

A TALE OF TWO CODES – THE PEREGRINATIONS OF A PENAL CODE

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Tony Smith was an early contributor to this review.¹ It is fitting therefore that a long and distinguished career in the criminal law be celebrated now in a special issue of the same journal. In the following picaresque-like account a colleague and former student join to celebrate the career of Professor Tony Smith. This article considers two criminal law codes – where they came from and the influence of each beyond its country of origin. The two codes referred to in this article are the Queensland Criminal Code Act 1899 prepared by Sir Samuel Griffith and the draft English Criminal Code 1880 prepared by Sir James Fitzjames Stephen.

I INTRODUCTION

The interest here is with the lineage of two current criminal law statutes – the Griffith Code (the Queensland Criminal Code Act 1899 prepared by Sir Samuel Griffith) and the New Zealand successor to the Stephen Code (the draft English Criminal Code 1880 prepared by Sir James Fitzjames Stephen). Background to the two codes is provided in Part II. That is followed in Part III by consideration of the Griffith Code through to its adoption in Seychelles. The last Part follows the Stephen Code and its influence through to Tokelau in 2003.

II BACKGROUND

These codes were prepared in an era informed by the thinking of Cesare Beccaria² and that of the codification crusader Jeremy Bentham, stimulated by the push to have modern laws to celebrate and cement the 19th-century unification of states in Europe.³ Both codes aspired to refine the existing criminal law in a common law world of diverse legislation and a multitude of judicial precedents that

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1 ATH Smith "Provocation and the Lesser Offences: *R v Laga* [1969] NZLR 417" (1970) 5 VUWLR 361.

2 Cesare Beccaria *Dei delitti e delle pene* (1764).

3 See generally Jeremy Bentham *Theory of Legislation* (1840); and Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (1789).

had to be mastered to gain any sense of the body of the criminal law. Could the law be more certain, coherent and accessible? Both Sir James Fitzjames Stephen and Sir Samuel Griffith believed it could and should.

This article indulges in some legislative tourism and indicates the seminal influence of personalities and individuals in the legislative fate of these two great documents. Doubtless their merits affected the codes' fates but happenstance also has determined their status in the 21st century. Politics too has had much to do with the development of the criminal law. Concerns about the death penalty, fixed sentences and the treatment of youth offenders have often sounded the death knell for progressive codes notwithstanding their doctrinal merit.

Whether either of the documents under discussion was a code⁴ depends on the definition of "code". In ideal terms a code should be inclusive, exclusive, systematic and general.⁵ Using these criteria,⁶ neither document would qualify. Nevertheless both were clear advances from the pre-existing law towards codification. The Griffith Code comes closest to the ideal.

The codification movement had strong support in continental Europe principally because it was seen as the best way to provide laws for the newly unified countries.⁷ There was a marked distrust of the judiciary from pre-revolutionary, pre-unification times and, in the case of France, codes were also ideal management tools to leave in conquered countries. The United Kingdom had some of the same motivation when it enacted comprehensive statutes for its colonies.⁸ Its goal was to provide a neat set of rules for places where common law precedents would often not be readily available and where the judges and lawyers frequently did not have the training and experience of those in the United Kingdom.⁹ The United Kingdom pattern was one of compendious legislation which set out the established rules of law in the particular subject area.

4 For ease of reference, both documents are referred to here as "codes".

5 Or using the criteria in John Henry Merryman *The Civil Law Tradition* (2nd ed, Stanford University Press, Stanford, 1984) at 29 – "complete, coherent and clear".

6 "Inclusive": all the law on the topic is included (see for example the French Code Civil, art 4). "Exclusive": all previous law on the topic is superseded. "Systematic": for example, the French Code Civil has an individual-oriented structure (the individual (family), the property of an individual (property), and the relationship of individuals to others (obligations)) and the German Civil Code begins with birth (art 1) and ends with death (inheritance). "General": sets out principles but not details (for example, note the longevity of delict arts 1382–1386 of the French Code Civil).

7 France led the way in this respect.

8 This extended beyond the criminal law to, for example, the Indian Contract Act 1872 and the Civil Wrongs Law 1933 (Cyprus). See also Edward Jenks *Digest of English Civil Law* (2nd ed, Butterworth & Co, London, 1921).

9 Independence constitutions followed a similar pattern: they were written, entrenched, single documents of the kind the United Kingdom has never had.

III THE GRIFFITH CODE¹⁰

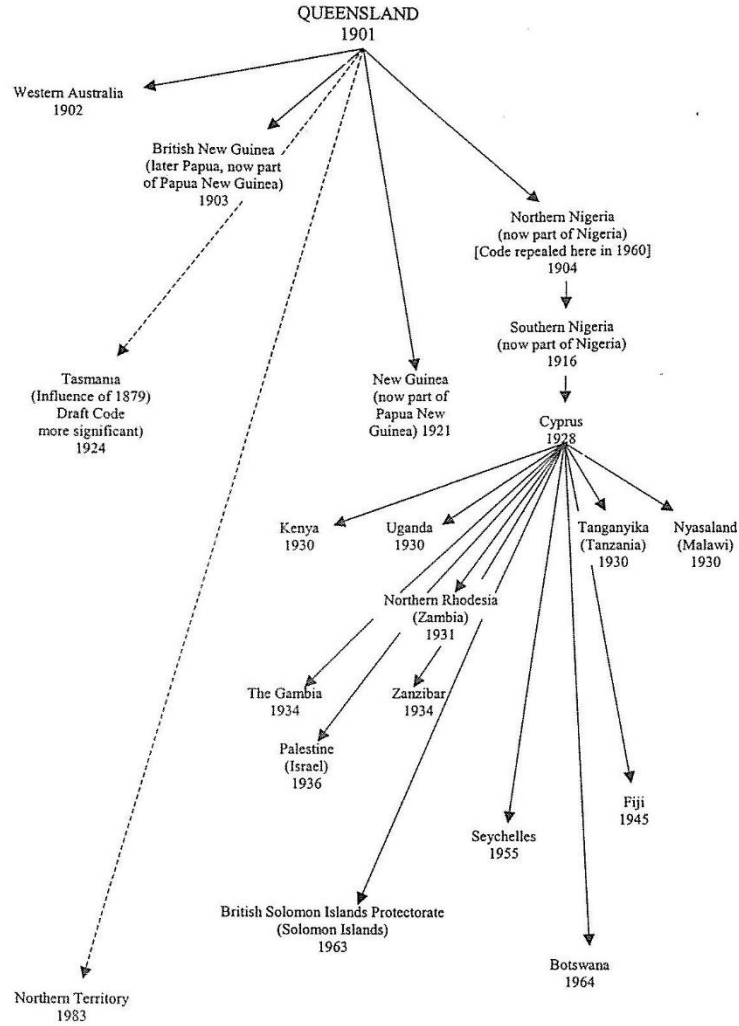
Griffith was a remarkable lawyer on many accounts.¹¹ The focus in this article is on his special interest in the Italian language and literature, and the relationship of that to the Criminal Law Code of Queensland.

Griffith as Chief Justice of Queensland was confronted in 1893 with a heterogeneous collection of rules as the criminal law of the Colony of Queensland. He set about remedying the situation with a view to having a single statute to replace the many existing sources. In the course of this project Sir William MacGregor¹² came to know Griffith. Griffith and MacGregor became friends; both were Italophiles.¹³ It is therefore no surprise that on a visit to Brisbane in 1894 MacGregor gave Griffith a copy of the Penal Code of 1889 of Italy. It was, MacGregor said, the best criminal code then available. Griffith was inspired by it. Ultimately his code of 1899¹⁴ owed much to the Italian Code. Griffith drew on its example about 20 times specifically and also generally in terms of its spirit, goals and structure. The ultimate influence of the Griffith Code is indicated by the following diagram:¹⁵

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- 10 The Griffith Code was almost, but not, repealed and replaced in Queensland by the Criminal Code Bill 1995. For discussion see Alberto Cadoppi and KA Cullinane (translator) "The Zanardelli Code and Codification in the Countries of the Common Law" (2000) 7 JCULR 116. The Zanardelli Code, which inspired Griffith, was repealed and replaced in Italy in 1930 by the Rocco Code. The Zanardelli Code remains in force, in an updated form, in the Vatican City. All legislation needs to be brought up to date from time to time. Less often do changed times require that an area of law be completely reconceptualised.
- 11 See generally Michael White and Aladin Rahemtula (eds) *Sir Samuel Griffith: The Law and the Constitution* (Lawbook Co, Sydney, 2002). See also David Jackson, judge of the Supreme Court of Queensland "The audacity of Griffith as a law reformer" (Selden Society Lecture, Brisbane, 25 March 2021).
- 12 A physician born in Scotland. He had a distinguished career in the British colonial service. It is interesting in the present context to note that his career began with a posting to Seychelles. From Seychelles he went to Fiji, British New Guinea, Lagos, Newfoundland and ultimately to Queensland as Governor from 1909–1914. Many of the colonies of his postings adopted the Griffith Code.
- 13 Griffith made a translation of Dante's *Divine Comedy*: see Clifford L Pannam "Dante and the Chief Justice" (1959) 33 ALJ 290. The application of legislative drafting methods to the translation of poetry is clearly not to be recommended.
- 14 Proclaimed to come into force on 1 January 1901.
- 15 White and Rahemtula, above n 11, at 84. The Griffith Code was also exported to Nauru (Laws Repeal and Adopting Ordinance 1922, s 12) and Kiribati (Penal Code, Cap 67). See further Eric Colvin "Criminal Responsibility under the South Pacific Codes" (2002) 26 Crim LJ 98.

CHRONOLOGY

The Migration of Sir Samuel Griffith's Code



A *Zanardelli*

The impetus for the Italian Penal Code, known as the Zanardelli Code,¹⁶ arose out of the unification of Italy in 1861. The Italian jurists of the time had a strong reputation in Europe, so the focus was on the competing Italian systems rather than on foreign precedents such as the Penal Code of France. The post-unification contest in Italy was a three-way affair: the code operating in Northern Italy, that operating in the South, and that of Tuscany: three systems, three views of the world. The Tuscan Code¹⁷ was the liberal code of the three, but in the political environment of the time it was pitted against the more conservative ones which were argued to be better-suited to dealing with the challenges to public order in the south of the country. Zanardelli succeeded in having a liberally inclined code enacted.¹⁸

B *The Mascarenes*

On 3 December 1810 in the Acte de Capitulation of Mauritius the French requested, among other things, "[q]ue les habitans conserveront leurs Religion, Loix, et Coutumes". The British response (art 8) was positive: "The inhabitants shall preserve their Religion, Laws and Customs".

In relation to criminal law this meant that Mauritius continued under the Code Pénal 1791 of France.¹⁹ That code was replaced in 1810 in France by a new code of Napoleonic inspiration. That and the fact that English judges were making decisions on a system with which they were unfamiliar led to pressures to replace the 1791 code with English principles. An initiative to adopt English criminal law was not accepted by London. In a letter of 16 April 1831 from London to the Governor of Mauritius, the Secretary of State for the Colonies said the colony should not embark on writing a new criminal code because:²⁰

... both in England and in almost every part of the continent of Europe, but more especially in France, the revision of the criminal code has, of late years, occupied the attention of the most imminent Jurists and Statesmen ... their labours have removed the greater part of the difficulties in which the subject was formerly involved and it would be in the highest degree irrational if any feelings of national rivalry were

16 Zanardelli was Attorney-General in 1883 and Minister of Justice in 1887. The Zanardelli Code was enacted in 1889. Zanardelli was the Minister of Justice of Italy who saw the code to and through the legislative process. It is likely the main author of its provisions was Lucchini, who was the doyen of Italian criminal law at the time.

17 The Tuscan Code was of 1853 and perhaps of German inspiration. It was significant in its abolition of the death penalty.

18 The Zanardelli Code, for example, provided for no death penalty, no hard labour and suspended sentences. It had a reform/rehabilitation orientation. See Luigi Lacchè "Un Code Pénal Pour l'Unité Italienne: le code Zanardelli (1889) – La Genèse, le Débat, le Projet Juridique" (2014) 68 *Seqüência* (Florianópolis) 37 at 41.

19 It had followed the Declaration of the Rights of Man and of the Citizen 1789.

20 LE Venchard *Code Pénal* (Best Graphics, Mauritius, 1994) at xi–xii.

permitted to obstruct the adoption of any of these improvements in the Criminal Code for which Europe is indebted to the profound wisdom and research of the authors of the French Digest ... however desirable the gradual assimilation of the Colonial to the English Code may be as a firm bond of union between the two countries, His Majesty will not sacrifice to this uniformity of system, the more important object of treating with respect either the habits and inclinations of his faithful subjects in the Colony, or even those honest prejudices, which the Colonists of French origin may cherish in favour of the institutions of the country under the dominion of which they formerly lived.

In 1838 the French Penal Code of 1810 was adopted in Mauritius to replace that of 1791. Seychelles was part of the colony of Mauritius at that time and therefore it also had the French Penal Code of 1810. That code continued in force in Seychelles when it became a colony in its own right in 1903. In the period that followed the re-enactment of its penal code in 1904 the law was amended many times by reference to a diversity of sources including the Macaulay Code²¹ until it resembled an exotic mix-up.²² In 1952 Seychelles adopted Ehrhardt's Model Code,²³ which was based on the Nigerian Code, which was based on the Griffith Code,²⁴ etc ...

IV THE STEPHEN CODE

A New Zealand

England in the 19th century made several major attempts to consolidate and reform its criminal law. The problems included failure to satisfy principles of legality, discrete enactments over scattered legislation, harshness of penalties and the availability of common law offences.²⁵ The precursors²⁶ to the Stephen Code included the Livingstone Code of 1826 for Louisiana, Macaulay's Indian Penal Code (produced in 1837 and adopted in 1860), Dudley Field's Code of 1848 for New York and the code Sir Robert Samuel Wright completed for Jamaica in the early 1870s. Despite this background and the effort put into promoting it, Stephen's Bill was not passed in England but was adopted in some

21 The Indian Penal Code 1860.

22 Mathilda Twomey *Legal Metissage in a Micro-jurisdiction: The Mixing of Common Law and Civil Law in Seychelles* (CLJP, Wellington, 2017) at 134, citing Colonial Office documents.

23 See chart, above n 15. For commentary on the Seychelles penal law, see Twomey, above n 22, at 133–137.

24 The Seychelles Court of Appeal often cites Australian precedents. See for example *Cinan v R* (2013) SLR 279 at 312, where several Queensland precedents were referred to.

25 The effect of which is clearly shown in *Shaw v Director of Public Prosecutions* [1962] AC 220 (HL).

26 For background, see Martin L Friedland "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Crim LF 145; and Rupert Cross "The Making of English Criminal Law: Macaulay" [1978] Crim LR 519.

colonies – New Zealand among them – with more success.²⁷ Whatever the antecedents, the contemporary criminal codes received great impetus from those historical factors.

The significant features of the Stephen Code as enacted in New Zealand include the requirement that all offences be prosecuted under a legislative provision – the removal of the possibility of the prosecution of an offence at common law²⁸ – the abolition of penal servitude and the rationalisation of the law on murder and manslaughter. The 1893 Act has been subject to multiple amendments reflecting changing societal attitudes and needs but in essence the Crimes Act 1908, now the Crimes Act 1961, remains the law in 2022. In 1989, a new criminal law was drafted in New Zealand to replace the 1961 Act.²⁹ The proposal had code aspirations and had strong advocates but there was also strong opposition to it from some quarters including the then Chief Justice.³⁰ The proposal was not proceeded with.³¹

B The Realm Countries and Samoa

Another Scotsman far away from Macaulay, MacGregor and Griffith savoured the task of drafting codes for two Pacific countries. Sir John Salmond drafted the Cook Islands Act 1915 and the first New Zealand legislation for Samoa.³² These pieces of legislation provided complete bodies of law,³³ such as: provision for an executive, legislature and judiciary; criminal law and procedure and evidence; and family and succession law. Often the rules were not elaborated on but were referenced to well-known statutes of the United Kingdom or of New Zealand or supported by the common law. Unlike the Griffith Code, they included little by way of principle; rather the statutes presented a catalogue of offences for which further detail was to be found in the case law.

27 The Stephen Code of 1880 began its New Zealand life in 1883. It was enacted with minor amendments in New Zealand in 1893. In the historical context, that was rapid. For instance, the English Criminal Code deliberations began in 1833 and ended in 1880 without the enactment of the Bill.

28 Criminal Code Act 1893, s 6; and Crimes Act 1908, s 5.

29 Crimes Bill 1989 (152). For discussion of this Bill, see Neil Cameron and Simon France "The Bill in context" (1990) 20 VUWLR Monograph 3.

30 And also Sir Robin Cooke. See Robin Cooke "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235; and Cameron and France, above n 29, at 4–5.

31 For a pungent assessment of the failed legislative endeavour, see Roger S Clark "Criminal code reform in New Zealand? A Martian's view of the Erewhon Crimes Act 1961 with some footnotes to the 1989 Bill" (1991) 21 VUWLR 1.

32 Samoa Constitution Order 1920. It was followed by the Samoa Act 1921.

33 Reminiscent in range of the Western Pacific Order in Council 1877 and the Pacific Order in Council 1893.

The Stephen Code began to migrate in New Zealand's zone of colonial influence. The basic ideas were included by Salmond in his drafting of the Cook Islands Act 1915 in ss 176–314.³⁴ In the course of colonial devolution the Cook Islands Act 1915 became the template for the Niue Act 1966, ss 129–246. In the Cook Islands the principles remain the same. In Niue they continue in force without significant amendment.³⁵

The Cook Islands Act 1915 was the basis for a significant Pacific colonial endeavour. It was relied on for the Samoa Constitution Order 1920. In turn the Niue Act 1966 followed the Cook Islands Act 1915. Tokelau's Crimes, Procedure and Evidence Rules 2003 are in their turn a reworking of the Niue legislation.³⁶

By a quirk of fate, the criminal law sections of the Niue Act 1966 were extended legislatively but ineffectually to Tokelau.³⁷ Tokelau then used those provisions for its enacting of a locally more relevant set of criminal laws.³⁸ That enactment is a basic catalogue of offences and procedures. Its provenance is still however evident.

An overview of the criminal law provisions adopted by New Zealand in 1893 and 1908 compared with the same subject matter in the Cook Islands Act 1915 discloses, first, that the catalogue of criminal offences is much shorter and, to a degree, more generalised (for example, a simple provision for assault instead of several specific provisions). Secondly, the drafting is much simplified. The standard approach in the Cook Islands Act 1915 is to begin an offence clause with: "Everyone is guilty

34 The Salmond contribution to the criminal law legislation is commented on in Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 186. Eric Colvin in the liber amicorum for Don Paterson explores the use of criminal law transplants in the Pacific: Eric Colvin "Blooms or Weeds? Transplants in Pacific Criminal Law" (2021) 23 JSPL 21. He speaks of the contrast between the model provided by the New Zealand Crimes Act 1893 and the Griffith Code (at 23): "the Griffith Code was designed to make the common law redundant and therefore does include statements of general principle about responsibility".

35 Now reprinted as the Criminal Law Code.

36 To better adapt the sections to the Tokelau circumstances. Some background to the system is provided in AH Angelo "Making the Criminal Law Your Own: The Tokelau Endeavour" in Kayleen Hazlehurst (ed) *Popular Justice and Community Regeneration* (Praeger Publishers, Connecticut, 1995) 22; and AH Angelo "Tokelau — The Village Rules of 1988" (1988) 4 QUTLJ 209.

37 The Tokelau Crimes Regulations 1975 (SR 1975/279) purported to extend pts V–VII (ss 129–304) of the Niue Act 1966 to Tokelau. The parts vested jurisdiction in the High Court of Niue. Niue had since October 1974 been a self-governing state and therefore there was no capacity in the Government of New Zealand to impose jurisdiction over Tokelau matters on a Niue court. This oversight was addressed in s 13 of the Tokelau Amendment Act 1986. The Tokelau Crimes Regulations 1975 were repealed by the Tokelau Crimes, Procedure and Evidence Rules 2003.

38 Crimes, Procedure and Evidence Rules 2003 (Tokelau).

of ... and is liable on conviction ... who – ".³⁹ Thirdly, the punishments for those convicted were fewer and less draconian. For example, hard labour, flogging and whipping (then present in the New Zealand Acts) were not part of the Cook Islands Act 1915.

In the case of theft, the substance of the offence for the Cook Islands is much the same but the New Zealand requirement of "without colour of right" is absent. On the other hand in respect of homicide, which is a feature of the New Zealand Acts, there is in the Cook Islands Act 1915 no taxonomy but simply sections providing for murder and manslaughter. The reference to "malice aforethought" was retained in the Cook Islands Act 1915.

The criminal law sections of the Cook Islands Act 1915 were repealed and replaced by the Crimes Act 1969 (CI). That Act generally followed the existing patterns of the Cook Islands Act 1915 and of the Samoa Act 1921. A Bill prepared in 2017 proposed the reform of the Cook Islands criminal law along the lines of the model criminal code of Australia.⁴⁰ As at 2021, that Bill was reported to be still under discussion.

Clauses 100–203 of the Samoa Order basically reproduce ss 176–271 of the Cook Islands Act 1915. The Samoa Act 1921, promulgated shortly after the Order, follows the same pattern but is not a simple reproduction of the provisions in the Order. For instance, the Act replaces the provisions for murder and manslaughter with sections on homicide which follow the pattern of the Crimes Act 1908 (NZ) and has no requirement of "malice aforethought".⁴¹

The Niue Act 1966 in ss 129–246 often reflects the criminal law provisions of the Samoa Act 1921 word for word. The influence appears to have been the Samoa Act 1921 rather than the Cook Islands Act 1915.

The Tokelau Crimes, Procedure and Evidence Rules 2003 were passed by the General Fono of Tokelau after a long period of gestation.⁴² The Tokelau Crimes Regulations 1975 were not known in Tokelau and were never implemented there. In the late 1980s the elders of Tokelau agreed on locally approved criminal law rules to replace the 1975 regulations. Those replacement rules were enacted after Tokelau acquired power to legislate for itself and were promulgated in 2003. The basis for them

39 The New Zealand legislation that preceded the Cook Islands Act 1915 used different formulations (both in 1893 and in 1908).

40 See Arlie Loughnan "'The Very Foundations of Any System of Criminal Justice': Criminal Responsibility in the Australian Model Criminal Code" (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 8.

41 Those provisions were repealed and replaced by the Criminal Law Ordinance 1961 of Samoa, which was in turn replaced by the Crimes Act 2013. The Crimes Act 2013 retains strong echoes of the New Zealand law.

42 For the background to the current Tokelau Crimes Rules, see Lomia Gaulofa and others (eds) *Tokelau Crimes, Procedure and Evidence: A Proposal – Na Holitulafono, Gaoioiga E Tatau Ke Fai, Ma Na Fakamaoniaga: He Fakatu* (Victoria University of Wellington, Wellington, 1998).

was the 1975 regulations. The process followed by the elders was to debate each of the provisions in those regulations and decide whether it should be retained and if so in what form. Consideration was also given to the extent to which customary offences should be included in the national rules as distinct from their featuring only in the domestic rules of each village. There are several things to note: first, the arrangement/structure does not follow that of the precedents; secondly, as is evident from the number of provisions – 152, which include both offences and criminal procedure – and the fact that they occupy fewer than 30 pages of text, they are much abbreviated; thirdly, there are several offences specific to the Tokelau situation such as adultery (*mulilua*), unmarried persons living together (*fakapouliuli*), spreading rumours and the invasion of privacy; and fourthly, the homicide and theft provisions show the clear influence of the Niue Act 1966 provisions. The assault clause on the other hand is more reminiscent of the provisions in the Crimes Act 1961 (NZ).⁴³

V CONCLUSION

The principle of codification has general support in countries which acknowledge the endeavours of Justinian. There is limited support expressed for codification in countries of a casuistic bent. New Zealand has occasionally moved to broad statutory consolidations in several areas but not yet to a code.⁴⁴ As this article has indicated, enacting criminal law codes has happily or unhappily proved difficult. Replacing them has often been equally difficult, if not because of factors personal to the proponents and detractors, then because of political or policy positions which affected both offences and the nature of the penalties to be imposed on offenders. These matters easily get in the way of legislative reform. In the meantime the two codes continue to have resonance.

Ave professor.

43 Sir Ronald Young recommended "[a] review and redraft of the Crimes Procedure and Evidence Rules" in his *Report to the Chief Justice and MFAT on Tokelau* (2018) at 4.

44 New Zealand has compendious statutes of a consolidating nature in several areas, most recently in the field of contract with the Contract and Commercial Law Act 2017. The High Court Rules 2016 also are indicative of aspirations to have complete legislation.