THE VICTORIAN CRIMINAL CODE

GREG TAYLOR*

I INTRODUCTION

One of the oddest fault lines in Australian law, and one of the hardest to explain to foreigners, is the one between those states and territories that have adopted a criminal code and those which have not. The division is all the more remarkable given that the Criminal Code drafted by Griffith CJ has been adopted, in a more or less faithful reproduction, in a variety of jurisdictions around the world.[1] This fault line in Australian criminal law has the consequence that, if someone in Brisbane gets into an aeroplane and flies to Perth,[2] or to Kenya or southern Nigeria,[3] that person remains subject to some descendant of Griffith CJ's Code, but a person in Brisbane who gets into a car and drives to Tweed Heads is no longer within its reach.

It was not inevitable that the law in Australia would be fragmented in this way. Griffith CJ's Code might easily have been adapted for adoption throughout Australia. An effort was made to do so in South Australia in the form of a Code drafted by Dr F W Pennefather in 1901 and 1902.[4] A similar effort, extending fitfully over some years and just as unsuccessful as the South Australian one, took place in Victoria. This article considers the Victorian Criminal Code of 1904-1912, which represented the Victorian attempt to adopt the Queensland Code. The aim of this article is not merely to commemorate the centenary of the attempt to codify the criminal law of Victoria but also to understand why that attempt failed so long ago. Despite the massive changes that have occurred since, it may be that the failure of the earlier attempt holds lessons for those who advocate the codification of Victorian law today, chiefly the proponents of the Model Criminal Code prepared

---

* Lecturer, Law School, Monash University. The author wishes to thank those who assisted him in this research project, including the anonymous referees; those named below nn 7 and 188; the staff of the Public Record Office of Victoria; Margaret Priwer from the Law Library of the University of Adelaide; and, last but never least, Ian Leader-Elliott.

[1] See Robin O'Regan, *New Essays on the Australian Criminal Codes* (1988), ch 8; Robin O'Regan, 'Sir Samuel Griffith's Criminal Code' (1990) 7 *Australian Bar Review* 141, 147-151. It is also in order to point out here that the author has compared the draft Victorian Criminal Code with that introduced in Palestine in 1936, looking in particular for any areas in which the Palestinian Criminal Code might differ from Griffith CJ's and reflect the Victorian draft instead. There appears to be no such area and it accordingly does seem to be wrong to state that the Criminal Code of Palestine was based on a Victorian source: see Robin O'Regan, 'Sir Samuel Griffith's Criminal Code' (1990) 7 *Australian Bar Review* 141, 150.

[2] *Criminal Code Act 1913* (WA).

[3] Alberto Cadoppi and Justice Kerry Cullinane, 'The Zardanelli Code and Codification in the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 116, 180; H F Morris, 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876 – 1935' [1974] *Journal of African Law* 6, 22.

[4] Greg Taylor, 'Dr Pennefather's Criminal Code for South Australia' (2002) 31 *Common Law World Review* 62.

by the Model Criminal Code Officers' Committee.[5] This is especially so if the reader agrees with the view which will be advanced here. That is, the Victorian Criminal Code, although not flawless, was a well-drafted attempt at codification. Its failure cannot be due to any defects of its own but must lie outside it, in the political process.

In particular, those responsible for the project of codification were unable to grasp that it was not a task that could be left to Parliament unassisted by the deliberations of an expert committee, such as existed in Queensland, to examine the Code's provisions in detail. Accordingly, the Parliament of Victoria did nothing about the Code because, within the time available, there was nothing it could sensibly have done. Furthermore, little effort was made to stir up interest in codification even among those, like lawyers, who might well have been interested in it. There was, in other words, a failure of tactics and salesmanship. The government seemed only half-heartedly committed to codification. The result is that, 99 years after the Victorian proposal for the adoption of the Queensland Code, the Law Reform Committee of the Parliament of Victoria could still say that, in Victoria, 'the role of statute law is arguably less than [in] any other Australian jurisdiction'.[6]

II PROPOSAL AND DRAFTING

Unless the author has overlooked some major source of primary material, recounting the history of the Criminal Code of Victoria is a task that is greatly hampered by the absence of so much relevant material.[7] So little is available that one almost feels at times as if one is reconstructing the textual history of some

[5] See M R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152.

[6] Victorian Parliament Law Reform Committee, *Inquiry into Administration of Justice Offences,* Discussion Paper August (2003), 6.

[7] There is nothing in the papers of Sir Samuel Griffith (State Library of New South Wales, ML MSS 363; as advised by Information Request Service, State Library of New South Wales, 29 September 2003, ref IR 31034), Sir Leo Cussen J, (Sir) John Davies A-G or Sir Frank Madden (State Library of Victoria, Australian Manuscripts Collection, PA 02/130; MS 11987 and MS 7612). James Butler and Michelle Bendall of the Library of the Supreme Court of Victoria were also consulted and were unable to assist further; it appears that there are no letter books from the period in question or copies of the Code there. A search of the records of the Public Record Office of Victoria produced only a small amount of information, which is noted below (eg below n 31), and no copy of the Code; VPRS 10265 (Parliamentary Counsel's Bill files) seems to have no material at all on the Code (which is actually not surprising given that it was, as we shall see, drafted outside that office); it is not mentioned in VPRS 6874/P001/2; VPRS 7631 and VPRS 7635 contain no material before 1948 (as advised by Felicity Murphy and Bridget Noonan, Parliament of Victoria – the material is not publicly available); there is nothing of interest in the relevant portions of VPRS 3253 or in various indexes and registers such as VPRS 1188. Carolyn Shine of the Justice Department Library was also unable to find anything in that Department's collection. There is nothing in the County Court Library. Dr Margaret Glass, the author of *Tommy Bent: 'Bent by Name, Bent by Nature'* (1993) advised the author by telephone on 15 October 2003 that she too did not uncover anything about the Code in her researches. There is nothing in the records of the Law Institute of Victoria held in the Archives of the University of Melbourne, to which the Law Institute kindly granted the author access, nor in those of the Victorian Bar Council (as advised by Alison Adams, the Archivist). The survey of colonial criminal codes briefly undertaken by H J Randall, 'The Resurrection of our Criminal Code' (1911) 27 *Law Quarterly Review* 209, 212 did not notice the Victorian effort, although it did refer to the unsuccessful South Australian one. The Victorian Criminal Code was also unknown to Harrison Moore, 'A Century of Victorian Law' (1934) 16 *Journal of Comparative Legislation and International Law* (3rd) 175, 184. Enquiries of Mr B Zichy-Woinarski QC and Mr J C Z Woinarski revealed that, if any of the papers of the Code's junior drafter have survived, their location is not known to his family. In this article, all references beginning with 'VPRS' are to records that may be found in the Public Record Office of Victoria.

obscure part of the New Testament, or some equally ancient document, based on the few external sources that have survived the millennia since it was written.

That is, however, something of an exaggeration; some propositions can be established with certainty or near-certainty. The chief of these is that the Victorian Criminal Code was an initiative of the Bent government, a conservative government that held office from February 1904 to January 1909. The not inaptly named (Sir) Thomas Bent was a man who, in his eccentricities and self-confidence, was a worthy predecessor of certain later conservative Victorian premiers. Tempting though it is to expand on this comparison, this article is not a general history of turn-of-the-century Victorian politics, and those interested in descriptions of Sir Thomas Bent's character and government could do much worse than consult the work of Dr Margaret Glass on this topic.[8] However, something of Bent's style and background can be conveyed by her descriptions of him as a 'rough, uneducated market gardener'[9] who exhibited 'autocratic and quite eccentric behaviour'.[10] *The Argus* referred to Bent's 'irresponsible gabbling', 'violent eccentricity' and habit of speaking 'as if he ruled Victoria by right of conquest'.[11] The government led by Bent eventually fell towards the end of 1908 — although its death was postponed to the start of 1909 by an election consequent on the success of a no-confidence motion — amid allegations of dubious land transactions by Bent which became the subject of a Royal Commission.[12] The fall of the government, incidentally, also meant the effective end of attempts to codify the criminal law of Victoria, although that project played no part in the government's demise.

One might wonder why a figure such as Bent would care about the codification of the criminal law. Here, as elsewhere, '[h]is character and motives remain something of an enigma'.[13] Although Bent was quite a large man in stature, it is possible that some form of Napoleonic complex was at work. However, it is clear that although he obviously knew of and supported the project of codification, it was not Bent himself who had charge of it. That honour belongs to (Sir) John Mackey, who became, at first, an Honorary Minister (Minister without Portfolio) in Bent's first government[14] and later filled the offices of Minister of Lands, Solicitor-General, Chief Secretary and Minister of Labour. Although apparently also '[r]ough in manners and appearance'[15] and a man who 'was earning his living at an age when most boys are still at school',[16] John Mackey lacked the eccentric habits of his Premier. He was 'a solid, serious man'[17] with a somewhat bookish manner who had matriculated at night school and gone on to university. He had a law degree from

[8] Margaret Glass, *Tommy Bent: 'Bent by Name, Bent by Nature'* (1993).
[9] Ibid 163.
[10] Ibid 168.
[11] Ibid 180.
[12] Victoria, *Victorian Parliamentary Papers* vol 2 2nd session, (1909) 1033.
[13] *Australian Dictionary of Biography* (3) 145.
[14] Cf *Victorian Government Gazette*, 18 February 1904, 651.
[15] *Australian Dictionary of Biography* (10) 309.
[16] *Melbourne Punch* (Melbourne), 23 September 1920, 2.
[17] *Melbourne Punch* (Melbourne), 8 June 1905, 740.

the University of Melbourne and lectured in equity there while a Member of Parliament.[18] However, he was never Attorney-General 'because the portfolios available for Ministers in the Legislative Assembly [were] already allotted'.[19] Despite their apparent differences in style, he appears to have been a strong supporter of Bent's, predicting in public, during a meeting on an unrelated matter a few months before Bent's ascension to the Premiership and at a time when the future leadership of the government of Victoria was uncertain, that Bent would 'occupy a much higher position yet'.[20] Equally, 'Sir Thomas Bent, with that political sagacity which characterised him, recognised in Sir John Mackey a man with a mind well suited to supply those qualities of precision and caution which he himself lacked'.[21]

It is tolerably clear that it was Mackey who was passionate about making an attempt to codify the criminal law, given that he was

> one of those men who are essential in any government to give form, consistency and legal verbiage to the ideas of practical politicians. Mackey regarded it as his special duty to see that the Victorian Statute book was kept in order and up to date ...[22]

As late as 1957, when Sir John Mackey had been dead for a third of a century, no lesser authority than Sir Owen Dixon paid tribute to his diligence in introducing reforms of what might be called 'lawyer's law' into Victoria.[23]

So the following state of affairs can be reconstructed: Bent, on forming his government, wanted to express his thanks to Mackey for his support and ensure its continuance but was unable to make him Attorney-General. Bent was, however, able to put Mackey in charge of a project which was close to the latter's heart: the codification of the criminal law as part of a more general mission to tidy up the statute book. This had two advantages from Bent's point of view: not only was he able to thank his supporter in a manner free of any political or other significant cost; he was also able to set him to work on a special project that would take a lot of time (during which it would be in Mackey's interest to continue his support for Bent) and absorb a lot of energy. Mackey's commissioning as the overseer of a project to codify the criminal law was thus an undertaking of mutual advantage given the respective characters, positions and interests of Bent and Mackey. Of course, the then recent enactment of criminal codes in Queensland and Western Australia, together with attempts to enact a code in South Australia, no doubt suggested the making of a similar attempt in Victoria. Finally, one imagines that both Bent and Mackey would also have been pleased to go down in history as the politicians, or rather statesmen, responsible for the Victorian Criminal Code.

---

[18] Notes of his lectures in equity in 1905 are still held in the Law Library of the University of Melbourne.
[19] *The Argus* (Melbourne), 13 February 1906, 4. This is doubtless a reference to the restrictions imposed by *Constitution Acts Amendment Act 1890* (Vic) s 13 (see now *Constitution Act 1975* (Vic) s 50(3)).
[20] *The Argus* (Melbourne), 13 November 1903, 4.
[21] *The Argus* (Melbourne), 7 April 1924, 11.
[22] E H Sugden and F W Eggleston, *George Swinburne: A Biography* (1931) 125.
[23] Sir Owen Dixon (1957) 31 *Australian Law Journal* 325, 342.

Work on codification accordingly started very early in the life of the government. Bent became Premier on 17 February 1904.[24] Cabinet's decision to proceed with codification of the criminal law appears from newspaper reports to have been made on 29 March 1904 (although confidence that the task would be successfully completed cannot have been raised by the report in *The Age* that codification was one of the 'matters of small importance'[25] decided upon by Cabinet). On 9 April 1904, it was already being reported that, in a major policy speech for the forthcoming election (1 June 1904),[26] the Premier

> owing to lack of time, [had] had to drop out of his ... speech [the topic] of law reform. The Government proposes to take in hand the codification of the criminal law, on the model of that prepared for Queensland by Sir Samuel Griffith, now Chief Justice of the High Court.[27]

That this topic was dropped perhaps gives some indication of the priority that Bent attached to it. Admittedly, this order of priorities is not surprising given that the codification of the criminal law could hardly be expected to be in the forefront of voters' concerns in the looming general election. Also, the Code had not been written by this stage, so it was hard to say much about it.

The Premier remedied his earlier omission later in the month in another policy speech at Cheltenham. He said:

> There is not the slightest doubt that law reform is necessary. ([Audience:] Hear, hear). Although I am not a lawyer myself, I know something of the difficulties we have, and, with the assistance of Mr Davies [A-G] and Mr Mackey, I feel justified in taking the stand I do ... We will also see to the codification of the criminal law on the lines followed by Chief Justice Griffith in Queensland ...[28]

Even before the election had been won, the project commenced. The Crown Prosecutor,[29] C B Finlayson and C J Z Woinarski, then a barrister and later Crown Prosecutor and a judge of the County Court,[30] were commissioned by the Premier on 3 May 1904 'to prepare a draft Bill for the codification of the Criminal Law with such amendments as may seem necessary'.[31] The letter commissioning these two good friends[32] as drafters expressly stated that Mackey was to be 'the responsible

---

[24] *Victorian Government Gazette*, 17 February 1904, 639.
[25] *The Age* (Melbourne) 30 March 1904, 6; see also *The Argus* (Melbourne), 30 March 1904, 4.
[26] *The Age* (Melbourne), 7 April 1904, 4; comments that the speech in question 'will practically be the opening of the general election campaign'.
[27] *The Argus* (Melbourne), 9 April 1904, 15.
[28] *The Argus* (Melbourne), 27 April 1904, 6; similar but briefer: *The Age* (Melbourne), 27 April 1904, 6.
[29] To use the title which appears to have been in common use at the time (eg Victoria, *Victorian Parliamentary Papers* vol 1, (1905) 453; *The Argus* (Melbourne), 26 July 1905, 4). The formal title (of all prosecutors, not just the chief one) was Prosecutor for the King: *Crimes Act 1890* (Vic) s 387.
[30] See the obituary in (1936) 9 *Australian Law Journal* 336.
[31] VPRS 1207/P000/1959/5R/6559. They eventually received £256/5/; VPRS 266/P000/619/1906/239. We are not told who received how much.
[32] See *Short Biographies of County Court Judges who have died since 1852* (1966) quoted in Hewitt Co Ct J, *Judges Through the Years, being a Chronology of the Judges of the County Court of Victoria from its Inception (1852)* (1984) 50.

Minister in charge of the matter'.[33] Each drafter accepted the task by letter on the following day, indicating that they had probably been approached beforehand.[34]

Very shortly after accepting the commission to draft a criminal code — on the following day, 5 May 1904 — Woinarski wrote to the Premier asking to be supplied with copies of inter-state and New Zealand codes,[35] a request the Premier's Office followed up promptly.[36] The Victorian draft eventually drew on the Criminal Codes of Queensland, Western Australia, Canada and New Zealand, as well as the English and South Australian draft Codes.[37]

Some two months after Finlayson and Woinarski had been commissioned, *The Argus*[38] and *The Age*[39] both carried news items, doubtless as a result of some form of official announcement, notifying that work had commenced. They reported that the work on codification was to be carried out by the two drafters appointed at the start of May. Both newspaper reports, again doubtless relying on some official source or other, reported that the Griffith code as well as Dr Pennefather's Criminal Code proposed in South Australia and the draft English Code of the late 1870s and early 1880s[40] would be consulted by the drafters. *The Age*, abandoning its earlier view that codification was 'of small importance', went so far as to say that '[t]he consolidation of the criminal law of Victoria comes under the category of a "long felt want" which is about to be satisfied' and also indicated that the drafters 'have been asked to make recommendations, but their suggestions will be confined to the severity of the penalties, with the object of making the punishment fit the crime rather than to any new method of treating offenders'. (Later, even the *Melbourne Punch*[41] was to indicate its support for the task of codification.) Both newspapers indicated that the drafters were expected to complete their task early in the following year — in about six months. This was quite an ambitious estimate given that court work no doubt continued to claim a good deal of their attention.

Just before Christmas 1904, while work on the codification was doubtless still proceeding and the original timetable for completion probably appeared somewhat optimistic, Davies A-G gave a speech on criminal law, perhaps in an attempt to

---

[33] VPRS 1161/P000/134/1373, 1374.

[34] Woinarski had just become a father – his son, born on 11 February 1904, was to become a County Court Judge, hold an LLD from the University of Melbourne and edit *Jesting Pilate*: *The Australasian* (Melbourne), 27 February 1904, 507; Hewitt Co Ct J, *Judges Through the Years, being a Chronology of the Judges of the County Court of Victoria from its Inception (1852)* (1984) 87. Woinarski *senior* was doubtless glad of the solid and reliable source of income thus offered to him at this stage in his life. He went on to earn £161/8/9 in 1906 by undertaking the consolidation of the Supreme Court Rules: VPRS 266/P000/619/1906/1197. This contains a statement by Hood J that he 'cannot speak too highly of the zeal, industry and ability displayed by' Woinarski.

[35] VPRS 1164/P000/23/1628 (the original letter has not, it seems, survived).

[36] VPRS 1161/P000/134/1437-1440, 1508, 1647.

[37] *The Argus* (Melbourne), 18 September 1905, 4.

[38] (Melbourne) 7 July 1904, 4.

[39] Ibid.

[40] See Rupert Cross, 'The Making of English Criminal Law (6): Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 656-660; A H Manchester, 'Simplifying the Sources of the Law: An Essay in Law Reform — II. James Fitzjames Stephen and the Codification of the Criminal Law of England and Wales' (1972) 2 *Anglo-American Law Review* 527.

[41] (Melbourne), 8 June 1905, 740.

provoke some interest in the codification project. As reported in *The Argus*[42] and *The Age*,[43] the Attorney-General, after referring to the codification project, said that he was a supporter of the recent legislation permitting accused persons to give evidence on their own behalf, despite the increase in the number of cases of perjury it was believed to have caused.[44] Nevertheless, he called for suggestions to reform the law to provide fewer opportunities for perjury by accused persons. Another topic he felt should receive consideration was reducing the incidences of juries being unable to agree.

We can also infer from this speech that Davies A-G did not oppose the codification project[45] and that its eventual failure is unlikely to have been due to anything as dramatic as a split in the Cabinet. While the speech might even suggest that the Attorney-General was now responsible for the project, it is clear that the Honorary Minister, Mr Mackey, was still in charge. On 5 April 1905, all three daily newspapers reported that the Premier, Mr Bent, had said in a major speech that the project was, to quote *The Age*,[46] 'in the hands of Mr Finlayson, KC, and Mr Woinarski, barrister, under Mr Mackey's supervision'. *The Herald,* adding its voice to the supporters of codification, called this 'the most important announcement of the evening',[47] probably its own rather than Bent's assessment. The timetable for completion of the Code, it was reported, was now the start of the following session. In an editorial published shortly afterwards, *The Age*[48] continued its support of codification, stating that '[i]f Mr Mackey perseveres in presenting to Parliament a complete code of the criminal law, his work will be one for which the whole community will be made his debtor'.

III THE CODE OF 1905

The Governor's Speech on opening Parliament on 27 June 1905 stated:

> The work of codifying the Criminal Law has been completed, and a measure has been prepared, and will be laid before you, to give effect to this desirable reform.[49]

This announcement was doubtless somewhat premature. Almost exactly a month later, *The Argus*[50] reported that completion was due early in the following month. That is no doubt one reason why the Crimes Bill 1905 (Vic) — the Criminal Code

---

[42] (Melbourne), 22 December 1904, 4.
[43] (Melbourne), 22 December 1904, 4.
[44] References to the Victorian controversy on this topic, caused by the defective drafting of the original Victorian legislation permitting accused persons to give evidence, may be found in Greg Taylor, 'The *Accused Persons Evidence Act 1882* of South Australia: A Model for British Law?' (2002) 31 *Common Law World Review* 332, 369-371; and see *The Age*, below n 144, 194.
[45] Although there is one indication that he was opposed to paying for it from his own funds: VPRS 1207/P000/1959/5R/6559 (notation of 5 July 1906).
[46] (Melbourne), 5 April 1905, 7; see also *The Argus* (Melbourne), 5 April 1905, 7.
[47] *The Herald* (Melbourne), 5 April 1905, 2.
[48] (Melbourne), 7 April 1905, 4.
[49] Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 1905, 3.
[50] (Melbourne), 26 July 1905, 4.

Bill — was not introduced into Parliament until 18 October 1905.[51] Given its length (544 clauses), it was too close to the end of session for there to be any hope of its being seriously considered, let alone passed, before Parliament was prorogued.

The long title of the Code was 'a Bill to declare consolidate and amend the Law relating to Crimes', which was a fair description of its contents, except that it curiously omitted any express reference to codification. It was introduced together with the Justices Bill 1905,[52] a much shorter Bill of 127 clauses, designed to make the alterations to the law of summary procedure consequent upon the enactment of the Code. This was required because the Code dealt with indictable offences only, and so the summary offences in the *Crimes Act 1890* were shifted to an Act dealing specifically with such offences.[53] This involved some duplication. The Justices Bill 1905 (Vic) contained numerous clauses dealing with summary determination of cases relating to theft (clauses 3-25), and clauses dealing with common and aggravated assaults on women and children (clauses 31-32). These duplicated the Code's general theft and assault provisions (clauses 224 and 289) albeit with a lesser penalty justifying the use of summary procedure. The result was two documents of shorter length than one combined document, a clear division between serious and less serious offences, and a handy short piece of legislation for those whose jurisdiction extended to summary offences only.

Given that the Code was introduced so late in the 1905 session, it is not surprising that there was no time to deal with it and, indeed, the order of the day for its second reading was formally withdrawn on 29 November.[54] It must have been clear by that stage that there would be insufficient time to deal with it before Parliament was prorogued on 12 December 1905. Two of the daily newspapers failed to comment upon the withdrawal of the Bill, giving one some idea about their estimate of the general public's level of interest in the codification. Even the Police Commissioner suggested reforms to the criminal law in September 1905 without bothering to mention the codification project.[55] *The Herald*, however, called the failure to make any progress on the Bill 'another example of the slothfulness of Parliament, and the tendency to neglect Bills which have not the propulsion of particular interests', something that it found particularly disappointing given that it claimed to know that Finlayson, Woinarski and Mackey 'have devoted a great deal of time and trouble'[56] to the Code. Even if it could not be passed, a second reading speech might well have raised interest and stimulated debate.

[51] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 1905, 2136 where the Bill is referred to as the Crimes Law Consolidation and Amendment Bill. The title used in the text is that found in the Bill itself.
[52] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 October 1905, 2136 (title again taken from the Bill itself rather than Hansard).
[53] *The Argus* (Melbourne), 18 September 1905, 4; *The Age* (Melbourne), 18 September 1905, 4.
[54] Victoria, *Parliamentary Debates*, Legislative Assembly, 29 November 1905, 3177.
[55] *The Argus* (Melbourne), 23 September 1905, 12.
[56] *The Herald* (Melbourne), 1 December 1905, 2.

Given this apparent lack of any significant public concern about the codification project, it is odd that Mackey did not think to appoint a committee to look at the Bill, either a select committee of Parliament, some sort of outside Committee, or even a Royal Commission such as that which investigated and recommended the enactment of the Griffith Code.[57] It was hardly sensible to expect Parliament, even in the Committee stage, to go through a Bill of several hundred clauses in detail or simply to pass it without some detailed examination by someone other than its drafters. Even if the will to do so had been present, it would have been hard to do so given the pressures of other business. Such a task was much more suited to a dedicated committee that could have presented a report to Parliament.

One step that was taken was the reference of the Bill to the judges. In a farewell dinner held in January 1906, just before he went on leave, Sir John Madden CJ said of the draft Code:

> Last session I received a copy of codified bills dealing with criminal law and the *Justices Act*, as introduced by Mr Mackey. That work has been admirably done and, though it has not yet become law, the fact that it is advanced as far as it has been is very creditable.[58]

Although it seems that none of the judges' correspondence from this period has survived,[59] it does seem that the Code's failure cannot be due to judicial opposition. Rather, the Chief Justice seems to have endorsed the Code as a piece of legislative drafting. As we shall see, he and Hood J provided suggestions on the draft; the public comments just quoted are not the only reason for concluding that the suggestions were probably of a constructive nature.

IV FORMAL MATTERS AND GENERAL PROVISIONS

Was Madden CJ's view of the Code's quality justified? To the author's knowledge, only one assessment of the Code has survived other than that of Sir John Madden CJ.[60] In 1948, the authors of *An Introduction to the Criminal Law in Australia*[61] opined that it 'shows the influence of other Australian attempts but it reflects great originality and industry' and that its failure 'cannot be explained by the quality of the draftsmanship'. However, the evidence offered for this assessment is not great: it consists of the fact that the draft consisted of 544 clauses, the use of the generic term 'offences' (implying the abolition of the distinction between felonies and misdemeanours, which the Code would indeed have effected) and the inclusion of irresistible impulse in insanity. The authors appear to suggest that the failure of the Code was because no 'influential member of the Cabinet [threw] his

[57] Robin O'Regan, 'Sir Samuel Griffith's Criminal Code' (1990) 7 *Australian Bar Review* 141, 145.
[58] *The Argus* (Melbourne), 12 January 1906, 5; see also *The Age* (Melbourne), 12 January 1906, 5.
[59] See above n 7.
[60] See also H Dallas Wiseman, 'Why not a Criminal Code?' (1949) 23 *Australian Law Journal* 347, 352.
[61] Sir John Vincent Barry, George W Paton and Geoffrey Sawer, *An Introduction to the Criminal Law in Australia* (1948).

weight behind'[62] it, but they do not seem to be aware that the codification was a government Bill sponsored by a Minister. Mackey was not necessarily the most 'influential' of all the members of the government but a contemporary assessment was that '[t]hough only an honorary Minister, Mr Mackey carries much weight in Cabinet. He is not one of those ornamental Ministers whom we have known'.[63] The reasons why the Code was not enacted therefore have to be sought elsewhere.

Despite this apparent lack of acquaintance with the Code and its background, the authors' assessment of its quality seems to be broadly correct. After all, this Code was drafted in the light of the Codes of Queensland, Western Australia, Canada and New Zealand and the draft Codes of England and South Australia.[64] Woinarski's first instinct was to consult these before beginning the task of drafting his own version. One might therefore expect that the wide degree of choice among models enjoyed by the drafters of the Victorian Code would, when added to their own native intelligence and skill as practising criminal lawyers, enable them to craft a superior product. As the authors of the 1948 text say, its failure was by no means due to the quality of its drafting, even if the drafting could have been improved in some respects.

The draft Victorian Code contained 'only' 544 clauses and was substantially shorter than the Queensland Code (707 sections as originally enacted). Even allowing for the extra clauses in the Justices Bill 1905, this lends weight to the criticism sometimes expressed regarding the Queensland Code — that it is too wordy.[65] Judged by this standard, the Victorian Code was in fact something of a minor miracle. The *Crimes Act 1890*, which it would have repealed, though not a code but a mere consolidation of statutory amendments to the criminal law occurring up to that date, had 566 sections when originally enacted. The draft Code was thus marginally shorter. Dozens of sections of the existing statutory law are indicated in a table attached to the Code to be unnecessary or not to be re-enacted. Thus, for example, ss 392-399 of the *Crimes Act* dealing with venue in a number of specific cases were replaced by clause 410 granting a general power to try anywhere in Victoria, substituting a short and simple provision covering all cases for a series of wordy, casuistic provisions in the old style.

In comparing the length of the Code with that of the *Crimes Act*, allowance must admittedly be made for the fact that, on the author's count, exactly 100 of the 127 clauses of the Justices Bill 1905 were, according to the marginal notes, taken from the *Crimes Act*. However, this still makes the combined length of the Code and clauses in the Justices Bill taken from the *Crimes Act* less than one-seventh greater than that of the *Crimes Act*. The Code would also have repealed a large number of sections dealing with the criminal law in other statutes (clause 2 and First Schedule,

[62] Ibid 21.
[63] *Melbourne Punch* (Melbourne), 8 June 1905, 740.
[64] *The Argus*, above n 37.
[65] Taylor, above n 4, 96 (referring to and agreeing with the views of the drafter of the South Australian Code).

Part II) so that it would have left Victorian statute law both more complete and more compact.

It is not possible to know how much of the Code was J E Mackey's own work, or how much of it he revised personally. The assessment of a local journal, made shortly before the Code was published, was that as a drafter, he had 'the invaluable knack of condensation'.[66] This assessment seems well justified by the Code. On the other hand, one structural defect is that comparatively few clauses are divided into numbered sub-clauses. One wonders why the drafters frequently adopted the practice of dividing a clause into unnumbered paragraphs rather than numbered sub-clauses, which makes reference to a particular part of a clause unnecessarily difficult. Although the Queensland Code as originally enacted was also deficient in this respect, sometimes the Victorian drafters removed sub-clause numbering even from a section which had sub-sections in the Queensland Code (eg clause 284 / s 391).

Both in outward appearance and in the detail, the draft Victorian Criminal Code was recognisably a descendant of Griffith CJ's. It mostly followed his order, although some parts were moved (Chapter IV of the Queensland Code on punishments was moved, as Division XLV, to a more logical place after the provisions dealing with verdicts). It also contained a strong admixture of ideas from prior local Victorian law and elsewhere, as well as original contributions by the drafters, some of which will be considered below. The Victorian drafters also left out one or two of Griffith CJ's original contributions, such as 'wilful murder' (examined later), and the offence of interference with political liberty borrowed from the Italian Code.[67]

The Victorian Code, unlike that of Queensland, was not in a Schedule appended to a short introductory Act; rather, as in the New Zealand Code, the introductory provisions and substantive provisions were together in the Bill for the Act. Like the Queensland Code but unlike the draft South Australian Code,[68] the drafters of the Victorian Criminal Code did not provide for the continued availability of prosecutions for common law offences omitted from the Code (clause 5). However, the draft left open the possibility of the development of further common law defences as Codes (such as the Tasmanian[69] and Canadian[70] Codes) sometimes do.

The drafters also followed Griffith CJ's example in attaching to the draft Code a letter of explanation. However, if a copy of that letter still exists, this author was

[66] *Melbourne Punch* (Melbourne), 8 June 1905, 740.
[67] Cadoppi and Cullinane, above n 3, 157. Such an offence was however created in Victorian law, in terms very similar to those existing in the Queensland Code s 78 by the *Constitution Act Amendment (Electoral Legislation) Act 1984* (Vic) s 91; see *Electoral Act 2002* (Vic) s 152.
[68] Taylor, above n 4, 85-89.
[69] *Criminal Code Act 1924* (Tas) s 6 (similar in wording to clause 5 of the Victorian draft Code).
[70] *Criminal Code* (Can) s 9; see below n 125.

unable to find it.[71] We know that it was dated 21 August 1905.[72] The letter is also referred to in — and is probably the basis of — two long reports in the morning newspapers on 18 September 1905[73] summarising the provisions of the draft Code and commenting upon the changes they would introduce. These reports probably also mark the day on which the Code was officially published for public comment. The similarity of the two newspaper reports may well reflect the fact that they are based on, and could be used to reconstruct the contents of, what *The Argus* refers to as the drafters' 'memorandum'. It is not proposed to attempt that here. Rather, the more interesting or novel provisions of the Code will be the subject of further comment below.

For its part, *The Herald* did not attempt to compete with the morning newspapers but did publish an editorial on the same day. It praised the Code in fulsome terms, calling it, for example, 'a bold and admirable attempt at reform from foundation to roof'.[74] *The Age*[75] also added to its longer report a short news item dealing with the Code's proposal to abolish the presumption of marital coercion (clause 20), explaining that the presumption was a survivor of the non-availability of benefit of clergy to women.[76] At all events, the non-adoption of the Code meant that this reform was postponed until the enactment of the *Crimes (Married Persons' Liability) Act 1977* (Vic), so that Professor Glanville Williams' classic *General Part* still records the presumption of martial coercion as extant in Victoria, alone among the Australian States.[77]

V WOMEN IN THE CODE

The place of women in the proposed Code was not only a matter attracting the newspapers' attention. It seems to have been one of the drafters' principal concerns and is reflected in a number of provisions in addition to that just mentioned.

The Victorian drafters proposed, in a provision with no equivalent in Queensland, to create a special offence applying to pregnant women only:

> 201. Every woman who, being about to be delivered of a child[,] neglects to provide reasonable assistance in her delivery if the child is permanently injured thereby or dies either just before or during or shortly after birth, unless she proves that death was not caused by such neglect or any wrongful act to which she was a party, is liable to imprisonment for fifteen years if the intent of such neglect be that the child shall not live, and to imprisonment for seven years if the intent of such neglect be to conceal the fact of her having had a child.

---

[71] See above n 7.
[72] Wiseman, above n 60, 352. See also Severin Howard Woinarski, *The History of Legal Institutions in Victoria* (LLD thesis, University of Melbourne, 1942), 377; see also 741 and 758.
[73] *The Argus* (Melbourne), 18 September 1905, 4; *The Age* (Melbourne), 18 September 1905, 4.
[74] (Melbourne), 18 September 1905, 2.
[75] (Melbourne), 18 September 1905, 4.
[76] See Glanville Williams, *Criminal Law: The General Part* (2nd ed, 1961), 763 and n 3.
[77] Ibid 768.

The Argus[78] tells us that the drafters 'agreed with Professor Pennefather [the drafter of the South Australian Code[79]] that there may be cases where heavier punishment than could be awarded for concealment of birth [two years' imprisonment] may be proper'. This, however, may also be seen as a merciful provision given that the second paragraph of clause 201 provided that a conviction for this offence should be a bar to conviction for murder and manslaughter. Mercy was also extended to women in the law of incest. Under clauses 260, 261 and 262 (largely based on the *Crimes Act 1891* (Vic) ss 8 and 9): the penalties for incest were much lower for women (five years' imprisonment as distinct from life). A specific offence of attempt existed for males only;[80] the liability of females was restricted to those over eighteen; and a defence was provided for females, but not males, acting under coercion.

Women were also to be protected by clause 268, which provided a penalty of one year's imprisonment for husbands deserting wives and fathers deserting children if they were left without adequate means of support — in the case of children, the children had to be born in wedlock and under fourteen. As the Code would have made it an offence if the desertion continued for two years,[81] this went beyond the existing offences created by s 3 of the *Marriage Act 1901* (Vic), which required the husband/father to leave Victoria. The Code did not substantially change pre-existing criminal liability under s 4 of that Act for refusing to comply with a maintenance order. Clause 535 permitted a delinquent husband to be committed for trial under clause 268 directly during divorce proceedings. *The Argus* commented that this provision 'is deemed most necessary, in view of the revelations of the divorce court, and is supported by the judges'. It does not say, however, how the judges' support had been ascertained.

Clause 464 of the Code would also have made a wife both a competent and compellable witness in cases involving the husband's criminal offences or the infliction of injury on her by her husband. The victim was also to be competent and compellable in cases of violence against husbands by their wives. (As desertion of husbands by wives was not an offence, no occasion arose to define the rights of husbands to give evidence in such cases.) This, or at least the part dealing with offences of violence, merely reflected the pre-existing common law.[82] It was also held in 1911 and 1912 that the wife was a competent witness in a prosecution under s 3 of the *Marriage Act 1901*.[83] Accordingly, this provision added little to the law beyond rendering it more certain.

---

[78] (Melbourne), 18 September 1905, 4.
[79] A similar provision was cl 229 in his draft Code.
[80] This was clause 261. However, this clause does not seem to achieve anything which cll 260 and 396(3) would not have achieved anyway. If this is correct, there is a defect in the drafting of the Code and also an argument that there was no liability at all for women attempting incest: *expressio unius* (clause 261) *est exclusio alterius* (clause 396(3)).
[81] It is assumed that the words 'in either case' in clause 268(2) mean that this option would have been applicable to the desertion of wives as well under (1). The drafting could have been clearer here; perhaps it was just the typesetting.
[82] Sir John Jervis and Richard Bruce, *Archbold's Pleading and Evidence in Criminal Cases* (20th ed, 1886) 321.
[83] *R v Jacono* [1911] VLR 326; *R v Hind* [1912] VLR 429.

It is also noteworthy that the Victorian draft Code (clause 67) followed s 10 of Griffith CJ's Code (as it then stood) to the extent that it ruled out the liability of a married woman as an accessory after the fact if she assisted her husband or some other participant in his crime in his presence and with his authority. Griffith CJ's Code also provided for the reverse case of a husband assisting his wife and stated that he too should not be an accessory. This latter provision protecting the husband was omitted by the Victorian drafters, although both newspaper reports pointed out that the drafters had provided a form of words (not differing substantially from Griffith CJ's) that could be used to restore the protection. Presumably the Victorian drafters thought that husbands, as authority figures in relation to their wives, would be strong enough to obey the orders of the highest of all authorities, the state, even at some personal cost, something which could or should not be expected of wives.

On the other hand, wives rather than husbands would have been slightly worse off in a related field as a result of the enactment of the Code. Having abolished the presumption of marital coercion, the draft Code, unlike the Queensland Code (s 32), would have created no additional general defence of compulsion for wives beyond the general defence available to all (clause 20) restricted to threats of immediate death or grievous bodily harm. A general policy giving, in borderline cases, greater preference to the demands of the criminal law than to those of one's spouse, male or female, is apparent here. Although Professor O'Regan thought that the additional defence for wives was warranted,[84] the legislature in Queensland recently repealed s 32 of the Code and left wives to rely on the general defence,[85] as the Victorian drafters proposed a century ago. This is, to some extent, an invalid comparison as the general defence of duress in Queensland is not as narrow as it was a hundred years ago. Then again, it is unclear whether wives could have taken advantage of the general and more extended defence of necessity proposed in the Victorian Code (clause 21), examined below. This question could have been solved only by case law or, if they dealt with the question, by reference to the drafters' explanation of clause 21, which is unavailable.

Perhaps most interestingly, the Victorian Code would have left less room for the defence of consent in rape (clause 237) and indecent assault[86] than Queensland's Code. Mistaken belief in consent is a topic that can be dealt with only once we have considered the general part of the Code. We shall see that the Code appears to have proposed a toughening of the law in that area as well but, for the moment, the question is the definition of 'consent'. Clause 62 — following Dr Pennefather's Criminal Code for South Australia, which referred to Mr Justice H L Stephen's draft colonial criminal code[87] — defined consent as not including consent 'obtained by fraud deceit force or a threat thereof or from any person disabled by age mental infirmity illness intoxication or stupefaction from forming a reasonable judgment

[84] Robin O'Regan, *Essays on the Australian Criminal Codes* (1979) 132-136.
[85] *Criminal Law Amendment Act 1997* (Qld) s 120 and sch 1.
[86] Clause 240(1); the concept of consent comes in through clause 223.
[87] See M L 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, 340-343.

on the circumstances of the case'. Under Griffith CJ's Code (s 347), deceit vitiated consent only if it was about the 'nature of the act' or if a man impersonated a woman's husband. These restrictions essentially reflected the received and statutory law of rape as it existed at that point.[88] No such restrictions were present in the Victorian Code, nor was the reference to intoxication or stupefaction in the Queensland Code, although doubtless a person incapable of consenting at all would not be held to have consented. The Victorian provision goes further and makes the test whether the victim could form a 'reasonable judgment on the circumstances of the case'. [89]

The Victorian clause would thus have effected two quite significant restrictions on the concept of consent. It is hard to disagree with the idea behind the proposal. There may nevertheless be some unease at the concept that *any* deceit by the actor, no matter how trivial, made the act rape. However, the drafters might respond by pointing to s 3 of the *Criminal Law Amendment Act 1885* (UK), arguing that they were merely incorporating this stand-alone offence into the offence of rape. The far-seeing nature of the clause is indicated by the fact that it would have satisfactorily dealt with the factual situation which came before the Victorian Courts eighty-five years later in *R v Mobilio*[90] and that it is similar in many ways to the *Crimes (Rape) Act 1991* (Vic) introduced eighty-six years later. Section 36(d) of the *Crimes Act 1958* (Vic), as inserted by the Act of 1991, also contains a reference to consent vitiated by intoxication, although it does not seem to go quite as far as that proposed in 1905. Section 36(f) still does not go as far as the Code of 1905 in permitting any form of deceit, as distinct from deceit about identity and the nature of the act, to vitiate consent. In Victoria this is still a separate offence, as it has been since the British Act of 1885 was first adopted in 1915.[91]

A provision of the Code relating to rape less likely to be acceptable by today's standards is clause 238, which reduced the penalty for rape from life to ten years' imprisonment where there were 'mitigating circumstances'. This concept, though not in the Queensland prototype, was merely copied from an earlier Victorian enactment, the *Crimes Act 1891* ss 10 and 27, and thus could not be said to be the responsibility of the drafters. However, they might have omitted it given that they reduced the maximum penalty for rape (along with that for many other offences) to life imprisonment from death.[92] It is the death penalty that explained the existence of the concept of 'rape with mitigating circumstances' in the pre-existing Victorian law. But, in defence of the drafters of the Code, the legislature was still using the

[88] See Sir John Jervis, William Craies and Guy Stephenson, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (23rd ed, 1905) 909 and, for a summary of the case law to the mid-1950s, *Papadimitropoulos v R* (1957) 98 CLR 249, 255-260. In relation to England and Wales, see *Sexual Offences Act 2003* (UK) s 76.
[89] Cf *R v Francis* [1993] 2 Qd R 300, the facts of which illustrate the different operation which the Victorian provision would have had.
[90] [1991] 1 VR 339.
[91] *Crimes Act 1958* (Vic) s 57; originally *Crimes Act 1915* (Vic) s 53.
[92] As it was under the *Crimes Act 1890* s 42, which in this respect followed 9 Geo IV c 31 (1828) (UK) s 16 rather than the *Offences against the Person Act 1861* (UK) s 48.

concept of 'rape with mitigating circumstances' almost seventy years later[93] — long after the death penalty for rape had been abolished.[94] It did not disappear from Victorian law until three-quarters of a century after the Code was drafted, in 1980.[95] The Victorian Code (clause 237), like the Queensland one (s 347), also exempted married men from liability for raping their wives. Again, this rule lasted for a long time after the draft Code was proposed — until 1985, to be precise[96] — and so it might be unfair to criticise the drafters for not being so far ahead of their time on this question.

Finally, it is interesting to observe that all these rules found in the Codes affecting women in the criminal law were adopted (in the Queensland case) or proposed (in the Victorian case) before the advent of female suffrage.[97]

VI A PROSECUTORS' CODE

Finlayson was Crown Prosecutor at the time of drafting the Code, and it is not merely the provisions regarding consent in rape which make the draft recognisably that of experienced criminal lawyers and, in particular, of prosecutors. This comment applies most obviously to the provision in clause 458 that '[w]here all the jurors after three hours' deliberation are unable to agree on their verdict the decision of three-fourths may be taken as the verdict of all'. This would have introduced a new principle into Victorian law not found in the Queensland Code. It was clearly mostly in the interests of the prosecution, despite the potential for a 'not guilty' verdict under the clause. There were no limits on this proposal other than time spent in deliberation; a verdict of guilty of treason or murder thus could have been returned by nine of twelve jury members.

The drafters justified this, according to *The Argus*,[98] by reference to 'the increasing number of disagreements of juries that occur nowadays, and the unnecessary cost to the country caused thereby' as well as the fact that a single corrupt or obstinate jury member could 'in the clearest case' prevent agreement where unanimity was required. While there is some evidence of public concern about the number of hung juries,[99] the drafters' view here is clearly an example of a prosecutor's perspective. Also, their proposal was to allow not just one but three dissentients to be overridden, in which case the difficulty in convicting might have been caused by more than mere obstinacy. The drafters must have realised that Parliament could not be expected to pass this clause without full debate and, perhaps, some amendment. It may have been an 'opening bid' in the sense that the drafters expected Parliament

[93] *Crimes (Amendment) Act 1972* (Vic) s 6.
[94] *Crimes Act 1949* (Vic) s 2(1)(c).
[95] *Crimes (Sexual Offences) Act 1980* s 5.
[96] See *Crimes Act 1958* (Vic) s 62(2), as amended by the *Crimes (Amendment) Act 1985* (Vic) s 10 via the half-way house of the *Crimes (Sexual Offences) Act 1980* (Vic) s 5.
[97] Adult suffrage was not introduced into the two jurisdictions referred to until the enactment of the *Elections Acts Amendment Act 1905* (Qld); *Adult Suffrage Act 1908* (Vic).
[98] (Melbourne), 18 September 1905, 4.
[99] *The Herald* (Melbourne), 23 December 1904, 4, which implies that even judges had expressed the same concern, although nothing can be found in the reports of the Council of Judges for 1900 – 1910.

to opt for some higher proportion. The rule eventually introduced into Victoria in 1993[100] provides for a verdict to be taken where all but one of the jurors agree, a much more defensible solution to the 'obstinacy' problem.

Another interesting provision in this respect relates to merely recording, rather than pronouncing, the sentence of death. Recording rather than pronouncing the sentence of death was a procedure that Australia had inherited from England for ameliorating the harshness of the compulsory death penalty.[101] Under s 512 of the Victorian *Crimes Act 1890*, it had the same effect 'as if judgment of death had actually been pronounced in open court and the offender had been reprieved by the Court'. Under the Victorian Code, unlike that of Queensland[102] and the law of Victoria under the *Crimes Act 1890* s 511, this decision was not to be left to the judge alone nor any form of murder excluded from its ambit. Rather, the court would have been required to extend this form of mercy to an offender convicted of any capital offence 'in any case when the jury have recommended the offender to mercy' (clause 493). While this appears at first blush to favour offenders, it was also a canny move from the point of view of the prosecution given that juries of this era were sometimes thought to be reluctant to convict if the conviction implied the death penalty.[103] This provision would have enabled juries to convict a person of a capital offence while sparing their consciences the reproach of sending a man to the gallows. The argument that liberalising the law in favour of the accused might in fact lead to more convictions by juries was proposed by Woinarski KC (as he then was) to a Committee chaired by Mackey when the adoption of the modern system of criminal appeal was being considered in Victoria in 1914.[104]

At the time of the Code's drafting, there was also some precedent for giving juries a role in sentencing in Victoria. The *Crimes Act 1891* s 10 expressly provided that it was the jury which was to determine whether the accused had committed rape 'with mitigating circumstances', thus reducing the maximum penalty, under s 27, from death to ten years' imprisonment. In 1903, Finlayson KC prosecuted in one such case where the fact that the decision on this point was solely in the jury's hands came to the fore[105] — and the jury convicted. The provision suggested in the Code was merely a generalisation of that existing provision to all capital offences and would, if adopted, have been an interesting experiment of the involvement with the jury in the sentencing process along American lines.[106]

---

[100] *Juries (Amendment) Act 1993* (Vic) s 7; see now *Juries Act 2000* (Vic) s 46.
[101] Taylor, above n 4, 89.
[102] Section 652. This was repealed when the death penalty was abolished in 1922: *Criminal Code Amendment Act 1922* (Qld) s 3(xviii).
[103] Thomas Newcomb, *The Court of Criminal Appeal, Victoria: A Short Synopsis of the New* Criminal Appeal Act 1914 *with Extracts from the Evidence Given before the Select Committee appointed by the House of Assembly [*sic*] by Mr Zichy-Woinarski; and Comparative Analysis between the Imperial and Victorian Acts, with Comments* (1915) 10; Taylor, above n 4, 83.
[104] Victoria, *Parliamentary Debates*, Legislative Assembly, 1914, 387.
[105] *R v Wartman* (1903) 9 Arg LR 27.
[106] Cf *Ring v Arizona* (2002) 536 US 584.

VII THE GENERAL DOCTRINES

In the general doctrines, the Code again broadly followed Griffith CJ's model. The abolition of the distinction between felonies and misdemeanours which the Victorian Code — unlike Griffith CJ's (s 3) — would have effected (clause 8) has already been mentioned; in this respect, the Victorian drafters definitely had the future on their side.[107] The Victorian Code very closely followed Griffith CJ on many other matters, adopting, for example, his (in)famous s 23 stating that, unless liability existed for negligent conduct, 'a person is not criminally responsible for an act which occurs independently of the exercise of his will or for an event which occurs by accident'. As already noted, the Victorian Code would have included irresistible impulse within insanity, as the Queensland Code still does: s 27(1). However, there was a rider stating that the absence of the power of control over the accused's conduct must not have been 'produced by his own default' (clause 18), doubtless another reflection of the fact that prosecutors wrote the Code. *The Australasian*[108] called the recognition of irresistible impulse, with a nicely ambiguous turn of phrase, '[an] heroic effort ... to improve the legal definition of insanity as a bar to punishment ... Whether this will be a substantial amendment of the present judicial definition it will be for the experts to say'. Doubtless it would, if enacted, have been interpreted in the same way as Western Australia's equivalent provision was interpreted in *R v Falconer*.[109]

The Victorian Code would also have adopted '[o]ne of the provisions which most characterises the break of the Griffith draft with the traditional rules of the common law',[110] namely the recognition of provocation as a defence to assault. The relevant provision was moved to the general part[111] (clause 44) from the portion of the Queensland Code dealing with assault (s 269). This decision is quite logical[112] given the drafters' choice to deal with summary offences of assault in the Justices Bill 1905 and the fact that clause 63 made the provisions of the general part applicable to all criminal offences. If the defence of provocation had not been in the general part, it would not have applied to summary offences.

The Victorian drafters departed from Griffith CJ's Code in relation to the definition of attempt. That Code provided that liability in attempt was incurred when 'a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence' (s 4). This too was based on the Italian Code.[113] The Victorian Code would have provided (clause 9):

---

[107] *Crimes Act 1958* (Vic) Pt IB.
[108] (Melbourne), 23 September 1905, 757.
[109] (1990) 171 CLR 30.
[110] Cadoppi and Cullinane, above n 3, 163.
[111] Not a term used by the drafters; their Division IV was headed 'Criminal Responsibility; Justifications and Excuses'.
[112] Cf Cadoppi and Cullinane, above n 3, 171 for a criticism of such an arrangement which is based on another, different Code.
[113] Ibid 144.

> An attempt to commit an offence is the doing with intent to commit that offence of an act forming part of a series of acts which would have constituted the offence if the completion of such series of acts had not been prevented by the voluntary determination of the offender not to complete the offence or by some other cause ...

This is an elaboration of the definition in *Stephen's Digest*.[114] It was virtually the same as proposed in Dr Pennefather's South Australian Code but that gentleman commented that his version 'seem[s] to me to convey the same meaning as those in'[115] the Queensland Code. Perhaps the Victorian drafters thought that they had merely adopted a shorter version of the Queensland model.

The present writer, however, does not think that the definitions amount to the same thing and has a slight preference for the Queensland model. First, because the Victorian one seems to verge on begging the question with its failure to define when the 'series of acts which would have constituted the offence' begins and, secondly, because the Queensland Code at least attempts to answer this question with its reference to beginning to put one's intention into fulfilment. This assessment may be unfair given that there is neither access to the drafters' explanation of this clause nor to later revisions of it. It must also be recalled that no drafter has ever succeeded in the apparently impossible task of providing more than the vaguest of formulae in this area, s 11.1 of the *Criminal Code* (Cth) being only the latest example and the *Crimes Act 1958* (Vic) s 321N(1) another.[116]

Another noteworthy change affecting the position of women in the criminal law but also with broader effect was made by the Victorian drafters to the provisions of the Queensland Code relating to mistake of fact. The provision that they added qualified the general defence of honest and reasonable mistake of fact still found in the Queensland Code (s 24(1)) in words otherwise virtually identical to those proposed for Victoria (clause 23). It provided that:

> subject to the provisions of this Act if an act in itself immoral is punishable by law only when certain facts exist independent of its immoral character every person liable to punishment by the existence of such facts is liable to such punishment although he was not aware of the existence of such facts and although he believed in good faith and on reasonable grounds that they did not exist unless the contrary is expressed in the definition of the offence.

It is not clear what precise area of application this general provision — also copied from Dr Pennefather's Criminal Code for South Australia (clause 23) and also credited by him to Mr Justice H L Stephen's draft Code — was intended to have. However, its most obvious application would be in cases where an accused person

---

[114] James Stephen, Herbert Stephen and Harry Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (5th ed, 1894) 39.
[115] Note to clause 7.
[116] B Fisse, *Howard's Criminal Law* (5th ed, 1990) 394.

wrongly believed that his or her sexual partner was over age. This would certainly explain why s 229 of the Queensland Code was not copied in the Victorian version. This explanation assumes that any act of sexual intercourse outside marriage would have been considered to be 'an act in itself immoral' in those days. The effect of the provision in such cases would have been to create absolute liability[117] in relation to the age of the sexual partner of the accused, reflecting and extending the law laid down in *R v Prince*[118] and failing to follow other English statute law which, although inconsistent, was in some areas more principled in requiring knowledge of the other party's age.[119] A similar result to that proposed for Victoria was achieved in Queensland by the less cryptically worded s 229 of the Code at the conclusion of the chapter dealing with offences against morality. Perhaps the Victorian provision was moved to the general part so that it was applicable to the offences relating to indecent publications included in the Justices Bill 1905 (clauses 41-48).[120] One improvement that the Victorian clause would have made should be noted: the original Queensland provision was restricted to the accused's knowledge or belief about the age of a female partner. The Victorian provision would have applied to all partners, thus anticipating the current provisions of the Queensland Code (s 229), but the difficulty is with determining whether it was meant to apply to anything else as well.

One major decision that would have had to be made had the Code been adopted was whether the lack of consent in rape and related offences was a fact 'independent of [the] immoral character' of the act of extramarital sexual intercourse, or whether it was constitutive of the immoral aspect of sexual intercourse outside marriage and thus was a fact to which the provision did not apply. If the former had been the legal position — as the standards of the age, the coyly censorious allusion to 'an act in itself immoral' and the otherwise inexplicable omission of an exact equivalent of s 229 of the Queensland Code suggest was intended — the Victorian law of rape would have been even tougher than that of Queensland (which is more severe in this respect than the common law).[121] Even an honest and reasonable (although mistaken) belief in consent would not have saved the accused. There would have been absolute liability in respect of the existence of consent. Only very rarely, by showing a mistaken belief that one was not having sexual intercourse, would the defence of honest and reasonable mistake have been available. Although some may agree with this proposal, and this is an area in which, as is well known, different views are strongly held, this strikes the author as too harsh. It is not something that Parliament could have been expected to enact without considerable thought. What would have happened if the provision had been enacted and survived into (say) the 1970s and the courts felt able to identify a change in community standards about

[117] This phrase is used in this article with the same meaning as in the *Criminal Code* (Cth) s 6.2.
[118] *R v Prince* (1875) LR 2 CCR 154.
[119] See *R v K* [2002] 1 AC 462, 468 for a brief history.
[120] The move cannot have been made to make the provision applicable to rape as well (see next paragraph of the text), as Division XXIV of the Victorian Code dealt with both rape and sexual offences in which age was an element, despite the fact that Griffith CJ had put them in two separate Chapters (XXII and XXXII), so that, if the provision had been left in Division XXIV, it would have been applicable to both sets of offences.
[121] See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 619; and *Sexual Offences Act 2003* (UK) ss 1(1)(c) and (2).

what is 'an act in itself immoral'? Would this have revivified the defence of honest and reasonable mistake about consent in the law of rape? Whatever one's feelings about the issues raised here may be, the fact that it cannot even be said with complete certainty whether the provision quoted was meant to apply to a mistake about consent in rape, or would have been held by the courts so to apply, means that its drafting is deficient.

VII NECESSITY

Clause 21 would have created a full-blown defence of necessity:

> 21. No act is an offence which is done only in order to avoid consequences which could not otherwise be avoided and which if they had followed would have inflicted upon the person doing the act or upon others whom he was bound to protect inevitable and serious evil; provided that no more is done than is reasonably necessary for that purpose and that the evil intended to be inflicted by such act is neither intended nor likely to be disproportionate to the evil intended to be avoided.
>
> No act which causes harm to the person of another is an offence if the person doing it is without any fault on his part so situated at the time that he could not avoid doing that act without doing some other act which would be equally likely to cause harm of a similar or greater kind to some other person (not being himself), and if he does the one act only in order to avoid doing the other.

The first paragraph is taken from *Stephen's Digest*.[122] That paragraph alone goes far beyond the rudimentary[123] provision in s 25 of the Queensland Code, but the second paragraph,[124] and the division of necessity into two separate sub-classes, might appear to be a wholly original contribution by the Victorian drafters. However, Dr Pennefather's Criminal Code for South Australia contained a very similar provision and he again credits Mr Justice H L Stephen with its authorship. At all events, the Victorian drafters are to be commended for making an attempt, even a derivative one, to deal with an area which some criminal codes simply ignore, in whole or in large part, and leave in the 'too hard' basket.[125]

The principal distinction drawn in clause 21 is between necessity in one's own cause (the first paragraph) and necessity involving a choice between harm to other persons (the second paragraph). The reference in the first paragraph to others whom the accused 'was bound to protect' does not disturb this scheme if we take 'bound'

---

[122] Stephen, Stephen and Stephen, above n 114, 24.

[123] For an illustration of its limitations, see Robin O'Regan, *New Essays on the Australian Criminal Codes* (1988) 52. See further Stanley Yeo, 'Necessity under the Griffith Code and the Common Law' (1991) 15(1) *Criminal Law Journal* 17.

[124] There are some very faint echoes of cl 18 of the *Homicide Bill 1874* (UK) (see *British Parliamentary Papers*, House of Commons 2 (1874) 369; *British Parliamentary Papers*, House of Commons 9 (1874) 551) in the second paragraph, but they are very faint. In addition, the Bill of 1874 did not make the distinction between acts in one's own cause and other acts which the Victorian Code would have made ('not being himself').

[125] The Canadian Code, for example, has no defence of necessity; accordingly, the common law defence continues: see Edward Greenspan and Marc Rosenberg, *Martin's Annual Criminal Code 2004* (2004) CC35; see also *Re A* [2001] Fam 147, 222-224; George Fletcher, *Rethinking Criminal Law* (1978) 783 and n 22. The situation in Queensland was referred to in the text.

to mean legally bound, a reference to those towards whom one has what the Victorian Code (Division XVIII), following Griffith CJ (Chapter XXVII),[126] calls 'Duties Relating to the Preservation of Life'. These duties were to avoid omissions, while clause 21 refers to acts. Under the definition section of the Code (clause 7), 'act' was to include omission and 'doing an act' to include making an omission. The inclusion of these definitions makes perfect sense if the interpretation and application of 'bound' suggested is adopted.

Thus, the basic distinction between the two paragraphs is one between acting in one's own cause and in that of others. The basis for this distinction is not some theoretical distinction between excuses and justifications. Although the word 'excuse' does not appear in clause 21, unlike in clause 20 on duress, the words used in each paragraph of clause 21 — 'no act is an offence' — suggest that each paragraph creates a defence of the same sort, probably an excuse. Those words may be contrasted with later provisions that use the word 'justified' (for example clause 46 (self-defence)).[127]

Rather than trying to distinguish necessity as justification and as excuse, clause 21 is concerned with substantive questions. Thus, the first paragraph requires the existence of 'inevitable and serious evil', while under the second, in which the actor is not acting for his or her own benefit, it is necessary merely to compare the evil incurred with that avoided. The drafters appear to have thought — and this author agrees — that we should be harder on ourselves when we act in our own interests and inflict harm on others to save ourselves than when we act to save others. That is no doubt why the first half of clause 21 rightly requires a serious evil and has tighter requirements relating to proportionality, whereas the second requires only an equal or greater evil.

The way in which this clause would have worked may be illustrated by thinking of standard necessity situations that would fall under the first paragraph, such as a prisoner breaking out of a burning gaol,[128] and those that would fall under the second. One example of the latter is the celebrated 'trolley problem' and its variants in which action to save five people can be taken only at the cost of action that necessarily sacrifices one life.[129] In order to understand the full area of application of the second paragraph, it is necessary to recall that, under clause 7, 'act' included omission and 'doing an act' included making an omission. Thus, situations in which it is necessary to choose between inaction and an act that causes or risks injury to a person to liberate him or her from danger (say, a fire or a machine in which he or she is trapped) would also fall under the second paragraph. The second paragraph of clause 21 thus created a defence for rescuers without making rescuing compulsory. It would also appear to save rescuers who owe a duty to rescue a number of people

[126] With the exception that Griffith CJ adds 'Human' before 'Life'.
[127] Eric Colvin, Suzie Linden and John McKechnie J, *Criminal Law in Queensland and Western Australia* (3rd ed, 2001) 317.
[128] For the source of this example, see Fletcher, above n 125, 818, and note cases such as *R v Rogers* (1996) 86 A Crim R 542 (with further references).
[129] See Judith Jarvis Thomson, 'The Trolley Problem' (1985) 94 *Yale Law Journal* 1395.

but can rescue only some of them in the time available, and might also have provided a defence to medical practitioners administering painkillers in the knowledge that that will hasten the death of the patient (the alternative here being either inaction or some other form of treatment). *R v Dudley & Stephens*[130] would also come under the second paragraph, at least if food were provided to others by the act of killing and the existence of benefits to oneself were merely to be disregarded under the second paragraph and not disqualify an act entirely from consideration under it.

It will quickly be perceived that clause 21, and its second half in particular, would have raised some fundamental ethical issues that the drafters are to be commended for dealing with in a manner that, while it may not be to everyone's taste, is at least defensible. This is not really the place to enter into ethical debates or even to canvass the various situations in which clause 21 might have been relied upon and the possible problems that might have been encountered in its application. It may be, however, that the greatest difficulty clause 21 would have caused — perhaps more on a theoretical than a practical plane — is that it does not appear to do justice to

> our apparently conflicting intuitions that it is morally permissible to redirect fatal threats away from a greater number of people to a lesser number of people, but that it is not morally permissible to kill one person in order to transplant his organs into a greater number of people merely because this alone will save their lives.[131]

However, such cases have caused difficulty even under highly refined Codes with some history of dealing with codified defences of necessity such as the German one.[132] It suffices to say here that it may well be that clause 21 could have been improved. But if it had been enacted, it would have been brought to the attention of the legal world and might well have become the basis for further development of twin statutory defences of necessity along South Australian/Victorian lines.

VIII SPECIFIC OFFENCES

Another very significant provision that differed from that existing in Queensland was the non-adoption by the drafters of Griffith CJ's division of murder into two offences of wilful murder and murder. Rather, clause 191 provided a short and simple definition of murder which did not vary very greatly from the common law with the exception that it included cases where 'the offender for any unlawful object does an act which he knows or ought to know to be likely to cause death and

---

[130] (1884) 14 QBD 273. Another example may be found in *Re A* [2001] Fam 147, 229 (Zeebrugge disaster).

[131] F M Kamm, 'Harming Some to Save Others' (1989) 57 *Philosophical Studies* 227, 227. See also Nicola Padfield, 'Duress, Necessity and the Law Commission' (1992) *Criminal Law Review* 778, 785.

[132] Johannes Wessels, *Strafrecht Allgemeiner Teil: Die Straftat und ihr Aufbau* (27th ed, 1997) 86f (citing — with references to further discussions — the example of a person compelled to give blood to save another's life and denying that force to achieve this would be excusable under the necessity doctrine on the grounds that it contradicts the forced donor's inherent human dignity; and see Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* (1996) 86-88).

thereby kills any person'. This is not in accordance with modern notions of what the law of murder should include, as it includes cases in which the accused's guilt is objectively rather than subjectively based. It does appear to be based on what is now s 302(1)(b) of the Queensland Code and is an exact copy of clause 219(4) of Dr Pennefather's South Australian Code. Importantly, the drafters of the Victorian Code avoided the mistake made by Griffith CJ in his Code of attempting to decide in advance, by means of a sub-division of cases of murder into wilful murder and 'plain' murder, which are the more serious cases of murder justifying (in the view of those responsible for the criminal law a hundred years ago) the imposition of the death penalty.[133] This was a 'clumsy'[134] attempt to deal with an issue of sentencing law by means of the substantive law of criminal offences that did not succeed. It also introduced unnecessary complication and difficulty into the law and was repealed in Queensland in 1971.[135] If it were desired to give the jury some power over sentencing law in the area of murder, to prevent undeserved acquittals caused by dislike of applying the death penalty, it is far better to do that, as the Victorian drafters did, directly. There seems to be no other valuable service performed by Griffith CJ's scheme which cannot be better performed by leaving the discretion about the imposition of the death penalty in the hands of the court in all cases of murder without trying to specify inflexible criteria in advance.

Another Victorian clause which is not to be found in the Queensland Code was clause 171, which would have criminalised publicly holding up 'the doctrines or practices of any religious faith to public derision or contempt ... with intent to offer offence to any of His Majesty's subjects' with an exception for (paraphrasing) reasoned argument. Griffith CJ had proposed a similar provision for the Queensland Code but it was omitted in the revision of his draft.[136] Minds can of course differ about whether such provisions are desirable at all. It is worth noting that this provision, unlike the offence of blasphemy in the English common law,[137] was not restricted to the Christian faith but would have included all, very much in the manner of modern statutes mandating religious tolerance such as the *Racial and Religious Tolerance Act 2001* (Vic) s 25.

The law of larceny is another important area in which any criminal code would be expected to accomplish a good deal of reform. Here the drafters of the Victorian Criminal Code largely followed Griffith CJ's example with some changes in order or emphasis and one change of some significance, at least conceptually: the omission of the word 'fraudulently' in the definition of theft (clause 284). By this means they were able to amalgamate the first two sub-sections of Queensland's s 391 and define the intent without resort to the descriptive, and some might think

[133] As it stood in 1901, s 652 of the Queensland Code prohibited merely recording the sentence of death in cases of treason and wilful murder.
[134] Taylor, above n 4, 89 (quoting Dr F W Pennefather).
[135] Ibid 92.
[136] Cadoppi and Cullinane, above n 3, 160-162, 168f. Clause 168 of Dr Pennefather's Criminal Code proposed a similar measure for South Australia.
[137] *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429, 447. For references to Australian law see Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 *University of New South Wales Law Journal* 409, 417-420.

superfluous or even misleading adverb, 'fraudulently'. They appear to have copied Dr Pennefather's Criminal Code for South Australia on this point as well. In the notes to his Code, that gentleman explained his omission of the concept of fraud by asking, not without reason, 'If A picks B's pocket, how can the act be called "fraud"?'[138]

On the other hand, the omission of an adverb such as 'dishonestly', which might well be applied to a pickpocket, from the definition of theft is less defensible. The resulting draft may be thought to place too much weight on the defence of claim of right in the 'fairly rare'[139] cases in which there might be a need for such a mental element extending beyond the claim of right and the general defence, recognised by the draft Code (clause 23), of honest and reasonable mistake of fact. Nevertheless, the law of larceny would have been greatly improved and simplified had the draft Code been adopted. Another change to the Queensland model (s 408) and to the prior Victorian law[140] — a change which promoted simplicity in the law and economy in drafting — was the inclusion in the list of things capable of being stolen of electricity (and gas) (clause 285(9)) rather than the creation of a separate section covering the fraudulent abstraction of electricity. This too was based on Dr Pennefather's Code (clause 280(9)).

IX PROCEDURE, SENTENCES AND APPEALS

In adjectival law, the Code (clause 462) proposed the adoption of the *Criminal Evidence Act 1898* (UK) s 1 as the ruling statute on the right of accused persons to give evidence in place of s 34 of the *Crimes Act 1891*. Although that Victorian statute was based on an earlier version of the English statute that had failed to reach the statute book,[141] it had been the subject of sustained criticism by judges.[142] We have seen that it was one of the matters to which the Attorney-General referred in a speech commenting on possible reforms in the law.[143] As late as December 1904, the Victorian statute was being criticised in court by the Chief Justice[144] and a newspaper referred to it as a 'new' system that was still 'on its trial'.[145] No doubt the criticism would have been lessened by the adoption of the English statute in its final and more sophisticated form, as indeed happened in Victoria in 1915.[146]

A change of limited practical effect but some symbolic importance was the proposal to abolish the grand jury for which the law of Victoria provides, even today, as a

[138] Note to clause 281 of Pennefather's Code.
[139] C R Williams, *Property Offences* (3rd ed, 1999) 131.
[140] *Electric Light and Power Act 1896* (Vic) s 49.
[141] Taylor, above n 44, 363.
[142] Ibid 370.
[143] See above n 24, 174.
[144] *The Age* (Melbourne), 16 December 1904, 6.
[145] *The Australasian* (Melbourne), 24 December 1904, 1544.
[146] *Crimes Act 1915 (No. 2)* (Vic).

means of commencing private prosecutions.[147] Clause 406 of the Code began with very similar words to those introducing s 389 of the *Crimes Act 1890* (the grand jury provision) but the clause moved on to adopt, in place of the grand jury, the Queensland procedure (s 686) involving the leave of the court for would-be private prosecutors.

The most interesting proposal in sentencing law was to give the jury control of the death penalty, which has already been considered. As far as offences for which the death sentence could be imposed are concerned, the two newspaper reports of 18 September 1905[148] both drew attention to the fact that the draft Code would have effectively restricted the penalty of death to murder (as well as treason, piracy and setting fire to the King's ships or dockyards). This was unlike the *Crimes Act 1890*, which permitted the imposition of the death penalty for wounding with intent to murder and rape: ss 8, 42. Very similar restrictions on the death penalty eventually reached the statute book as late as 1949,[149] indicating that the draft Code is by no means to be condemned for not being ahead of its time and proposing the entire abolition of the death penalty.

There were a couple of other novelties not found in the Queensland Code, such as a ticket-of-leave system in clause 510 (an early form of parole) and a system for police supervision of recidivists (clause 503). Both of these were based on precedents from elsewhere, the former on statutes from England[150] and New South Wales,[151] and the latter on statutes from England[152] and South Australia.[153] The Code was very much a product of its time — it would of course not be fair to expect it to be consistently in advance of its own time — and thus provided for a number of punishments that are now obsolete. These included, as well as the death penalty, keeping in irons and whipping (clause 495). The Queensland Code did not provide for keeping in irons (s 18) but the prior law of Victoria did so provide for violent offenders and perjurers[154] and the provision of the draft Code providing for a similar punishment (clause 499(5)) was virtually a word-for-word copy. The punishments of death, whipping and keeping in irons remained on the statute books for decades after the draft Code appeared: until 1975,[155] 1981[156] and 1949[157] respectively.

---

[147] *Crimes Act 1958* (Vic) s 354; see also s 351; *R v Nicola* [1987] VR 1040, 1045; *Re Shaw* (2001) 4 VR 103; E Histed, 'The Introduction and Use of the Grand Jury in Victoria' (1987) 8 *Journal of Legal History* 167; Harrison Moore, 'A Century of Victorian Law' (1934) 16 *Journal of Comparative Legislation and International Law* (3rd) 175, 187.

[148] See above n 73.

[149] *Crimes Act 1949* (Vic) s 2.

[150] *Penal Servitude Act 1853* (UK) s 9.

[151] *Crimes Act 1900* (NSW) s 463.

[152] *Prevention of Crimes Act 1871* (UK) ss 7 and 8.

[153] *Habitual Criminals Act 1870* (SA).

[154] *Crimes Act 1890* (Vic) s 510.

[155] *Crimes (Capital Offences) Act 1975* (Vic).

[156] *Crimes Act 1958* (Vic) s 477, repealed by the *Penalties and Sentences Act 1981* (Vic) s 2(1) & sch 1 item 7.

[157] *Crimes Act 1949* (Vic) s 12. By 1948 it could however be said that keeping in irons had not been used 'for very many years': *Report from the Statute Law Revision Committee on the* Crimes Bill *together with Minutes of Evidence*, Victoria, *Victorian Parliamentary Papers* vol 1 (1947-48) 1103.

In the law of appeals — which was to undergo a transformation in 1914 due to Australian copying of the English Act of 1907[158]— the Victorian drafters retained in clause 515 an interesting provision from the *Judicature Act 1883* (Vic) s 70. This provision, which remains in Victoria to this day,[159] permitted the Full Court to compel the reservation of a question of law — appeals on questions of fact had to await the adoption of the modern system of criminal appeals in 1914[160] — where the trial judge had refused to do so. This meant that the decision whether an appeal should be permitted on a question of law was not confided solely to the trial judge, a somewhat unsatisfactory position.[161] It made it unnecessary for the Victorian drafters to adopt the expedient to which Griffith CJ had resort — compelling the trial judge to state a case whenever counsel for the accused applied for it to be done (s 668; clause 513). The Victorian solution was clearly preferable; it both permitted the unrepresented (at least in theory) to compel a case to be stated and also left the final decision in the hands of judges rather than counsel.[162] However, Finlayson and Woinarski cannot claim credit for anything more than retaining the pre-existing provision rather than replacing it with Griffith CJ's.

X REFINEMENT, ABANDONMENT AND LATER ATTEMPTS

On the day after it carried its long report on the provisions of the draft Code, *The Age* reported the Premier's address to a public meeting. He did not mention the Code. Rather:

> Mr Bent then treated the audience to a song entitled [']Beware, Young Man, of the Musical Wife[']. The audience was fairly convulsed with laughter, especially when the Premier took the last high note in a falsetto voice.[163]

One might wish that the audience had been warned to beware the musical Premier. While this song-singing episode, by no means an isolated one,[164] was no doubt vastly amusing to all present, it gives an insight into Bent's increasing eccentricity[165] — and perhaps also into the chances that a serious and (for the layperson) deathly dull topic such as the codification of the criminal law had of being the subject of serious consideration. J E Mackey's support for the Bent regime may be inferred from his retention of ministerial office until its end and is moreover apparent from his address to the electors of his constituency, Gippsland West, for the December 1908 election.[166] However, it is hard to imagine that such a

[158] In Victoria, the transformation was effected by the *Criminal Appeal Act 1914* (Vic).
[159] *Crimes Act 1958* (Vic) s 449.
[160] Victoria, *Parliamentary Debates*, Legislative Assembly, 1914, 385.
[161] Taylor, above n 4, 93.
[162] Ibid 94.
[163] *The Age* (Melbourne), 19 September 1905, 6.
[164] Glass, above n 8, 167.
[165] Ibid 180.
[166] *The Argus* (Melbourne), 17 December 1908, 8; *The Age* (Melbourne), 17 December 1908, 9. Mackey was in the event returned unopposed after a would-be opponent lodged his nomination seven minutes late: *The Age* (Melbourne), 22 December 1908, 8.

serious, sober man was not distressed by the increasing oddities in the behaviour of his leader in general and the failure to proceed with his Code in particular.

It remains to resume the narrative of events from the end of 1905. Following the Code's withdrawal from the notice paper in 1905, after it had been introduced far too late for any form of reasoned discussion, the Bill for the Code became a hardy perennial in the remaining years. As the biographers of George Swinburne put it, in terms which perhaps indicate what the non-legal members of Cabinet thought of this project, Mackey had proposed Bills 'of juristic interest, such as a criminal code' which 'reappeared in the programme'.[167] The Governor's Speech at the State Opening of Parliament mentioned the proposed Code in every remaining year of the Bent government — 1906, 1907 and 1908.[168] In 1906, the Governor's speech stated that '[t]he measure which was before you last session for the codification of the criminal law has been revised and amended in several directions, and will be again submitted for your consideration'. The Code was also a regular item in Mr Bent's speeches outlining the government's future proposals (or, in mid-1907 when he was away and Davies A-G acted as Premier, in the government's list of proposals reported in the newspaper).[169] In February 1907[170] during a speech on the third anniversary of his assumption of office and just before an election, Bent said in typical style:

> *Crimes Act* Codification will be the subject of a Bill. Mr Mackey gave a lot [of] time to this. For Indeterminate Sentences we have a Bill prepared, and also for Police Offences. Steps will be taken to deal with Wife-Beaters. No doubt the reports in the papers show how many of these wretches, who promise to love these women, do nothing but thrash them. It would take me an hour to show you from statistics what ought to be done to these wretches.[171]

This is of interest not just because of the provisions of the Code, summarised above, dealing with delinquent husbands, but also because of the occasional stories associating Bent himself with violence against women.[172] It should be noted that none of these were ever finally proved. Despite all these promises, however, and the introduction of the Bill for the Code on one further occasion into the Legislative Assembly where it received only a first reading,[173] nothing ever came of it. This is perhaps not surprising given the Premier's character. *The Age*,[174] in commenting on the speech of February 1907 just quoted, referred to Bent's failure to deliver on so many of his promises and to his 'Micawber-like genius for saying he will do a

[167] Sugden and Eggleston, above n 22, 170 and 177.
[168] Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 1906, 3; Victoria, *Parliamentary Debates*, Legislative Assembly, 10 July 1907, 7; Victoria, *Parliamentary Debates*, Legislative Assembly, 2 July 1908, 4.
[169] *The Argus* (Melbourne), 2 July 1907, 5.
[170] See also *The Argus* (Melbourne), 25 June 1906, 9; *The Age* (Melbourne), 25 June 1906, 8; *The Argus* (Melbourne), 1 June 1908, 9; *The Age* (Melbourne), 1 June 1908, 8.
[171] Sir Thomas Bent, *A Review of the Bent Administration from 1903-4 to February, 1907; together with the Speech Delivered by the Hon Premier at Brighton, on 16th February, 1907* (1907) 11; *The Argus* (Melbourne), 18 February 1907, 8.
[172] Glass, above n 8, 76.
[173] Victoria, *Parliamentary Debates*, Legislative Assembly, 1 October 1908, 980.
[174] (Melbourne), 18 February 1907, 6.

thing, and then fervently exclaiming, "Thank heaven that's settled"'. *The Argus*[175] stated that Bent 'suffers less from ideas than from mental spasms'. It may well be that, in Bent's view of the world, his announcement that something would be done was equivalent to its actually being done, so great was the power of his office and his mind. For his part, Mackey was appointed Lands Minister in mid-1906.[176] This role no doubt took up some of the time that might otherwise have been devoted to codification.[177]

When the government lost office at the very start of 1909,[178] Mackey left office as well and the chief advocate of codification disappeared from the stage or, at least, the Cabinet. He did so without including the failure of the Code in his list of 'unfulfilled projects that now, alas, must be passed on to his successor' as recorded in the newspapers.[179] Also in 1909, Finlayson and Sir Thomas Bent died within a few hours of each other,[180] thus removing further advocates of codification from the arena. Mackey's successor did nothing about codification, and the next criminal-law-related Bill introduced into Parliament was not an attempt to carry on the project of codification but a measure which was as short as it was bizarre. Virtually the sole provision of it was as follows:

> Every man or youth who carnally knows any unmarried girl under twenty years of age and does not marry her within eight months after carnally knowing her shall be guilty of a misdemeanour and shall on conviction be liable to be imprisoned for any term not exceeding three years. In this section the expression 'girl' means any girl who is not commonly known as a prostitute.[181]

It is pleasing to be able to report that this measure was not passed — but nor was the Criminal Code.

XI SIR SAMUEL GRIFFITH'S REVISION

The speech delivered by the Governor before Parliament in 1906 referred to the revision of the Code. Reference to Bent's pre-sessional speech in 1906 outlining his government's programme indicates that the revision referred to was carried out by none other than Sir Samuel Griffith. Bent stated that 'Mr Mackey wishes me to thank Sir Samuel Griffith for the help he has given in this matter'.[182] Mackey acknowledged this assistance again before a Joint Select Committee in 1916, where he said that Griffith CJ

---

[175] (Melbourne), 17 June 1908, 6.
[176] *Victorian Government Gazette*, 17 August 1906, 3585.
[177] *The Leader* (Melbourne), 25 August 1906, 21, reports that the new Lands Minister 'will not be left with nothing to do'.
[178] *Victorian Government Gazette*, 8 January 1909, 53.
[179] *The Age* (Melbourne), 5 December 1908, 12; *The Argus* (Melbourne), 5 December 1908, 9.
[180] Their obituaries appear on the same page in *The Australasian* (Melbourne), 18 September 1909, 743.
[181] Victoria, *Parliamentary Debates*, 28 October 1909, 1885.
[182] *The Argus* (Melbourne), 25 June 1906, 9. The report of the same speech in *The Age* (Melbourne), 25 June 1906, 8 does not mention this but there is no reason to doubt the accuracy of the report in *The Argus*.

> went into the matter, and gave an immense amount of time to it. The result of his suggestions were [sic] submitted to Mr Finlayson and Mr Woinarski, and they made corresponding alterations. I know that Sir Samuel Griffith said that, in some cases, it was an improvement on his code that he had in Queensland ...[183]

Earlier, in Parliament, Mackey had also referred to this work and added that, of the Victorian judges, Madden CJ and Hood J had 'most carefully'[184] looked through the Code and provided suggestions on it. It is also worth noting that, in May 1906, Blair A-G of Queensland, who was visiting Melbourne with the Under-Secretary of his Department of Justice, called on Davies A-G of Victoria for what the newspapers variously described as a 'chat',[185] a 'courtesy call'[186] and a 'general conversation on law matters'.[187] Unfortunately, there is no way of knowing whether they talked about codification or Griffith CJ's revision of the draft Code, which must have been completed by then or at least close to completion.

Great difficulty arises, however, in finding a copy of this revised version of the Code. As no versions were ever read a second time, copies were never printed by Parliament.[188] Those involved in its drafting either left no papers or left papers that did not include any information about the proposed Code.[189] Nor has any file been uncovered in the Victorian Archives that includes a copy of the revised Code.

It is not surprising that Griffith CJ should have left nothing to posterity about this as no doubt his Honour was consulted in person during one or more of the numerous sittings of the High Court of Australia in Melbourne, thus obviating the need for any correspondence which might have survived. The apparent non-survival of any copy of the Code as revised by Sir Samuel Griffith — of course, it cannot be ruled out that the author has not looked in the right place, although he has looked in many places[190] — is something of a loss to the history of the codification of the criminal law, not just in Victoria but throughout Australia. It would have been most interesting to see his Honour's second thoughts based on his reactions to an intelligent draft produced elsewhere. His reactions to the Victorian attempt and necessity provisions, for example, would be worth knowing.

XII FURTHER ATTEMPTS AFTER 1909

A couple of other attempts by Mackey to keep codification before the public by introducing the Bill for the Code into Parliament in 1911 and 1912 produced no

---

[183] Victoria, *Parliamentary Debates*, Legislative Assembly, 1916, 790. If a word is missing in the quotation after 'had', it is also missing in the original source.
[184] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 1914, 1191.
[185] *The Argus* (Melbourne), 18 May 1906, 5. Note the article in the same day's edition (6) on Sir Samuel Griffith CJ, which however mentions only the codification in Queensland, not that in Victoria.
[186] *The Age* (Melbourne), 18 May 1906, 5.
[187] *The Herald* (Melbourne), 18 May 1906, 8.
[188] An email from Mr Tim Brown of the Parliament of Victoria to the author dated 22 September 2003 has confirmed this: email from Tim Brown of the Parliament of Victoria to Greg Taylor, 22 September 2003.
[189] See above n 7.
[190] See above n 7.

result.[191] Attention shifted to Cussen J's 1915 consolidation of Victorian legislation.[192] During that process, Mackey 'strongly recommend[ed]'[193] that the proposed Code should be considered, perhaps for inclusion in the consolidation itself, but MacKinnon A-G S-G did not seem to be interested, even though he had served with Mackey for a time in the Bent government. There is, at all events, no recorded mention of codifying the criminal law when, early in 1908, Cussen J was appointed — during the tenure of office of Mackey S-G and at his suggestion[194] — to carry out what was to become the 1915 consolidation of the Victorian statutes.[195] Perhaps Mackey S-G hoped that the Code would be subsumed into the larger process of consolidating the statute law of the State, but the matter seems to have been completely ignored during the process of drafting that led up to the consolidation of 1915. This was so even though Woinarski, (now Finlayson's successor as Crown Prosecutor), drafted the consolidation of the crimes legislation and mentioned, very briefly, his earlier work on the Code to the Joint Select Committee considering the consolidation.[196] Given the amount of effort required for consolidation and the fact that it would have distracted Parliament from its chief task of determining whether the consolidated statutes truly reflected those they were to replace, it is hardly surprising that no further tasks were added to the consolidators' labours. Furthermore, Cussen J had, as *The Argus*[197] pointed out on his appointment as a judge, little criminal experience and doubtless less interest in the criminal than in the civil law.

Cussen J did state before the Joint Select Committee on Statute Law Revision of 1916 that the Criminal Code drafted about a decade before 'should not be altogether thrown away'[198] and that some attention should be directed towards codifying the criminal law. In 1922, some small portions of Griffith CJ's Code were indeed incorporated into the law of Victoria when the *Imperial Acts Application Act 1922* (Vic) was passed as a result of a great deal of work by Cussen J.[199] Thus, there is a marked similarity between ss 47-49 of the Queensland Code and s 316 of the *Crimes Act 1958* (Vic) dealing with unlawful oaths.[200] Likewise, apart from the penalty, there is a similarity between s 207 of the Queensland Code and s 21 of the

[191] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 July 1911, 113; 25 July 1912, 400; 10 October 1912, 1944. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 1 August 1917, 586; 11 October 1917, 2304. It cannot, however, be said with certainty that this was any version of the Code at all and the Bill was not printed (see above n 188).

[192] *The Argus* (Melbourne), 5 December 1908, 9; *The Age* (Melbourne), 5 December 1908, 5.

[193] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 1914, 1191.

[194] Victoria, *Parliamentary Debates*, Legislative Assembly, 1914, 399.

[195] *The Argus* (Melbourne), 4 March 1908, 6; *The Age* (Melbourne), 4 March 1908, 6; *The Argus* (Melbourne), 6 March 1908, 4; J M Bennett, 'Historical Trends in Australian Law Reform' (1969) 9 *University of Western Australia Law Review* 211, 218.

[196] Victoria, *Parliamentary Debates*, Legislative Assembly, 1914, 453.

[197] (Melbourne), 14 March 1906, 7. His biographers in the *Australian Dictionary of Biography* agree: *Australian Dictionary of Biography* (8) 184.

[198] Victoria, *Parliamentary Debates*, Legislative Assembly, 1916, 790.

[199] See the marginal notes to ss 44, 52, 53, 68, 73, 93-96 of the Act; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 December 1922, 3381; Victoria, *Parliamentary Debates*, Legislative Assembly, 1922, 781, 800, 807, 809.

[200] Originally div 15 of pt III of the *Imperial Acts Application Act 1922* (Vic).

Summary Offences Act 1966 (Vic)[201] relating to the disturbance of religious worship.

At about the same time, there were further indications that more codification was to come. Cussen J expressed himself in favour of a criminal code in evidence before a Parliamentary committee dealing with the Bill for the *Imperial Acts Application Act 1922* (Vic)[202] and pointed out that the Queensland Code 'has been found satisfactory in Queensland for the last twenty years, and has been adopted substantially in other places'.[203] The explanatory memorandum for the Bill referred to amendments that would be necessary 'when a complete Criminal Code comes to be enacted and a further consolidation of Victorian law takes place'.[204]

When the next consolidation of the Victorian statutes (that completed in 1929) was undertaken, Cussen J was still thinking vaguely of a Criminal Code. In June 1926, he said before the Statute Law Revision Committee that he had been asked by the Attorney-General

> whether it would be possible — and I propose to consider whether it would be possible — to make a code of it [the *Crimes Act 1915*], not merely a consolidation, but a code, as has been done in Queensland, Tasmania, New Zealand, and, I think, Western Australia.

When the Chairman pointed out that a criminal code would be 'a very big thing' and asked whether Cussen J would have time to do it, his Honour is reported to have said, somewhat inelegantly, 'after I got rid of a number of these things [presumably referring to the consolidation of the statutes,] I was going to start on it soon'.[205]

Newspaper reports of 1 December 1925 — about eighteen months after the death of Sir John Mackey — confirm that Eggleston A-G had indeed asked Cussen J to 'prepare a complete codification of the criminal law'.[206] The Finlayson/Woinarski draft was not referred to but no doubt Cussen J would have taken it as the basis of his draft. Far from being forgotten, it had been referred to in approving terms by the general press as late as 1918 when Woinarski was appointed to the Bench[207] and would be mentioned again in his obituary in December 1935.[208] Very sensibly, Eggleston A-G, according to the newspaper report, proposed to submit the code, once drafted, to the Statute Law Revision Committee, which would at least have given it some greater chance of enactment, had it ever been drafted, than if simply introduced into Parliament in the same way as an ordinary Bill would be.

---

[201] Originally s 68 of the *Imperial Acts Application Act 1922*.
[202] Victoria, *Parliamentary Debates*, Legislative Assembly, 1922, 787.
[203] Victoria, *Parliamentary Debates*, Legislative Assembly, 1922, 790, 793 and 800.
[204] The memorandum is printed in the special volume of the Victorian statutes which contains the *Imperial Acts Application Act 1922* and the extract quoted is at 77 of that volume; see also 78.
[205] Victoria, *Parliamentary Debates*, Legislative Assembly, 1928, 705.
[206] *The Argus* (Melbourne), 1 December 1925, 10; *The Age* (Melbourne), 1 December 1925, 10.
[207] *The Australasian* (Melbourne), 21 September 1918, 52.
[208] *The Argus* (Melbourne), 23 December 1935, 8. See also Wiseman, above n 60, 352.

Eggleston A-G clearly understood that, as he put it a couple of years later, 'legislation affecting problems of pure law'[209] would best be dealt with by reference to a committee.

However, Eggleston A-G lost both his office and his seat at the next election (going on, however, to greater things and a knighthood — this is Sir Frederic Eggleston). Without some external impetus such as might have been provided by the Attorney-General, Cussen J was no doubt too much taken up with the work of consolidation of the statutes to consider the extra work of codifying the criminal law as well. When he finished that work, an unseemly row broke out about whether he should be paid for it; this could hardly be expected to fire him with enthusiasm for performing extra work.[210] He then took two years' leave, partly as a reward for his labours in the consolidation of 1929 and partly owing to illness.[211] He returned to the Bench in August 1931 and commenced a long appointment as Acting Chief Justice almost immediately,[212] dying on 18 May 1933.[213] It is thus not surprising that he never got around to the long-promised codification.

XIII CONCLUSION

No doubt, if the criminal law of Victoria had been codified using the Finlayson and Woinarski draft (perhaps one should say the Griffith, Finlayson, Woinarski and Griffith draft) as its base, Victorian criminal law would have joined the great family of jurisdictions in which some adaptation of Griffith CJ's Code applies. Whether this would have been a good thing is a matter of opinion. The benefits and disadvantages of codification have been extensively canvassed; there is no need to repeat that discussion here.

One result of adopting the draft Code of 1905-1908 would doubtless have been that many parts of the law would have remained frozen in the form in which they were codified. In Queensland and Western Australia, the general doctrines of Griffith CJ's Code have not undergone anything like a thorough-going reform in the last 100 years and no doubt that would have happened in Victoria too. The same process would have happened in the law relating to particular offences. Thus, the adoption of the Code would have brought with it a law of theft which would have been more rational and less complicated than the common law that it replaced. On the other hand, it is unlikely that Victoria would have adopted a version of the English *Theft Act 1968*.[214]

---

[209] Sir Frederic Eggleston, 'Legislative Reform' (1928) 2 *Law Institute Journal* 74, 74.
[210] Victoria, *Parliamentary Debates*, 22 October 1929, 2460-2466.
[211] *Australian Dictionary of Biography* (8) 185.
[212] *Victorian Government Gazette*, 29 July 1931, 2125; 27 January 1932, 167; 27 July 1932, 1620; 7 December 1932, 2730.
[213] For contemporary reports of these events, see *The Argus* (Melbourne), 17 January 1931, 20; 20 January 1931, 6; 4 August 1931, 6; 20 January 1932, 6; 18 May 1933, 7.
[214] *Crimes Act 1958* (Vic) pt I div 2.

Given that the Victorian draft has its defects but is a good-quality piece of work, and that the suggestions for improvement made by Griffith and Madden CJJ and Hood J are most unlikely to have diminished its quality, the question arises why it was not enacted at some stage in the first decade of the 20th century. This question is especially pertinent given that the Queensland Code was enacted in the last years of the 19th century while the Victorian attempt was made in the first years of the 20th. While only a few years separate the two attempts at codification, it is remarkable that it was the earlier that was successful given that, in 1901, what then became the state parliaments were suddenly deprived of a good portion of their responsibilities. It might therefore be thought that 1905 was a more propitious time for codification than 1899 given that there were fewer things for state parliaments to do.

The principal reason why the Victorian attempt at codification was unsuccessful has been suggested above: rather than being entrusted to a committee that could have conducted a detailed review and reported to Parliament on the Code,[215] it was simply dumped into Parliament's lap. It was, apparently, expected that Parliament would have sufficient enthusiasm, energy and specialist knowledge to be willing and able to take it from there. This was a wildly over-optimistic assessment of the interest that Parliament could be expected to show in the subject. The system we have rewards politicians for winning votes. It does not reward them for getting through codifications, but for enacting popular measures that interest the general public and make a difference to everyday life outside the courts. Nor can the public be expected to interest itself in subjects that do not immediately affect it. It was therefore not the Criminal Code but the announcement that trains would no longer run on Sunday mornings to which the leader writers of *The Argus*[216] devoted themselves in the week beginning 18 September 1905 when the Code was released to the public. By the time a politician of more than usual talent and perspicacity, Eggleston A-G, had recognised that Parliament could not be expected to deal in detail with a Code, it was too late; the political process swept him out of office soon afterwards.

The failure of the Code must, however, be seen not only as a failure of strategy and tactics but also as a failure of salesmanship. It is remarkable that there are so few references to it in the daily newspapers. Even allowing for the fact that the lack of an index to any of the daily newspapers makes the search more difficult than it should be,[217] there seems to be a remarkable lack of interest in the Code. There is no sign in the newspapers of any sort of public debate developing around any aspect of the Code at all. This lack of interest may well be a reflection of the fact that Mackey (as well as lacking Griffith CJ's pre-eminent stature in public life) appears to have

[215] Of course, not that review by a committee would necessarily have guaranteed enactment of the Code (cf Bennett, above n 195, 215) but it would have given it a much better chance.
[216] (Melbourne), 19 September 1905, 4; 20 September 1905, 6; 21 September 1905, 4.
[217] The procedure adopted in the research for this article was to survey each edition of *The Argus* for the periods in question and then to use the material obtained in that way to narrow down the search in *The Age* and *The Herald.* Needless to say, the indexes to *The Argus* were consulted when they resumed in 1910, as were those for *The Australasian.*

been a stolid man who found it difficult to set the public's imagination on fire.[218] It may be thought that a more skilled publicist could have done more to bring the Code to the public's attention. Certainly Tommy Bent could have managed that, but his enthusiasm, while quickly aroused, was more difficult to sustain. A project such as codification of the criminal law was clearly not at the forefront of his concerns. John Mackey, on the other hand, was a slow and steady worker but one who was not good at arousing the public's interest. The Premier's failure to go into bat for the Code meant that one half of the team necessary to get it enacted was missing.

The Code, although not a riveting read, was not without its points of interest even to non-lawyers. The proposal for majority jury verdicts after three hours, for example, might surely have been used as a means of drawing the public's attention to the proposal to codify the law. However, no such attempt appears to have been made. For this reason, too, it is hardly surprising that the public and the politicians tended to concentrate on other and — for them — more interesting and pressing matters.

[218] See *Melbourne Punch*, above n 17.