**CRIMINAL LAW CONSOLIDATION (FELONIES AND MISDEMEANOURS) AMENDMENT BILL 1994**

**Legislative Council, 5 May 1994, pages 767-9**

Second reading

**The Hon. K.T. GRIFFIN (Attorney-General**) introduced a Bill for an Act to amend the Criminal Law Consolidation Act 1935 and to make consequential amendments to other legislation to provide for the abolition of the classification of offences as felonies and misdemeanours; and for other purposes. Read a first time.

The Hon. K.T. GRIFFIN: I move:

That this Bill be now read a second time.

At common law, crimes developed as felonies and misdemeanours. In general terms, it might be said that, at least until relatively recent times, felonies were more serious crimes than misdemeanours. There are a number of exceptions to this, however, even of quite early date. One of the more obvious is that the ancillary offences—incitement, conspiracy and attempt to commit murder, for example—are misdemeanours, although murder is, of course, a felony and there are many felonies less serious than those misdemeanours. In general, the classification of common law offences is determined at common law.

The major significance of the division between felonies and misdemeanours originally lay in punishment. A felon forfeited all his or her property to the Crown, while the person guilty of a misdemeanour did not. Further, the felon was almost invariably subject to the death penalty whereas the person guilty of a misdemeanour was not. Neither of these consequences is remotely true in South Australia today.

South Australia inherited the distinction between felonies and misdemeanours in 1836. It remains in South Australian criminal law. But in the last century, the key classification of offences, which is all-important from a procedural point of view, has moved from the felony/misdemeanour distinction to that between indictable and summary offences and, latterly, major indictable, minor indictable and summary offences. It is these classifications which determine, for example, mode of trial, procedural steps and, to a degree, penal consequences.

It is quite clear that the designated classification of crimes as felonies or misdemeanours at common law no longer makes any sense at all. For example, murder is a felony, but attempted murder is not. Manslaughter is not a felony, but attempted manslaughter is (by statute). A second example— one of the many possible—suffices to make the point. All larcenies are a felony—even the stealing of $2 worth of sweets from a shop, but an act of gross indecency with a minor is a misdemeanour.

These anomalies have been aggravated by the statutory designation of certain indictable offences as felonies by section 5(2) of the Criminal Law Consolidation Act. This section was inserted by the Criminal Law Consolidation Act, No. 90 of 1986. The principal purpose of this Act was to make large-scale reforms to ancient offences dealing with assaults and the like and damage to property. The addition of section 5(2) was a shorthand way of preserving the existing felony status of many of the repealed offences for other purposes. It may have achieved that aim in a rough way—but it leads to further difficulties and anomalies.

The South Australian criminal justice system does not need the felony/misdemeanour distinction. One reason is its irrelevance. It outlived its reason for existence a century ago. There is simply no reason for its continued existence. A second reason is that its current form gives rise to what can charitably be called anomalies. Not only is the distinction irrelevant but also it no longer makes sense. A third reason is that the vestiges of the distinction left in South Australian law affect the operation of other laws in a way that is counterproductive and that makes no sense. South Australian criminal law can do without these unproductive disputes.

Of all Australian jurisdictions, only New South Wales and South Australia retain the terms. It is more than time they were abolished. Abolition of the distinction requires more than the mere replacement of the terms in question—although it involves at least that. That kind of routine and uncontroversial amendment may be found in the two schedules to the Bill. But the abolition of the distinction also requires the examination of some areas of substantive criminal law. They fall under the following headings.

1. The Felony Murder Rule

The felony murder rule goes back a very long time in the history of the criminal law at common law. In general terms, it is murder if a person kills another by an act of violence committed in the course of the commission of a felony involving violence. The point of the rule is that an accused will be guilty of murder in such a case even if he or she has not had the fault elements (such as an intention to kill or cause grievous bodily harm) normally required for conviction for murder. This rule applies only in relation to felonies.

It was abolished in England in 1957, and is no longer law in the ACT. It has been declared to be contrary to the Charter of Rights in Canada. It was recommended for abolition by the Mitchell committee, the Victorian Law Reform Commissioner, the Victorian Law Reform Commission, the Queensland Criminal Code Review Committee and the Canadian Law Reform Commission.

Against this unanimity of professional opinion, there can be no doubt that the doctrine has been employed in recent highly publicised cases in South Australia, and it has a certain popular appeal. When Victoria abolished the distinction between felonies and misdemeanours in 1981, it enacted a provision retaining the rule to a large degree.

This Bill adopts the latter course, despite a number of submissions to the Government that sought to have the rule abolished entirely. The reason is that such a reform would be controversial, and that controversy would be destructive of the main aim of the Bill—which is to abolish the anachronistic distinction.

2. Burglary and Allied Offences

South Australia has a very ancient structure of offences of dishonesty. It derives from the time at which the distinction between felonies and misdemeanours was central to the classification of offences. In many cases, it is possible to abolish the distinction quite simply. But in the cases of sections 167 to 171 of the Criminal Law Consolidation Act the irrationality of the ancient distinction still retains full hold.

The object of the Bill is to abolish the procedural distinction while retaining the status quo in terms of the substantive law so far as is possible. Literally, such an objective would require the Bill to restate the old distinction in modern legislative form. But such is the anomalous state of the law that that is neither wise, nor desirable—nor indeed possible. Hence, the offences have been re-enacted with a scope as close as is possible to their intended scope.

3. Complicity

The common law rules are described by a noted authority as follows:

At common law the rules of complicity are exactly the same for both felonies and misdemeanours but different words describe them. If D instigates the commission of a felony, and the felony is in fact committed, he is called an accessary before the fact and what he has to do to become an accessary before the fact is counsel or procure the commission of the felony. If D participates in the commission of the felony he is called a principal in the second degree, as opposed to the person who actually commits it, who is called the principal in the first degree. To become a principal in the second degree D has to aid and abet the commission of the felony. If the crime is a misdemeanour, D’s liability to conviction is still described in terms of counselling, procuring, aiding and abetting, but he is not called either accessary before the fact or principal in the second degree, and the person who actually commits it is not called principal in the first degree. Indeed, neither of them is called anything in particular as a matter of established custom. These categories. . . are quaint and have no significant bearing on the principles of responsibility for the promotion of crime.

The Bill deals with all of this by simply enacting the common law formula of ‘aid, abet, counsel or procure’ and applying it to all offences.

4. Power of Arrest

Currently, sections 271 and 272 of the Criminal Law Consolidation Act contain a statutory version of the common law power of arrest. Because it pre-dates the creation of the Police Force, it vests powers in private citizens. It is arguable whether or not sections 271 and 272 could simply be abolished without replacement. Certainly, section 75 of the Summary Offences Act provides police with a comprehensive power of arrest without warrant. Section 272 is an anachronism, and there appears to be no recent record of its use. However, in the interests of caution, and taking into account the fact that this Bill is not intended to constitute a review of powers of arrest, it has been decided to re-enact the effect of section 271.

SUMMARY

The eminent criminal jurist, Sir James Stephen, writing in 1883, strongly advocated the abolition of the felony misdemeanour distinction on the ground that it had then grown to be irrational and no longer served any useful purpose in the criminal law. In 1994, in South Australia, that is all the more true because it is now causing anomalies and quite unnecessary complexities in the criminal law. The distinction simply does not belong in a modern criminal justice system. The home of the common law, England, abolished the distinction in 1967. In Australia, only New South Wales still has it (apart from this State). It is time that South Australia caught up with the rest of this country. I commend this Bill to the Council and indicate that this it is not the Government’s intention that we should proceed with this Bill before the end of this session but that it should lay on the table for public exposure and be dealt with in the next session.

I seek leave to have the explanation of the clauses inserted in Hansard without my reading it.

Leave granted.

Explanation of Clauses

Clause 1: Short title

Clause 2: Commencement Clauses 1 and 2 are formal.

Clause 3: Amendment of s. 5—Interpretation Clause 3 substitutes a new subsection (2) in section 5 of the principal Act. The current subsection (2) deems certain offences to be felonies for the purposes of the Act. The abolition of the distinction between felonies and misdemeanours makes such a provision inappropriate. New subsection (2) specifies that notes written in the text of the Act form part of the Act. This consequential amendment is necessary because of the drafting style used in new sections 12A, and 167 to 171 and the amendments to 270b(1) and (2).

Clause 4: Insertion of s. 5D Clause 4 abolishes the classification of offences as felonies and misdemeanours.

Clause 5: Insertion of s. 12A Clause 5 inserts a new section 12A into the principal Act. New section 12A provides that a person who causes death by an intentional act of violence committed in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more is guilty of murder. This provision may be seen as providing a statutory replacement for the common law "felony-murder rule", although the scope of the statutory rule is somewhat different as it applies only to serious crimes. There is, however, a specific exception for causing death in the course or furtherance of an illegal abortion, to preserve the common law leniency in relation to this offence.

Clause 6: Substitution of s. 75 Clause 6 substitutes a new section 75 in the principal Act dealing with alternative verdicts on trials for rape or unlawful sexual intercourse. New section 75 does not effect any substantive change but removes all references to felonies and misdemeanours and is in modern drafting style.

Clause 7: Repeal of ss. 134 and 135 Clause 7 repeals sections 134 and 135 of the principal Act which prescribe the penalty on conviction for larceny after a previous conviction for a felony and after a previous conviction for a misdemeanour, respectively.

Clause 8: Substitution of ss. 167—172 Clause 8 substitutes a number of new sections in the principal Act. New sections 167 to 171 cover the same ground as the existing sections 167 to 172 but use modern language and delete the references to felonies. The offence created by the current section 171 is incorporated in proposed section 170. These sections of the principal Act deal with the offences of sacrilege, burglary, housebreaking, breaking and entering and various offences at night which involve being in possession of an offensive weapon or instruments of housebreaking, being in disguise, or being in a building. Most of these offences are currently triggered by the intent to commit, or the commission of, a felony. The proposed sections delete the references to felonies by having these offences triggered by the intent to commit, or the commission of, an offence of larceny, or an offence of which larceny is an element, an offence against the person, or an offence of property damage which is punishable by imprisonment for three years or more.

Clause 9: Substitution of ss. 267 and 269 Clause 9 repeals sections 267 and 269 of the principal Act and replaces them with a single provision on aiding, abetting, counselling or procuring an offence. The abolition of the distinction between felonies and misdemeanours means that it is no longer necessary to have two separate provisions dealing with accessorial liability. New section 267, like the sections it replaces, provides that an accessory may be prosecuted and punished as a principal offender.

Clause 10: Substitution of ss. 271 and 272 Clause 10 repeals sections 271 and 272 of the principal Act, which deal with the citizen’s power of arrest in two different circumstances, and replaces them with a general power of arrest. New section 271 would allow a citizen to arrest and detain a person found committing, or having just committed, an indictable offence, larceny, an offence against the person or property damage.

Schedule 1 Schedule 1 consequentially amends all other provisions of the principal Act which mention felonies and misdemeanours. This schedule does not make any substantive changes to the law but amends the terminology used in keeping with the abolition of the classification of offences as felonies and misdemeanours.

Schedule 2 Schedule 2 consequentially amends all other Acts which mention felonies and misdemeanours. This schedule does not effect any substantive changes to the law but amends the terminology used in keeping with the abolition of the classification of offences as felonies and misdemeanours.

The Hon. C.J. SUMNER secured the adjournment of the debate.