The pitfalls of imitation: the New South Wales First Offenders Probation Act of 1894

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One obvious and frequently used method of law reform by legislation is to copy a model from another jurisdiction making no more changes in the model than are thought necessary to adapt it to the reforming jurisdiction. But which model to copy and how easy is copying? In this article Stephen White raises the question why, when introducing a probation system in 1894, the legislators of New South Wales preferred the Queensland to the reputedly more satisfactory New Zealand model, and shows how the legislators of South Australia and New South Wales, while both believing they were copying the Queensland model, produced significantly different statutes.

I. INTRODUCTION

The Australasian colonies were among the first jurisdictions in the world to enact the forerunners of today's probation statutes which allow courts to release offenders conditionally on good behaviour while at the same time subjecting them to the supervision of probation officers. The first such statutes were passed in Massachusetts in 1878 and 1880, and these were followed by the First Offenders Probation Act of New Zealand, and by the Offenders Probation Act of Queensland, which received the Royal Assent on 9 August and 6 October 1886 respectively.

The New Zealand Act had been foreshadowed by a Prisoners Probation Bill of the previous year and though the Act differed in certain respects from the Bill both reflected the Massachusetts model.[1] The Act provided for the appointment of probation officers. These officers were to enquire into the character and offence of everyone arrested for a first offence not ranking in the first order of gravity to ascertain if he might be expected to reform without punishment. Where appropriate they were to recommend to the court that such a person be placed

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1 I have examined the influence of the Massachusetts model in New Zealand and Australia in Stephen White, "Howard Vincent and the Development of Probation in Australia, New Zealand and the United Kingdom" (1979) 18 Historical Studies: Australia and New Zealand 598.

on probation. The courts were empowered, instead of sentencing a first offender immediately to punishment, to release him on probation for any period not exceeding the maximum length of imprisonment for which he could be sentenced. Among the conditions of probation was an obligation to report regularly to and submit to the supervision of a probation officer. Breach of the conditions of probation rendered the probationer liable to be sentenced for the offence for which he had been put on probation, but on satisfactory completion of the period of probation a probationer was to be regarded as having been sentenced and having served the sentence.[2]

Under the Queensland Act any person who had not previously been sentenced to more than three months' imprisonment or penal servitude could be put on probation for any offence punishable with a sentence of imprisonment or penal servitude for less than three years provided that the court believed such a sentence to be "an adequate punishment". The court would pass a sentence of imprisonment but was empowered to suspend its execution conditionally for a period equal to the term of the sentence or twelve months, whichever was the greater.[3] The condition of suspension was that the offender enter into a recognizance to be of good behaviour, to report at least quarterly to the police either by post or in person unless the Colonial Secretary specified the latter mode only, and to make such restitution or compensation for his offence as was ordered by the court. The Governor was also empowered to subject persons released from prison as a result of the exercise of the Royal Prerogative to identical conditions. For breach of any of these undertakings the recognizance could be forfeit, and the Act also provided that it could be forfeit for various specific offences, mainly related to vagrancy, or for failing to give a name and address or giving a false one when charged with an offence. When his recognizance was forfeit the offender was committed to prison to serve so much of his sentence as he could before the date fixed for the expiry of his recognizance: he was, in current usage, given the benefit of "street time". If, on the other hand, he stayed out of trouble during the period of the recognizance the conviction in respect of which sentence had been suspended was not to count as a "previous conviction" for the purpose of any provision allowing increased penalties for recidivists.

Three features, all present in this Act, which distinguish the first probation statutes passed in Australia from those passed in Massachusetts and New Zealand were first, that they made no provision for the office of probation officer; second, that what provision they did make for supervision was made in the form of regular reporting to the police; and third, that they made no provision for any pre-sentence investigation before persons were put on probation. Indeed one explanation for the comparatively tardy development and limited scope of pre-sentence reporting in Australia is to be found in these features of the early Acts.

Elsewhere I have argued that Queensland's failure to follow the Massachusetts

2 In fact the drafting of both the Bill of 1885 and the Act of 1886 contained rather many ambiguities and anomalies for such short measures, but none of them are germane to the subject of this article. They are examined in a book I am currently writing.

3 This was the world's first suspended sentence of imprisonment: see White, op.cit. 608.

and New Zealand models was the result partly of pure accident and partly of the influence in these parts of Howard Vincent, the first Director of the C.I.D. in London, who visited Massachusetts, New Zealand and Australia in 1884 during the course of a world tour he made as preparation for entry into the House of Commons.[4] In fact the legislation passed in Queensland would have been far more to his liking than that which he was able to push through his own Parliament. Despite the attention given by Australian politicians at this time to proceedings in the British Parliament, the troubles that Vincent's own proposals ran into in England in 1886 and again in 1887[5] did not prevent South Australia and Victoria in 1887, New South Wales in 1894 and Tasmania in 1898 from following Queensland's lead. Western Australia in isolation in 1892 passed an Act modelled on the English Probation of First Offenders Act of 1887. Vincent did not visit Western Australia in 1884, although he almost certainly met politicians from that State at the Colonial Conference in 1887.

While the reflection of the Queensland model in the South Australian statute of 1887 can be explained by that statute's following closely upon the Queensland Act,[6] the conformity of the New South Wales Act to it is more difficult to explain. Even when the first attempt was made in New South Wales to secure probation legislation information was available which suggested that those responsible for the administration of the New Zealand and Queensland Acts respectively thought very differently of their charges, and by the time that the First Offenders Probation Act was actually passed six years later there can have been no doubt of it. The annual reports of Arthur Hume, the Controller of Prisons in New Zealand, time and again recounted that experience had shown, in the words of his report for 1894, "what a real good Act it is".[7] Seymour, the Commissioner of Police in Queensland, on the other hand, was constantly complaining of the effects of the Queensland Act. Indeed in 1899, although the administration of the Act was still his responsibility, the Commissioner of Police ceased to give any account of its operation in his annual reports, possibly from disgust. It became known too, in 1890, that some at least of the Queensland judges were highly critical of the Act.

The question which all this suggests is why did New South Wales legislators not abandon the Queensland and adopt the New Zealand model in the 1890's.

4 White, op.cit. Among other things he liked about New Zealand was the Public Trustee and over twenty years later finally succeeded in transplanting it from New Zealand to the United Kingdom.

5 Accounts of these can be found in N. S. Timasheff *One Hundred Years of Probation 1841-1941 Part I: Probation in the United States, England and the British Commonwealth of Nations* (Fordham University Press, New York, 1941) 26-31 (not wholly reliable); Gordon Rose *The Struggle for Penal Reform: The Howard League and its Predecessors* (Stevens & Sons, London, 1961) 50-52. The fullest and most recent study is in Dorothy Bochel *Probation and After-Care: Its Development in England and Wales* (Scottish Academic Press, Edinburgh, 1976) 9-14.

6 I have examined the passage of the Victorian Act in White, op.cit. 604-608.

7 This is not to overlook the political and personal pressures that made Hume especially inclined to write well of his own administration: see Thomas Young Wilson *New Zealand Prisons 1880-1909:* (M.A. Thesis, Victoria University of Wellington, 1970). But there is no evidence that these led Australians to discount Hume's reports.

Had they done so, the development of probation and pre-sentence reporting in Australia might have been different and speedier. Lest readers' hopes of being given an answer to this question are raised, I should warn them that I have not found one which convinces me. The purpose of this article is simply to recount the travails of the New South Wales Act as it passed through Parliament with a view to examining what light they shed upon it.

Part of the explanation for the long delay involved in introducing and passing the First Offenders Probation Act is, no doubt, the instability of Government in New South Wales in the later 1880's, the resignation of Ministers responsible for putting the Government's views on the bill, and the elevation of its original sponsor, Joseph Palmer Abbott, to the Speakership of the Legislative Assembly in 1890. Even if this delay is discounted, however, the passage of this bill into law was more resisted than even Vincent's original proposals to the United Kingdom Parliament, compared with which it was much less far reaching.

II. JOSEPH PALMER ABBOTT

It is not clear why it fell to Abbott to introduce the Offenders Probation Bill on 8 November 1888.[8] When the Vincents visited New South Wales in 1884, Abbott was Secretary for Mines. Although Mrs Vincent, in her account of her husband's and her travels, recounted Vincent's meetings with Sir Alfred Stephen, Sir James Martin, then Chief Justice, and William Bede Dalley, the Attorney-General,[9] she did not record any meeting with Abbott. Mrs Vincent also believed that in 1884 the Government was committed to introducing legislation on probation.[10] Why then was legislation not introduced to Parliament until four years later and then not by a minister but by a private member, Abbot? During the debate on the Bill Albert Gould, the Minister of Justice, observed that so important a measure should have been introduced by the Government but in remarking on Abbot's credentials for introducing such a Bill stated that he had "filled the office of Minister of Justice".[11] Abbott is not recorded as having done so, however, in the New South Wales Parliamentary Record and, if he did so, it may have been that he was merely acting in that capacity during the temporary absence from the colony or indisposition of the actual minister, though once again I have been unable to find any record of his having done so.[12] From his entry into Parliament in 1880, however, Abbott displayed a special interest in law reform, and was "one of the leading private members responsible for filling the gap made by the shortcomings of several cabinets in initiating and carrying legislation through both

8 N.S.W. L.A. debates. S.1, vol. 37, 1889: 884.

9 Mrs Howard Vincent *Forty Thousand Miles over Land and Water: The Journal of a Tour through the British Empire and America* (I ed., Sampson, Low, Marston, Searle & Rivington, London, 1885) vol. I, 272, 274 and 283. Dalley, a "most amusing and clever man" in this edition became a "most accomplished and clever man" in the shortened third edition (3 ed., Sampson, Low, Marston, Searle & Rivington, London, 1886) 186.

10 Ibid. 288.

11 N.S.W. L.A. debates. S.1, vol. 37, 1889: 885.

12 His family have no recollection of his having done so: personal communication from Hon. C. L. A. Abbott.

Houses".[13] Vincent may well have met Abbott in 1884 and discussed his ideas about probation with him, or Abbott's interest in probation may have dated from his service as Minister of Justice, if indeed he ever did serve in that capacity.

III. OFFENDERS PROBATION BILL 1888

The Offenders Probation Bill had its First Reading in the Legislative Assembly on 13 November 1888,[14] but before it could be read a second time the Parkes Government resigned. Following on the resignation of the short lived Dibbs Ministry, Parkes returned to office, and on 4 April 1889 the Bill was again given a First Reading.[15] Although Abbott believed that the Queensland Act was not working well, the Bill, apart from containing no provision relating to the exercise by the Governor of the Royal Prerogative, was almost a replica of it. Apparently he thought that the fundamental fault in the Queensland Act was that the power of conditional release was extended too widely to Courts of Petty Sessions: any two justices could exercise it. In this he identified the issue that proved to be the most contentious, and the one responsible more than any other for the Bill's slow progress. When moving the Second Reading of the Bill he suggested that it might be better if the power of conditional release for offences tried in petty sessions was confined to particular magistrates nominated by the Government for that purpose.[16] An amendment to provide for this was moved by Henry Dangar, the Bill's sponsor in the Legislative Council. The Council was the only Australian Chamber where a Bill on probation occasioned any sustained rhetoric about penal philosophy:[17] the Bill was read a second time only after a division, its main opponent declaring that it would have to be remade lock, stock and barrel "like the Irishman's gun".[18] Both the Second Reading and Committee stages of the Bill in the Council were adjourned on numerous occasions over a period of three months because of the absences of the Attorney-General and Sir Alfred Stephen, and when Parliament was prorogued on 10 October 1889, almost two months after Dangar had moved his amendment,[19] the Council had still not voted on it.

The Government gave the Bill qualified support, though as the passage of the English Act had shown, this could be far from an unmitigated blessing.[20] Gould was sympathetic to the principle of the Bill, while reporting that the Comptroller of Prisons, "although he does not say that he is opposed to a measure of this

13 See entry on "Abbott, Sir Joseph Palmer (1842-1901)" in Douglas Pike (ed.) *Australian Dictionary of Biography* (Melbourne University Press, Melbourne, 1969) vol. 3, 1851-1900, A-C.

14 N.S.W. L.A. debates. S.1, vol. 35, 1888: 361.

15 N.S.W. L.A. debates. S.1, vol. 37, 1889: 444.

16 Ibid. 885.

17 David Buchanan, in the climax to a speech which some members found regrettable, declaimed: "I advocate not a malignant revenge, not a diabolical hatred, but a divine authentic hatred of crime and of criminals". N.S.W. L.C. debates. S.1, vol. 37, 1889: 884. Buchanan was notorious for, and prided himself upon, his declamatory style of oratory: see R. B. Walker, "David Buchanan: Chartist, Radical, Republican" (1967) 53 *Journal of the Royal Australian Historical Society* 122.

18 Archibald Jacob, N.S.W. L.C. debates. S.1, vol. 38, 1889: 1553.

19 N.S.W. L.C. debates. S.1, vol. 41, 1889: 4331.

20 Bochel, op. cit. 13-14.

nature", nevertheless "does not feel very sanguine with regard to this matter".[21] With the Victorian and English legislation in mind, Gould wanted a limitation on the age of offenders who might be put on probation and an injunction inserted in the Bill requiring courts in exercising the powers conferred by it to have regard to considerations identical to those specified in the English Act.[22] These included "the youth, character and antecedents of the offender, . . . the trivial nature of the offence, and . . . any extenuating circumstances under which the offence was committed".[23] In Committee, however, Gould failed to persuade the Assembly and withdrew his amendment, contenting himself with the remark that, if an upper age limit of 21 was not acceptable, perhaps one of 25 or 30 would be.[24] In the Legislative Council, however, this matter was taken up again by Sir Alfred Stephen who observed that the absence of previous convictions was quite compatible with the offender being an habitual criminal and complained that[25]

> There is no condition as to inquiring into character, no condition as to age, no condition as to antecedents of any kind, no reference to any extenuating circumstances.

Against this view it was argued that it would be extremely unlikely that a court would put someone on probation without regard to these considerations.[26] Andrew Garran, in noting that the Bill merely gave courts discretionary powers, remarked:[27]

> We are to suppose that those who try the case are experts in these matters, that they have a knowledge of crime and character, and that they have all the information that can possibly be gained as to the antecedents of the offender, and that in their discretion they will decide whether the case is one in which a lenient treatment would be sufficient, or whether it looks like a case of hopeless criminality, where sharp and decisive punishment is required.

There was, however, some feeling that, whether or not courts were expressly enjoined to have regard to such matters, the machinery for providing them with the information to enable them to do this would be deficient, though there was disagreement as to whether it would work better in the city where the police would find it easier to discover a man's antecedents or in the country districts where the magistrates, because of their more intimate knowledge of the areas they served, would already know of the antecedents of persons appearing before them.[28] Unlike the Queensland Act, but similarly to the New Zealand legislation, the Bill allowed the use of probation for persons without previous convictions "so far as is known to the Court".[29] One amendment made to the Bill to enable courts to be better informed about whether offenders had previously been put on probation was based directly on experience in Queensland, though, not as one speaker said, on the law there.[30] The New South Wales Act allowed a court to order the

21 N.S.W. L.A. debates. S.1, vol. 37, 1889: 886.
22 Idem.
23 First Offenders Probation Act 1887, (U.K.) s.1(1).
24 N.S.W. L.A. debates. S.1, vol. 37, 1889: 891.
25 N.S.W. L.C. debates. S.1, vol. 39, 1889: 2154.
26 Ibid. 2574.
27 Ibid. 2578.
28 N.S.W. L.C. debates. S.1, vol. 38, 1889: 1534, 1535, and vol. 41, 1889: 4595.
29 First Offenders Probation Act 1894, (N.S.W.), s.3.
30 William Trail, N.S.W. L.A. debates. S.1, vol. 37, 1889: 891, 896; N.S.W. L.C. debates. S.1, vol. 70, 1894: 1582.

detention for up to forty-eight hours of a person released on probation to allow an "examination customary for securing future identification" to be made.[31]

Whether this provision did overcome the difficulty it was designed to meet it is impossible to tell. In 1900 the Statistical Register began to publish figures of persons put on probation and subsequently discovered to have had previous convictions. So, for example, in 1900 of 55 persons put on probation by the higher courts 8 had previous convictions. One such in 1899 was known to have as many as 7 previous convictions.[32] The Yearbook commented[33] that either

> the judges have been over lenient in dealing with the accused, or the means of identication are so inadequate that the prisoners were able to pose as first offenders.

It seems, however, that all the previous convictions referred to should have disqualified those who had sustained them from admission to probation. Following on the installation of a system of finger-printing in 1903,[34] the Yearbook was able to boast in 1905 that no persons put on probation were subsequently found to have had previous convictions.[35]

When the Bill was lost with the prorogation of Parliament, it had been very little amended. There had been no opportunity for Stephen to move an amendment so that the considerations a court should bear in mind would be expressly stated in the Act. Had he done so, as must have been his intention, there can be little doubt that it would have been accepted by both Council and Assembly. Dangar would have approved of it,[36] and the reason why Gould's similar amendment was defeated in the Assembly was because it was linked to an express restriction on the age of offenders who might be put on probation. There had been an unsuccessful attempt to do away with the definition of a minor offence, and extend probation to persons convicted of a first offence.[37] One amendment, however, had been made to the criteria of eligibility for probation, but to understand its provenance and its full significance it is necessary to consider the Queensland Act in greater detail.

Queensland's Criminal Law Amendment Bill of 1886 provided that the powers it conferred on courts could be exercised "when a person is convicted of a minor offence, not having previously been convicted of an offence for which he was sentenced to penal servitude or imprisonment for a period exceeding three months".

31 First Offenders Probation Act 1894, (N.S.W.) s.3(iii).
32 T. A. Goghlan *New South Wales Statistical Register for 1900 and Previous Years* (Government Printer, Sydney, 1902) 782.
33 T. A. Goghlan *The Wealth and Progress of New South Wales 1900-01* (Government Printer, Sydney, 1902) 215.
34 *Identification and Registration of Habitual Criminals (Return Respecting)* New South Wales. Votes and Proceedings of the Legislative Assembly, vol. 2, 1895: 1283; *Report of The Police Department 1903* New South Wales. Parliamentary Papers, vol. 1, 1904 2nd Session, 4; *Report of the Police Department 1904* New South Wales. Parliamentary Papers, vol. 2, 1905, 5.
35 W. H. Hall *The Official Yearbook of New South Wales 1904-05* (Government Printer, Sydney, 1906) 581.
36 N.S.W. L.C. debates. S.1, vol. 39, 1889: 2580.
37 N.S.W. L.A. debates. S.1, vol. 37, 1889: 888.

A "minor offence" was defined as one for which, among other things, a sentence of less than three years penal servitude or imprisonment could be imposed and for which such a sentence (i.e. one of less than three years penal servitude or imprisonment) was judged an adequate punishment. During the Committee stage of the Bill, however, Norton intervened with a criticism the point of which is not easily grasped.[38] He first observed that probation should not be granted to anyone previously convicted of an offence *punishable* with penal servitude or imprisonment for more than three months — a perfectly intelligible proposition, but one to which Samuel Walker Griffith, the Bill's sponsor, demurred — but then went on to suggest that this purpose would be achieved — when clearly it would not — if the words "convicted and" were inserted before "sentenced", adding that this would improve the clause's awkward expression and make its meaning clearer.

Griffith, not surprisingly, could not understand how it would make any difference whatsoever, but to satisfy Norton he than devised amendments as a result of which the Act finally read: "When a person is convicted of a minor offence, not having been previously convicted in Queensland or elsewhere, of an offence, and sentenced upon such conviction, to penal servitude or imprisonment for a period exceeding three months . . . "[39] It is unlikely that he realised what he had done for the slight changes to the wording of the Bill coupled with its extraordinary punctuation, now left it unclear whether a person could be put on probation provided he had not previously been sentenced to three months or more or whether he could be put on probation only on being sentenced to three months or more. The original draft left absolutely no doubt that the former interpretation was the intended one. It is also the more reasonable one. Moreover, this was how it was understood by the sponsor of the South Australian Offenders Probation Act of 1887, which was modelled on that of Queensland, for he improved the punctuation so that his measure admitted of no other interpretation. That Act allowed a court to put on probation where he "is convicted of a minor offence, not having been previously convicted in South Australia or elsewhere of an offence and sentenced upon such conviction to imprisonment for a period exceeding three months, . . . " The Magistrates of Queensland, however, either ignored the section completely or adopted the other interpretation of it,[40] and Abbott also adopted it. His insertion of the word "is" before the word "sentenced" shows both that he appreciated the ambiguity of the Queensland provision while adhering to this erroneous interpretation of it.[41] His Bill provided that a person could be put on probation where he "is convicted of a minor offence, not having been previously convicted in New South Wales, or elsewhere, in so far as is known to the Court of an offence, and is sentenced upon such conviction to penal servitude or imprisonment

38 See Appendix for the relevant Queensland, South Australia and New South Wales provisions.

39 Qld. L.A. debates. vol. 49, 1886: 363.

40 *Report of the Commissioner of Police 1887* Queensland. Legislative Assembly. Votes and Proceedings, vol. 1, 1882, 2.

41 If this account of the true meaning of the Queensland Act is correct, Timasheff also misunderstood it. It is hardly surprising, therefore, that he commented on the "peculiar" restriction "which makes probation inapplicable to cases of short term imprisonment, where it is badly needed", see Timasheff, op.cit. 38 and 40.

for a period exceeding three months." No good reason appearing to the legislators of New South Wales for allowing probation to those sentenced to more than three months but refusing it to those sentenced to less, an amendment was passed to remove the restriction. These provisions would probably have had to have been further amended because, as Stephen pointed out, there was no such sentence as that of less than three years penal servitude referred to in the definition of "minor offence".[42]

With the election of Abbott as Speaker of the Legislative Assembly in the following Parliamentary session but one, the Bill lost its sponsor, but just over three years later it was introduced once more, this time by William Patrick Crick. Crick, for all his larrikinism,[43] had a genuine interest in penal reform. He was one of the batch of Labour politicians first elected to Parliament around 1890 who provided a balance to the prevailing Parliamentary attitudes to social deviance, which were mainly repressive.[44] He had spoken in favour of the Bill three years earlier and his continued support for it was due to the fact that he envisaged that no headway would be made with a motion in favour of reformatories which he had standing on the order paper for some time.[45] W. N. Willis, in his partisan memoir of Crick, claimed that Crick was the "father" of the measure,[46] and in this he is followed by Clune.[47] Both recognise it was modelled on Queensland's Act, but neither mention Abbott who might be credited equally with its paternity. The combination of Abbott and Crick, it must be admitted, is a most unlikely one. During Abbott's speakership Crick was one of the most troublesome members of the Legislative Assembly.[48]

In the Legislative Council too the Bill was in different hands from formerly, apparently because Dangar had been too disheartened by what he considered to be the petty obstruction it had encountered under his sponsorship.[49] Although the Bill was read a first time on 22 February 1893,[50] it was not read a second time until a year later on 20 February 1894.[51] No explanation appears from the debates of why it was postponed so long.[52].

The Bill met with less opposition this time, though some of the former

42 N.S.W. L.C. debates. S.1, vol. 39, 1889: 2154.
43 Cyril Pearl *Wild Men of Sydney* (W. H. Allen, London, 1958).
44 Peter N. Grabosky *Sydney in Ferment: Crime, Dissent and Official Reaction 1788 to 1973* (Australian National University Press, Canberra, 1977) 95-96.
45 N.S.W. L.A. debates. S.1, vol. 337, 1889: 887. I have been unable to confirm this from looking at the Votes and Proceedings of the Legislative Assembly.
46 W. N. Willis *The Life of W. P. Crick* (Sydney, 1908) 190.
47 Frank Clune *Scandals of Sydney Town* (Angus & Robertson, Sydney, 1957) 74.
48 E. H. Collis *Lost Years: A Backward Glance at Australian Life and Manners* (Angus & Robertson, Sydney, 1948) 72.
49 N.S.W. L.C. debates S.1, vol. 41, 1889: 4336, 4597; N.S.W. L.C. debates S.1, vol. 70, 1894: 1208.
50 NS.W. L.A. debates S.1, vol. 63, 1893: 4511.
51 N.S.W. L.A. debates. S.1, vol. 69, 1894: 824.
52 N.S.W. Votes and Proceedings of the Legislative Assembly vol. 1, 1892-93, 361 405, 420, 455, 539, and 604; N.S.W. L.A. debates S.1, vol. 67, 1893: 92; N.S.W. Votes and Proceedings of the Legislative Assembly vol. 1, 1893, 35, 150, 187; N.S.W. L.A. debates S.1, vol. 69, 1894: 176.

objections to it were repeated and former sentiments expressed. Thus the issue of whether all Courts of Petty Session should be able to put persons on probation was discussed again,[53] and Jacob argued once more that the Bill would need to be completely reformulated.[54] Two important amendments were made to the Bill. Its definition of "a minor offence" for which a person could be put on probation was altered to any offence "which in the opinion of the Court is one to which the provisions of the Act should be applied",[55] an amendment both surprising in the light of the concern formerly expressed that the criteria of eligibility for probation were too widely drawn and the attempts made to express them in more detail, as in the English Act, and indicative of the difficulty of obtaining agreement on the types of case for which probation might suitably be ordered once it had been decided that the definition in the Queensland Act was inappropriate.

The other amendment followed from the misunderstanding of the Queensland Act referred to above. Whereas in Queensland and South Australia only certain types of previous conviction disqualified an offender from admittance to probation, the New South Wales Bill would not disqualify an offender with a previous conviction of any sort. After several attempts to find a satisfactory formula for allowing those with previous convictions for only trivial offences to be eligible for probation, it was provided that only a previous conviction for an indictable offence would exclude a person from the chance of being put on probation.[56] It is a delightful irony that the two very different results achieved in South Australia and New South Wales arose from amendments to the Queensland provision which were intended to clarify what was in truth a perfectly unambiguous piece of drafting. The title of the New South Wales Bill was also amended[57] and the Bill became law as the First Offenders Probation Act on 1 June 1894.

It remains to be explained why the New South Wales legislation remained so similar to the Queensland Act. Crick was the only important speaker in the debates to voice the opinion that the Queensland Act was working well, but this was probably because he had not studied the information available about it.[58]

53 N.S.W. L.C. debates S.1, vol. 70, 1894: 1209, 1572; N.S.W. L.C. debates S.1, vol. 71, 1894: 2521, 2688.

54 NS.W. L.C. debates S.1, vol. 70, 1894: 1206.

55 N.S.W. L.C. debates S.1, vol. 70, 1894: 1574; NS.W. L.C. debates S.1, vol. 71, 1894: 2521, 2688.

56 N.S.W. L.A. debates S.1, vol. 69, 1894: 1574; N.S.W. L.C. debates S.1, vol. 70, 1894: 1580; N.S.W. L.C. debates S.1, vol. 71, 1894: 2748.

57 N.S.W. L.A. debates S.1, vol. 69, 1894: 825.

58 N.S.W. L.A. rebates S.1, vol. 69, 1894: 824. In 1889 Dangar also appeared to think well of the Queensland Act, but this may have been because he confused the Queensland and Victorian legislation. He was the only speaker to refer to reports which showed the New Zealand legislation to be working better than the Victorian. I know of only one report about the Victorian legislation which would have permitted such an inference to be drawn at that time, but this, the Report of the Inspector-General of Penal Establishments in Victoria for 1888, is dated 27 May 1889. Dangar's opinion about the Queensland Act changed little between 1889 and 1894: N.S.W. L.C. debates S.1, vol. 38, 1889: 153; N.S.W. L.C. debates S.1, vol. 41, 1889: 4595; N.S.W. L.C. debates S.1, vol. 70, 1894: 1208.

Other speakers, who referred to the Queensland Act, referred to its shortcomings. Not only was it known that the Queensland Commissioner of Police was not pleased with the Act but it was also reported that the Crown Law Officers in Queensland found it difficult to administer.[59] Reports of the misuse of the Act were also quoted on several occasions from the Brisbane newspapers.[60] Yet, though many seemed to be aware of the greater success of the New Zealand measure, few spoke out in favour of adopting it.

I am unable to offer a convincing explanation for this neglect of the New Zealand Act, but several reasons probably contributed to it. The first was a pure parochialism. As Buchanan put it:[61]

> I do not care a straw whether the bill has passed in any colony or not. I am speaking from my knowledge of human affairs . . .

The second reason was that some just could not understand why the New Zealand Act was the more successful, probably because they saw no essential difference between it and the Queensland measure.[62] But there was an essential difference, and it lay in the New Zealand Act's creation of the position of probation officer and its provision for the probation officer's active involvement in the cases of first offenders both before and after sentence. Some who saw this did not apparently attribute the greater success of the New Zealand Act to it, while others thought it a positive disadvantage. Sir Alfred Stephen, for example, judging the measures by their complexity, a yardstick of which was the number of sections each contained, remarked on the superiority of the English Act to either the Queensland or New Zealand one, and thereby implied that the Queensland Act was superior to that of New Zealand.[63] Those who saw no advantage in the greater detail of the New Zealand provisions, believed that the defects of the Queensland Act could be cured by relatively minor amendments, an opinion in which they were undoubtedly confirmed by the reported opinion of Griffith that the amendments made to the Bill in New South Wales were improvements on the Queensland Act.[64]

A few did appreciate the significance of the differences between the Queensland and New Zealand Act. Jacob was one who consistently argued that the Bill would

59 N.S.W. L.C. debates S.1, vol. 41, 1889: 4595. The basis, in part at least, of their dissatisfaction was no doubt the letter sent to the Secretary, Crown Law Officers, by Seymour, 21 September 1889, Queensland Archives, JUS/W1.

60 N.S.W. L.A. debates S.1, vol. 37, 1889: 885; N.S.W. L.C. debates S.1, vol. 39, 1889: 2579.

61 N.SW L.C. debates S.1, vol. 39, 1889: 2151.

62 N.S.W. L.C. debates S.1, vol. 38, 1889: 1531; though Dangar may not have been thinking of the Queensland Act nevertheless the Victorian legislation resembled it much more than it did the New Zealand.

63 N.S.W. L.C. debates S.1, vol. 39, 1889: 2155. Stephen had written to Griffith in 1886 asking for a copy of the Queensland Act which he described as "valuable" and "important" and which, he stated, he was sure he would find "well adapted in frame to accomplish (its) objectives — and of *these* no-one can fail to approve": Letters dated 8 October 1886 and 1 January 1887, Stephen to Griffith, Griffith Papers, MSQ, 186, 565 and 583 (Mitchell Library, Sydney, N.S.W.).

64 N.S.W. L.C. debates S.1, vol. 70, 1894: 1572.

not work unless considerably more machinery was provided,[65] and William Trickett, who had studied the operation of the Act in New Zealand and who consistently expressed his preference for that measure, drew attention to the strict surveillance provided for and actually carried out under the Act.[66] The reporting provisions of the New South Wales Bill, however, attracted little comment besides this. Hugh Langwell observed incorrectly that in Queensland persons on probation had to report once a month,[67] but that in his opinion reporting once every three months would be sufficient,[68] and Septimus Stephen drew attention to the fact that the United Kingdom Parliament had seen fit to remove the proposals for police supervision from the Probation of First Offenders Act.[69] There was hardly any appreciation of the importance of the position of probation officer, and what little there was related to his duties of supervision or surveillance. Despite an awareness of the difficulty of ensuring that only those truly eligible to be put on probation were admitted to probation, no one spoke to the importance of there being an agent whose special duty it was to do just this.

APPENDIX

Criminal Law Amendment Bill 1886 (Qld.) — Clause 3

"When a person is convicted of a minor offence, not having previously convicted of an offence for which he was sentenced to penal servitude or imprisonment for a period exceeding three months . . . " he can be given a suspended sentence.

Offenders Probation Act 1886 (Qld.) — Section 3

"When a person is convicted of a minor offence, not having been previously convicted in Queensland or elsewhere, of an offence, and sentenced upon such conviction, to penal servitude or imprisonment for a period exceeding three months . . . " he can be given a suspended sentence.

Offenders Probation Act 1887 (S.A.) — Section 3

"When a person is convicted of a minor offence, not having been previously convicted in South Australia or elsewhere of an offence and sentenced upon such conviction to imprisonment for a period exceeding three months. . . . " he can be given a suspended sentence.

First Offenders Probation Act 1894 (N.S.W.)[70]

Section 2: "Minor Offence" — Any offence punishable on summary conviction

65 N.S.W. L.C. S.1, vol. 38, 1889: 1533; N.S.W. L.C. debates S.1, vol. 70, 1894: 1207. It is not entirely clear that Jacob appreciated the difference between the Queensland and New Zealand Acts but he certainly sensed that unless special machinery to enable it to work was provided, the Bill would be ineffective.

66 N.S.W. L.C. debates S.1, vol. 39, 1889: 2579; N.S.W. L.C. debates S.1, vol. 70, 1894: 1209, 1519.

67 A few did have to, but most, apparently, did not: Queensland State Archives COL./A523, 8571.

68 N.S.W. L.A. debates S.1, vol. 69, 1894: 825.

69 N.S.W. L.C. debates S.1, vol. 70, 1894: 1572.

70 The numerals inserted in the N.S.W. Act show the order in which the Act was amended. Brackets indicate that the words enclosed within them were deleted and replaced by the words, if any, written above them.

any justice[1]
before or justices, with or without the consent of the

which
accused, or any offence, of whatsoever nature, [for

in the opinion of
which by law a sentence of (penal servitude or)[2] imprisonment, with

the Court is one
or without hard labour, for a shorter period than three years

to which the
may be imposed, and for which a sentence of such duration is,

provisions of the Act should apply.
in the opinion, of the Court an adequate punishment.][3]"

Section 3: "When a person is convicted of a minor offence, not having been previously convicted in New South Wales or elsewhere,

indictable
(or more serious[3])[4]
(minor[2])
so far as is known to the Court, of an

offence and is sentenced upon such conviction to penal
servitude or imprisonment (for a period exceeding three months)[1] . . ." he can be given a suspended sentence.