be imprisoned for a term not exceeding two years.

(2) Any person who -

(a) receives, or agrees to receive, any reward or profit for any interest, request or negotiation about any office, or under pretence of using any such interest, making any such request, or being concerned in any such negotiation:

(b) gives or procures to be given, or makes or procures to be made any agreement for the giving of any reward or profit for any such interest, request or negotiation:

(c) solicits, recommends, or negotiates in any manner as to any appointment to, or resignation of, any office in expectation of reward or profit:

(d) opens or keeps open any place for transacting or negotiating any business relating to vacancies in, or the sale of purchase of, or appointment to, or resignation of, offices,

shall be guilty of a misdemeanour, and liable to be imprisoned for a term not exceeding two years.

(3) The provisions of this section do not prevent or make void any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement lawfully made in respect of any allowance, salary or payment made or agreed to be made by or to the principal or deputy respectively, out of the fees or profits of the office.

(4) "Office" means any office, commission, place, or employment of profit or emolument under the Crown in South Australia, or any deputation thereto, or participation in the profits thereof.

This legislation is taken from an English statute called the *Sale of Offices Act* 1809 (UK),[15] but ultimately derives from legislation in 1551,[16] That legislation in turn had historical antecedents as early as 1275.[17] The South Australian Law Reform Committee reported on the latest of these Acts as follows:

> This is a statute that public offices shall not be sold. Until that date many public offices could be sold, could be devised for fees simple or fees tail, or life interests could be created out of them. They were simply a species of property and this statute was enacted to take this away ... [T]he statute can be repealed here. It is still in force in part in England. It involves the law of contract and the law of public appointments as well as the criminal law. If it is repealed however there should be some statute in South Australia dealing with the problem. There are other statutes besides this one involved and if the matter is not subsumed under the general rubric of the criminal law, and usually it is not, then the matter should be referred to the Committee for a report on the subject in general.[18]

So far as can be ascertained, that further reference was not given. South Australia thus retains the offence and any or all of the received Imperial statutes. That is the sole provision of the *general* South Australian criminal statutes dealing with public sector corruption. Clearly, then, the general statutory criminal law of this State insofar as it relates to public sector corruption is in a woeful state and requires immediate and drastic remedial attention.

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15 49 Geo 3, c126.

16 5 and 6 Edw 6, c16.

17 *Statute of Westminster* 3 Edw 1, c26.

18 Law Reform Committee of South Australia, *In Respect of Imperial Laws Application within this State in Relation to the Criminal Law* (Fifty-Ninth Report, 1980) p28.

3. OTHER CRIMINAL OFFENCES DEALING WITH PUBLIC SECTOR CORRUPTION

(a) Statutes

The two main pieces of legislation relevant to the State government area are the *Secret Commissions Prohibition Act* (SA) 1920 and the *Government Management and Employment Act* (SA) 1985.

The *Government Management and Employment Act* 1985 (SA) contains no offences of corruption in relation to government employment. Section 65 of the Act requires any employee holding a "prescribed position" to disclose pecuniary interests to the Commissioner for Public Employment. Section 66 of the Act contains a conflict of interest offence as follows:

(1) Where -

(a) an employee has a pecuniary or other personal interest in a matter;

and

(b) that interest conflicts or may conflict with the duties of that employee in relation to that matter;

the employee shall disclose the nature of the interest to the appropriate authority.

(2) The appropriate authority may direct an employee to take action specified in the direction with a view to resolving the conflict between a pecuniary or other personal interest and a duty as an employee.

(3) In this section -

"the appropriate authority" means -

(a) in relation to the Chief Executive Officer - the responsible Minister;

(b) in relation to any other employee - the Chief Executive Officer of the administrative unit in which the employee is employed.

This is, presumably, a disciplinary offence, since no other penalty is specified. The consequences may be harsh in relative terms - or they may not - but they are not criminal consequences, they are employment consequences. There are literally dozens of similar specific conflict of interest offences in relation to government and quasi-government enterprises scattered all over the statute book. That contrasts with the position in relation to South Australian local government where the offence against very complex and detailed conflict of interest provisions is a criminal offence punishable by a fine of $10,000 or imprisonment for one year for elected membes and $5,000 or imprisonment for one year for officers and employees.[19] The *Local Government Act* 1934 (SA) also contains very general bribery offences, applicable to briber and bribee, and punishable by imprisonment for one year and or a fine of $10,000.[20]

The *Secret Commissions Prohibition Act* 1920 (SA) legislation will not be detailed here. The point to be made is that, despite its relatively recently demonstrated usefulness in Victoria, the legislation now suffers from the defects that may be expected from legislation that has acquired such age. It is verbose, hard to understand, the offences are summary and the penalties too small, there is a general period of limitation of six months which is, in the circumstances, completely unrealistic, and there are problems with the scope of its application.[21] It is not hard to conclude that the current criminal statute regime dealing with public corruption in South Australia is profoundly unsatisfactory.

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19 *Local Government Act* 1934 (SA) ss54 and 80 respectively. The local government provisions are the subject of a current review.

20 Sections 56 and 81.

21 Commonwealth Criminal Law Review Committee, *Review of Commonwealth Criminal Law* (Fourth Interim Report, 1990) pp193-216.

(b) Common Law Offences

In South Australia, then, the criminal law in relation to public sector misbehaviour and corruption relies principally upon the common law as inherited from England in 1836. There are three such specific offences. They are: oppression in office, breach of trust or fraud, and neglect of duty. These are common law misdemeanours. Here is a brief account, in summary form, of each.[22]

A public officer commits a misdemeanour at common law if they do an act, legal or illegal, while exercising the duties of office (or, more technically, "under colour of office"), or abuses any discretion granted by law, with an improper motive. If the act consists of taking money or other valuable it is extortion.[23] If the result is the infliction of harm, injury or imprisonment on any person, it is oppression.[24]

A public officer commits a misdemeanour at common law if, in the course of their public office, they commit a fraud or breach of trust on the public, whether or not that fraud or breach of trust would have been criminal if committed by a private person.[25]

A public officer commits a misdemeanour if they wilfully neglect to perform a public duty which they are obliged by statute or common law to perform.[26]

A number of more general common law offences are also relevant in this area, notably conspiracy to defraud, conspiracy to defeat or pervert the course of justice, bribery and selling offices. In the most general of terms, conspiracy to defraud covers an agreement by two or more to cause a

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22 The following is largely derived from the invaluable and now sadly often overlooked work of Stephen, *A Digest of the Criminal Law* (MacMillan, London, 9th ed 1950) pp112-144.

23 This was the gist of the charge against Warren Hastings. See generally *Wyat* (1703) 1 Salk 380; *Bembridge* (1783) 3 Doug 327; *Borron* (1820) 3 B & Ald 432.

24 *Scroggs* (1680) 8 St Tr 199; *Williams* (1762) 3 Blurr 1317; *Okey* (1722) 8 Mod 46; *Morfit* (1816) R & R 307.

25 *Bembridge* (1783) 3 Doug 327; *Jones* (1809) 31 St Tr 251.

26 *Kennet* (1781) 5 C & P 282; *Pinney* (1832) 5 C & P 254; *Antrobus* (1835) 2 A & E 788; *James* (1850) 2 Den 1.

public official to act contrary to their duty,[27] even where that would not constitute any criminal offence[28] and even where there was no deceit involved.[29] It is worthy to note that, even where the desirable reform of restricting the crime of conspiracy to agreements to commit crimes has been undertaken, the reform has preserved the undefined scope of conspiracy to defraud.[30]

Even before 1801, the common law prohibited the sale of certain offices independently of the Act of 1551.[31] More important, however, for present purposes is the common law offence of bribery which, for obvious reasons, tends to overlap with the sale of offices type of offence. There are a number of eighteenth and nineteenth century decisions which make it clear that the bribery or attempted bribery of "public officials" is a misdemeanour at common law. The most cited of these is *Vaughan*[32] in which the accused was convicted of the attempt to bribe the first Lord of the Treasury to procure the public office as clerk of the Supreme Court of Jamaica, despite the fact that, under English law at the time, the office was saleable property.[33] The authorities were discussed in *White*[34] a case in which the accused attempted to bribe a Member of Parliament to vote in a particular

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27 See, for example, *Boston* (1923) 33 CLR 386; *Howes* (1971) 2 SASR 293; *Withers* [1975] AC 842; *Freeman* (1985) 3 NSWLR 303.

28 *Weaver* (1931) 45 CLR 321; *Proctor* [1963] Qd R 335; *Eade* (1984) 14 A Crim R 186.

29 *Scott* [1975] AC 819; *Walsh* [1984] VR 474; *Eade* (1984) 14 A Crim R 186; *Horsington* [1983] 2 NSWLR 72.

30 See, in England, the *Criminal Law Act* 1977 (UK) s1, enacting reforms proposed by the English Law Commission, *Conspiracy and Law Reform* (Law Com No 76, Part 1, 1976). There is a great deal of secondary material on conspiracy to defraud. The latest English reform document is the English Law Commission, *Conspiracy to Defraud* (Working Paper No 104, 1988). The English lead was followed in Victoria in the *Crimes Act Amendment Act* 1985 (Vic) enacting, inter alia, s321F. No other jurisdiction has followed suit to date.

31 See, for example, *Stockwell v North* (1600) Noy 102; 74 ER 1068 - the Sheriff of Nottingham was convicted of selling the offices of gaolor and baileywick - Robin Hood would no doubt have been pleased.

32 (1769) Burr 2494; 98 ER 308.

33 Other examples are *Bacon* (1620) 2 St Tr 1087; *Tiverton Corporation* (1723) 8 Mod R 176; 88 ER 136; *Macclesfield* (1725) 16 St Tr 767; *Beale* (1798) reported [1914] 3 KB 1300; *Cassano* (1805) 5 Esp 231; 170 ER 795; *Pollman* (1809) 2 Camp 229; 170 ER 1139; *Boyes* (1860) 2 F & F 157; 175 ER 1004.

34 (1875) 13 NSWSCR 322.

way on a particular question, and are neatly summarised by Faucett J as follows:

> That principle is, that any person who holds a public office or public employment of trust, if he accepts a bribe to abuse his trust - in other words, if he corruptly abuses his trust - is guilty of an offence at Common Law; and the person who gives the bribe is guilty of an offence at Common Law ... [That principle] is applicable to all public offices to which a trust is attached.[35]

The offence, and the others cited, apply to all "public officers". The width of that phrase is indicated by the decision in *Whitaker*.[36] In that case the colonel of a regiment was convicted of the common law offence in relation to the sale of the rights to operate the regimental canteen. Lawrence J stated:

> A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is public officer.[37]

4. WHAT SHOULD BE DONE ABOUT ALL OF THIS

It is clear beyond argument that a thorough-going overhaul and reform of the general criminal offences touching upon public sector misbehaviour and corruption is long overdue. There are a variety of reasons for this. They relate to the general principles of public policy or, as they should be called, the general principles of criminal legislation, which underlie moves to the codification of criminal law. Those principles are that the general criminal law should:

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35 At 337.
36 [1914] 3 KB 1283.
37 At 1296.

- clearly punish behaviour regarded by the community as deserving of criminal punishment;
- be easy to find;
- be easy to understand;
- be cheap to buy; and
- be democratically made and amended.[38]

The current state of the criminal law in South Australia - and the rest of Australia as well - falls well short of these criteria. The common law offence of bribery and the provisions of the *Secret Commissions Act* 1920 (SA) should be modernised and placed in the *Criminal Law Consolidation Act* 1936 (SA).[39] Together, these provisions would make the current antiquated provisions redundant. They should be repealed. Similarly, the trio of common law offences dealing with official misconduct and corruption should be replaced with modern statutory offences in a codified form. These offences should apply to all persons holding public office, exercising public discretions or performing public duties. That should include, for example, local and State government, police, politicians, and quangos.

That in turn raises a host of issues. Late in the last session of Parliament in 1991, the Attorney-General of South Australia introduced a Bill to reform the whole of this, and related, areas of law.[40] The Bill was to lie on the table for public consultation and debate in the first session of Parliament in 1992.

The Bill covers the following general areas:

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38 See, for an exploration and emplification of these principles, 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* (November, 1991). See, for an extract of this report on this issue, Goode, "Codification of the Australian Criminal Law" (1992) 16 *Crim LJ* 3 at 8-16.

39 A model worth considering is the secret commissions provisions of the Canadian Criminal Code. See, for example, the recent decision in *Kelly* (1989) 52 CCC (3d) 137.

40 *Statutes Amendment and Repeal (Public Offences) Bill* 1991 (SA). The Second Reading Speech is to be found in SA, Parl, *Debates* (1992) at 2246, per the Honourable Chris Sumner.

- offences in relation to the impeding of the investigation of offences and the apprehension of offenders and escapees;

- offences against the administration of justice including perjury, fabricating or concealing evidence, tampering with witnesses and jurors, and judicial officers;

- offences dealing with public corruption, including bribery, intimidation, extortion, and abuse of public office;

- a miscellaneous group of offences criminal defamation, offences in elation to industrial disputes, forcible entry on land, riot and the conduct of public meetings.

In relation to public sector corruption, the Bill abolishes the common law and any inherited imperial legislation and enacts statutory offences dealing with:

(a) The Bribery and Corruption of a Public Officer

There are offences here which apply to both the maker of the bribe and the receiver of the bribe. In general, the offences relate to giving or seeking a benefit as a reward or inducement for an act, omission, or the exercise of power or influence in an official capacity or by virtue of public office.

(b) The Making of Threats or Reprisals Against a Public Officer

The offence here relates to the causing of threatening to cause any injury to person or property with the intention of influencing a public officer or in retaliation for anything done by a public officer in their official capacity.

(c) Abuse of Public Office by Public Officers

This offence criminalises a public officer exercising power or influence, refusing to perform or discharge an official duty of function or using

information gained through public office with the intention of securing a benefit for themself or another, or causing injury or detriment to another.

(d) Extortion By a Public Officer

This offence relates to the demanding or requiring a benefit of another and, when doing so, suggesting or implying that it should be complied with because of the holding of public office knowing that there is no legal entitlement to that benefit.

(e) Offences Relating to the Appointment to or Removal from Public Office

These offences deal with a public officer who exercises power or influence of office to affect the public employment of any person, or who accepts or seeks bribes for such a purpose.

These offences are serious indictable offences and are generally punishable by a maximum of seven years imprisonment. They regulate the conduct and, on the other side of the coin, protect the integrity of, what the Bill calls "public officers". This term is widely defined in the Bill to include a person appointed to public office by the Governor, a judicial officer, Members of Parliament, public servants, police officers, employees of the Crown, members, officers and employees of State instrumentalities, and members and employees of local government.

Two features of the Bill are of particular importance. The first deals with what is not in it. That is a general offence dealing with conflict of interest. Arguably, the multitude of provisions dealing with conflict of interest should be repealed and replaced with a general criminal offence of moderately serious import. It should be phrased as follows:

> It is an offence for a public officer to participate personally and substantially in an official matter in which, to his or her knowledge, he or she, or his or her spouse, child or partner has a financial interest, direct or indirect, unless he or she first communicates the nature and extent of that interest to a

> superior who has no such interest, makes full and frank disclosure, and receives permission in writing to act.[41]

This view is fortified by a recommendation of the New South Wales Independent Commission Against Corruption,[42] and provisions in the Tasmanian,[43] Queensland,[44] Northern Territory[45] and Western Australian[46] Codes. The Gibbs Committee's conclusion that disciplinary offences and the other criminal offences cover as much of the field as possible or the view of the Bowen Committee that this is too much of a "grey area" are simply unconvincing assertions which savour too much of the protection of privilege from public scrutiny.[47]

The reality was that such an offence was not practical in the context of this exercise. To achieve that end, it would have been necessary to comb the statute book and redo an indeterminate but quite large number of specific conflict of interest provisions. It would also have been necessary, in addition to the major policy initiatives contained in the Bill and in the overall strategy, to carry the further and controversial proposition that acting in conflict of interest *in a way not already caught by the proposed offences dealing with securing a benefit or exercising influence* should be escalated from a disciplinary offence to a serious criminal offence.

This would not have been an easy task, as, in codifying the common law offences relating to abuse of office, the Bill had gone to an extent that some might regard to be excessive. For example, the proposed s248 of the Act would provide:

> A public officer who improperly -

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41 Based on an American model, the citation for which is 18 USC 208 ("Act affecting a personal financial interest").

42 ICAC, *Report on Investigation into the Maritime Services Board and Helicopter Services* (July 1991) p59.

43 Section 85.

44 Section 89.

45 Section 79.

46 Section 83(b).

47 Commonwealth Criminal Law Review Committee, *Review of Commonwealth Criminal Law* (Fourth Interim Report, 1990) pp225-227.

(a) exercises power or influence that the public officer has by virtue of his or her public office;

(b) refuses or fails to discharge or perform an official duty or function; or

(c) uses information that the public officer has gained by virtue of his or her public office,

with the intention of -

(d) securing a benefit for himself or herself or for another person; or

(e) causing injury or detriment to another person,

is guilty of an offence.

The proposed s250(1) provides:

A public officer who improperly exercises power or influence that the public officer has by virtue of his or her office with the intention of -

(a) securing the appointment of a person to a public office; or

(b) securing the transfer, retirement, resignation or dismissal of a person from a public office,

is guilty of an offence.

This latter provision was removed from the Bill during debate in Parliament[48] on the ground that it went too far, in particular because it criminalised the exercise of power or influence without the necessity for proof that it was done with the intention (generally speaking) of securing a

48 SA, Parl, *Debates* (1992) at 3682-3685.

benefit or causing a detriment of any kind. That situation was criminalised by proposed s250(2).

The risk that the criminal law, be it common law, the law in the Griffith Codes, or in these new offences, under or over criminalises is a real one, for the simple reason that there are no hard and fast rules governing right and honest conduct in public life - nor should there be. This observation about the difficulty of setting the limits of the criminal sanction - as opposed to, say, disciplinary offences as well as purely political sanctions for impropriety - leads to the second main issue raised by the Bill. It is the standard of culpability that should be required for convinction for these offences. At common law and in statutes, it was common - almost universal - for the offence to require that the act be done "corruptly". This is a most unhelpful word of uncertain content, but can be generally described as knowing that what was done was *improper* (whatever that may mean).[49] It had, in short, overtones of dishonesty or malpractice. But there was considerable uncertainty in its meaning. For example, the New South Wales Court of Appeal has recently held that the word "corruptly" has at least three distinct meanings.[50]

As a result, there has been a distinct tendency for law reformers[51] and courts[52] - to abandon the "*flavoursome*" part of "corruptly" and to opt instead for the mainstream variations on criminal fault of "intention", "knowledge" and "recklessness". To enlarge a little on what Professor Finn has recently pointed out, with some justification, the results of this, however defensible in terms of criminal law doctrinal purity, will be to eliminate much needed and correct flexibility in the standards that the law expects in terms of public sector propriety.[53] After all, criminal standards of culpability and fault are all about setting standards of acceptable

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49 See, for example, *Cooper v Slade* (1858) 6 HLC 746; *Gross* (1945) 86 CCC 68; *Welburn* (1970) 69 Cr App R 254; *Gallagher* (1985) 16 A Crim R 215; *Jamieson* [1988] VR 819.

50 *Drummoyne Municipal Council v ABC* (1990) 21 NSWLR 135 at 154-155.

51 Commonwealth Criminal Law Review Committee, *Review of Commonwealth Criminal Law* (Fourth Interim Report, 1990) Draft Bill ss34-40, 52, 56.

52 See, for example, *Kelly* (1989) 52 CCC (3d) 137 and *Arnold and Boswick* (1991) 65 CCC (3d) 171.

53 Finn, "Why Corruption should not Compromise Judgment" *The Australian*, 9 August 1991.

behaviour. The result in the case of the Gibbs Committee was the necessity to deal with problematic situations by definition. So, for example, in the Gibbs Committee's Draft Bill, "reward" was to be so defined as to exclude normal pay claims, which would otherwise have fallen foul of the offence of extortion.[54] This sort of thing raises doubts about the ambit of the offences and should be avoided if at all possible.

There is available a criminal law device which effects a compromise between certainty and flexibility in standards of public sector behaviour. When the English Criminal Law Revision Committee proposed a "plain English", long overdue, comprehensive reform of the general criminal law dealing with theft and fraud,[55] it too was faced with the problem of setting a general standard in an area of infinite variety and shading of human behaviour where the common law test (intent to defraud) had long been unintelligible. They came up with the standard "dishonesty".[56] There is a

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54 Commonwealth Criminal Law Review Committee, *Review of Commonwealth Criminal Law* (Fourth Interim Report, 1990) Draft Bill s51.

55 Criminal Law Revision Committee, *Theft and Related Offences* (Eighth Report, 1966). This produced the *Theft Act* 1967 (UK). The model has been adopted in Victoria and in the ACT.

56 Another analogous offence to the sorts of crimes at issue here is blackmail or extortion. At common law, the line between extortion and hard bargaining is not clear. Fisse, *Howard's Criminal Law* p287 states that:

> Much depends on whether the demand is considered extortionate by a jury, and the law has failed to specify exactly where the boundary lies. This deficiency has prompted the observation that "[e]xtortion seems ... to be a highly emotive offence, one which depends to a disturbing extent upon subjective moral judgements ..."

However that might be deplored, when it came for reform of the offence in common law jurisdictions, that problem proved intractable. It is said by Fisse of the new offence (at p308): "A feature of the new offence of blackmail is that the scope of liability is governed primarily by D's subjective beliefs as to the legal or even moral propriety of his conduct."

The leading text writers Smith and Hogan, *Criminal Law* (Butterworths, London 1983) p554 (speaking about blackmail) explain a very similar concept in this way:

> As a practical matter most people do act according to generally accepted legal and moral standards, and the cases must be rare where D can *genuinely* rely on his own moral standards where these are seriously at odds with accepted standards. If D knows that the threat he proposes is to commit a crime, he cannot accordingly maintain that he believes such a threat to be proper. It is not enough that D feels that his conduct is justified or that it is in some way

long story to this, but, in the event, this was taken to mean that the jury must find that what the accused did would have been regarded as dishonest according to the standards of ordinary decent people and that the accused must have realised that what they were doing was dishonest.[57]

The Bill suggests that a similar standard could be employed in this context. The relevant section in the Bill as introduced provided:

> (1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public officers of the relevant kind.
>
> (2) The determination of the standards referred to above is a question of law to be answered by judicial assessment of those standards and not by evidence of those standards.
>
> (3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if:

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right for him; "proper" in this context involves a consideration of what D believes would be generally thought of as proper. The test of D's belief is of course a subjective one but the belief refers to an external standard; D cannot, therefore, take refuge in his own standards when he knows that these are not thought proper by members of society generally.

57 The foremost authority is *Ghosh* [1982] QB 341. Recent examples are *Buzalek and Schiffer* [1991] Crim LR 130; *Holden* [1991] Crim LR 478. See also the application of the concept in NSW in *Glenister* [1980] 2 NSWLR 597. There is a lot of writing and case law on this point. See, for example, Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] *Crim LR* 341. More than this is beyond the scope of this paper. For an up to date account see Fisse, *Howard's Criminal Law* p299ff.

(a) there was lawful authority or a reasonable excuse for the act; or

(b) the act was of a trivial character and caused no significant detriment to the public interest.[58]

What could be more "honest" than asking a judge and jury to consider whether the accused knowingly or recklessly acted in a manner contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind? This test has the virtue of setting a general standard, comprehensible on its own terms, which contains the flexibility to cope with the individualisation of culpability required by the broad sweep of the offences. Society, as represented by its court based institutions, is asked to answer the directly relevant question. We get the standards of public sector behaviour that we determine and deserve.

This innovative standard met with some resistance in Parliament, with an anonymous QC being quoted as deploring the vagueness of the standard and expressing the opinion that the fault elements proposed would have no content. Be that as it may, eventually the standard prevailed in an amended form. There were three amendments of substance. The first added the following subclause:

> A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of the criminal sanction was warranted.

The analogy drawn here is with the concept of criminal negligence as it has been interpreted to apply particularly in relation to the offence of manslaughter. It is manslaughter to cause the death of another person by criminal negligence. It is clear that mere negligence, as would suffice for civil liability, will not do for the offence. The offence does not escalate mere negligence to a very serious offence.

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58 This subsection derives from the views of McGarvie J in *Bonnollo* [1981] VR 633 on "dishonesty".

So it is necessary to distinguish between mere negligence on the one hand and criminal negligence on the other. The common definition of criminal negligence is that set out by the Victorian Court of Criminal Appeal in *Nydam*.[59] It requires

> such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.[60]

The second amendment deleted subclause (2) above. There were two reasons for its inclusion. The first was that, over time, a body of law would be built up which would be far more specific than any legislation could ever hope to be. The strength of the judicial method is that decided cases take statements of general legislative standards and provide very specific case by case illustrations. With the jury deciding the question, all there is for future guidance is the general verdict, with no reasoning to inform.

The second reason was to provide that, except in exceptional cases, the parties cannot lead evidence on the standard. It was thought to be undesirable that, for example, a defendant could lead evidence of public opinion on an issue, or sociological surveys of what the public believes the standards of public behaviour are or ought to be.

Nevetheless, the subclause was deleted. Both the Government and the opposition felt, in the end, more comfortable with the standard in the particular case being left with the jury.

The third amendment inserted another qualification into subclause (3), defining what is *not* "improper". It read:

> the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner.

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59 [1977] VR 430.
60 At 455.

These amendments were accompanied by a high standard of debate on matters of fundamental criminal law principle, and the appropriate reach of the criminal sanction. It remains to be seen whether the innovative approach to public sector corruption and abuse of power taken by this Bill will fulfil the hopes of the Government and the Opposition for a principled and appropriate Code of Criminal Offences in this vexed and difficult area.