

more important or difficult area of the law than family law' (the *Age*, 21 March 1988). At the same time Sir Anthony cast doubt on the moves to confer jurisdiction on the Family Court in bankruptcy, taxation, consumer protection, trade practices and administrative review work. If the proposal did not result in Family Court judges undertaking a significant proportion of important work it would do little for the status and reputation of the Court, though it may prove relief from an exclusive diet of family law.

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update on the review of commonwealth criminal law

The Review of Commonwealth Criminal Law was established with the aim, amongst other things, of consolidating and rationalising the criminal laws of the Commonwealth and bringing into being one consolidated law. The review is being conducted by Sir Harry Gibbs, former Chief Justice of the High Court, Mr Justice Watson and Mr Andrew Menzies. The first two Discussion Papers produced by the Review Committee, DP1: *Onus of proof in Criminal Proceedings and Averment Provisions* and DP 2: *Common Law Offences and the Commonwealth*, were discussed in the October 1987 issue of *Reform* ([1987] *Reform* 205). The output of the Review Committee since then has been prolific and at the time of writing another 8 DPs had been produced. The space is not available to discuss the Review Committee's proposals in the depth which they deserve, however, what follows seeks to draw to the reader's attention at least the subject matter and main themes of the Review Committee's recent work.

dp 3: arrest and related matters. DP 3 deals primarily with arrest without warrant. The main proposals involve an extension of police powers in this area while also giving some additional rights to those arrested. The Review Committee is of the view that the numerous powers in Commonwealth legislation for police to arrest without warrant should, with limited exceptions, be repealed and replaced with one comprehensive provision. The provision tentatively proposed would be broader than the current s 8A of the Crimes Act. It is suggested that the power should extend to cases where it is reasonably suspected (or believed) that the person to be arrested has committed, is committing, has attempted to commit or is attempting to commit an offence, but probably not to situations where it is reasonably suspected or believed that a person is about to commit an offence.

In addition it was argued that the issue of whether a person arrested for an offence against Commonwealth law may be detained for questioning should not be left to State laws which vary significantly. Following some recent State reforms it was proposed that the consolidating law should specify a time for which an arrested person may be held for questioning before being brought before a justice and that there should be provision for extension of that time in proper cases.

To balance giving police new powers to question on arrest it is proposed that any person arrested should have the opportunity to communicate with a legal adviser and should, with some exceptions, have the right to have such an adviser present during the police questioning. The arrested person should also have an opportunity to communicate with a parent, spouse, other rela-

tive or friend unless it is reasonably suspected that this might lead to damage to evidence or put the safety of some person at risk.

Other significant issues which the Review Committee sought submissions on were whether a court should be entitled to draw inferences from the failure of an arrested person to answer questions and whether legislation should comprehensively deal with a citizen's power of arrest.

dp 4: search warrants. This DP commences with a consideration of the competing interests involved with search warrants, namely: the freedom of the individual in his or her home or premises and the need for the State to prevent crime and to successfully prosecute those crimes which do occur. With these considerations in mind, the Review Committee noted perceived problems with s 10 of the Crimes Act 1914 (Cth), the main search warrant provision in the Act, and called for submissions on numerous possible approaches for any new provision. Some of the many issues raised included:

- Who may grant search warrants?
- With what particularity should search warrants be required to identify the articles to be seized?
- Should provision be made to authorise searches of persons found on the premises the subject of the search warrant?
- Should there be a time limit within which the warrant must be executed?
- Should special provision be made for searches in an emergency?
- Should provision be made for telephone warrants?

- Should special provisions be made in relation to articles such as undeveloped films, sound and video recordings and information which is electronically stored?

Other matters upon which submission are sought include whether or not provisions in Commonwealth legislation which allow for general warrants and for search and entry without warrant should be abolished. Also, whether the 'Guidelines on the Execution of Search Warrants on Lawyers', drawn up by the Law Council and the Commissioner of the Australian Federal Police, should be included in any future legislation.

dp 5: offences against the government involving property or money. DP 5 deals with those offences against the Commonwealth Government involving property and money other than counterfeiting and forgery. Three main issues were addressed. First, the Committee considered the extent to which the Commonwealth should rely on State laws for offences in relation to Commonwealth property and money. Here the Committee was of the view that offences of common occurrence in respect of Commonwealth property, such as theft, which are currently included in the Crimes Act should be included in any consolidating law. It seeks submissions, however, on the question of whether the consolidating law should provide for a comprehensive set of offences in regard to theft or whether the present pattern of the Crimes Act, whereby provision is made for theft but not for offences of theft in circumstances of aggravation, should be retained.

Secondly, the Review Committee considered whether present Commonwealth criminal laws make adequate

provision for offences against the Government involving money. It considered and sought submissions on possible amendments to sections 71, 30, 29B and 90A of the Commonwealth Crimes Act. In this area it also raised the possibility of a special provision being enacted to deal with dishonest use of, or interference with, a computer owned or operated by the Commonwealth with intent to gain a benefit or loss to the Commonwealth.

Finally, the Review Committee considered whether particular provisions on this subject, which are now located in Commonwealth laws other than the Crimes Act, should be included in or subsumed under provisions of the consolidating law. In particular, the Committee looked at whether provisions of certain Acts broadly equivalent to s 29A-C of the Crimes Act, such as section 174 of the Social Security Act 1947 which deals with obtaining benefits or payments by false representations or untrue statements and the like, should be repealed and replaced by a redrafted comprehensive set of general provisions in the future law.

dp 6: what offences should be included in the future consolidating law. This short DP is important because it sets out the approach to consolidation to be taken by the Review Committee. The Committee recognises that it is not possible for the consolidation to include all offences, however, it considers that 'it should include all offences which might properly be described as serious, unless for some special reason it would be inconvenient to include a particular offence'. It is suggested that offences which are punishable by 3 years' imprisonment or more should be considered to be serious ones for this purpose. In respect of offences which attract less serious punishments it was

thought that they should be included in the consolidation if they are criminal in the ordinary sense and of general application or comply with other stated criteria. On the other hand, it is considered that trivial offences, which could be described as merely regulatory infringements, should not be included unless there is some special reason for their inclusion.

dp 7: attempts. Section 7 of the Crimes Act does not attempt to define 'attempt'. Rather, this task is left to the common law and the courts. In this DP the Review Committee addresses the question of whether or not the future consolidating legislation should continue with this approach or should include a definition of attempt. It favours defining 'attempt' and seeks submission on whether the general approach of the U.K. Criminal Attempts Act 1981 should be followed. That approach involves defining attempt to mean 'doing, with intent to commit an offence, an act which is more than merely preparatory to the commission of the offence'. It provides that a person 'may be convicted of an attempt even though the facts (not limited to facts of which the defendant is unaware) are such that the commission of the offence is impossible'. Under this approach whether an act amounted to attempt would be a question of fact. In determining the defendant's intention regard is had to 'the facts as believed by the defendant to exist rather than as they in fact existed' and no defence of withdrawal is provided. The Committee also discusses possible departures from the UK approach and invites submissions on these points. For the purposes of the determining the applicable procedural requirements they ask whether attempt should be an offence against the law creating the prin-

cial offence or against the consolidating law.

dp 8: offences relating to the security and defence of the Commonwealth. This DP concentrates on those offences contained in Parts II and IIA of the Commonwealth Crimes Act which relate to 'the protection of the Constitution and other offences relating to security and allied matter'. Topics dealt with in this DP include treason and treachery, assisting prisoners of war to escape, unlawful training in military procedures, inciting mutiny, assemblies on Commonwealth and protected premises and the dispersal thereof and sabotage. The recommendations made in the DP are too numerous for comprehensive coverage here, however, recommendations of particular note include the Review Committee's view that while a separate offence of sedition should be retained it should be limited to 'inciting to violence for the purpose of disturbing or overthrowing constitutional authority'. Also of significance was the suggestion that the provisions of the Diplomatic and Consular Missions Act 1978 be extended 'to prevent or control the activities of persons who do not claim to represent foreign states or peoples but who claim to represent a body which is known to be hostile to a foreign state with which Australia has friendly relations'. Such an extension would, for example, provide a power to 'prevent the establishment of an office claiming to be an office of the IRA near the United Kingdom High Commission'. Other recommendations of note include that Part IIA of the Crimes Act, which contains provisions with questionable worth from a civil liberties viewpoint, be repealed while any provisions in replacement of sub-sections 30J and 30K should be inserted in industrial relations legisla-

tion. In respect of those offences dealing with interfering with political liberty it was thought that the current provisions in the various Acts should be repealed and that the consolidating law 'should contain one section which provides for two offences of interfering with political liberty, one of which would involve, and one which would not, the use of violence, threats and intimidation'.

dp 9: conspiracy. The Review Committee is of the view that the crime of conspiracy for Commonwealth purposes should be limited to agreements to commit offences against the law of the Commonwealth. For this reason sub-sections 86(1)(b), (c) and (d) of the Crimes Act should be repealed. In respect of who may be parties to a conspiracy, it favours consideration being given to the abolition of the rule that there can be no conspiracy to which the only parties are spouses. It also seeks submissions on whether the law should be amended to enable a prosecution for conspiracy to succeed when the purported agreement is made with a police agent, or else whether it should be made clear that a charge of attempted conspiracy would lie in such a case? Similarly, submissions are sought as to whether it should be made clear that a company may be criminally liable for conspiracy and if so, in what circumstances? Other issues raised in respect of the law of conspiracy were whether the consolidating law should deal expressly with the mental element necessary to constitute a crime of conspiracy; should conspiracy exist even though the agreement is impossible to perform; should it remain an offence to conspire to commit a summary offence and should greater penalties be available for conspiracy than for the substantive offence?

dp 10: secondary offences and offences by corporations. The section of this DP likely to have the most significant long term consequences is that which deals with the basis for corporate criminal liability. The Review Committee asserted its support for the principle that a corporation can be criminally liable, however, it sought submissions as to just what the basis of this liability should be. Three options were put forward. The first of these involved combining an adoption of section 4B of the Crimes Act (which is yet to come into operation) with clauses 34 and 35 of the UK draft Criminal Code. Section 4B provides that bodies corporate can be guilty of indictable and summary offences and that where they are found so guilty they shall be liable to a pecuniary penalty not exceeding five times the amount of the maximum pecuniary penalty for individuals. Clauses 34 and 35 are detailed provisions establishing the basis for corporate criminal liability. Amongst other things, they draw a distinction between the basis of liability in offences involving a fault element and those which do not. Alternatively, the Review Committee suggested that less stringent provisions along the lines of sections 84 and 85 of the Trade Practices Act 1974 (Cth) (without the reversal of onus of proof) could be incorporated in the consolidating law. The third option put forward was that an equivalent of section 43 of the Crimes Act be re-enacted but that the principles of corporate criminal liability be left to be determined by the common law.

Of the other matters dealt with in the DP of the Review Committee was basically satisfied with the operation of the current provisions dealing with accessories after the fact (s 6 Crimes Act) and incitement (s 7A Crimes Act), al-

though some slight changes were recommended. In respect of the operation of s 5 of the Crimes Act, which deals with secondary parties, the Review put forward various options for modernising and improving the provision. Finally, in respect of current procedural impediments to the trial of corporations, it was recommended that the Commonwealth should seek to reach agreement with the States as to the form of legislation required to make adequate provision for the trial of corporations for indictable offences.

submissions sought. The Review Committee invites comments on all matters raised in their Discussion Papers. Comments should be addressed to the Secretary, Review of Commonwealth Criminal Law, PO Box 237, Civic Square, ACT, 2608.

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police powers of arrest and detention

N.T. amendments. Amendments to the Northern Territory Police Administration Act came into effect on 30 March 1988. The amendments bring about significant changes to the laws relating to arrest and detention in the Northern Territory. While a person taken into custody must be brought before a court as soon as is practicable, a member of the Police Force is empowered to detain a person who has been taken into custody 'for a reasonable period' to enable the person to be questioned or for investigations to be carried out. The court is given a very wide discretion to determine what is a reasonable period but is required to take into account factors such as