sexual harassment established. In his decision, Justice Einfeld found that Dr Sheiban:

- had indulged in unwanted touching, holding and several attempts at closer physical contact, including kissing
- on one occasion had placed his hand underneath a receptionist's uniform and touched her inner thigh
- had twice lowered the level of the zips on the front of the uniforms of the complainants to about breast or bra level.

The Judge found that there were adequate indications from the employees that these activities were not pleasing to them. But he also found that Dr Sheiban had 'tactile and amorous impulses which, because he did not regard them as threatening or sexually creative, did not in his view require advance or retrospective consideration of the complainants' attitudes'.

Justice Einfeld stated that 'women with the normal experiences . . . know very well the various ways in which some men occasionally behave'. He also suggested that if the doctor's advances worried one of the complainants 'she could have enlisted the aid of her boyfriend or a parent or friend'

no compensation awarded. Justice Einfeld said none deserved damages for their temporary distress, and that 'the public exposure of these complaints' and his findings were 'sufficient relief'. Nevertheless, he rebuked Dr Sheiban for having dismissed one of the complainants on the ground she had a worker's compensation claim, noting that 'compensation is a legal right, if the appropriate legal and factual circumstances exist. It is more than a hundred years too late to be complaining about the entitlement now'.

The Head of the NSW Anti-Discrimination Board, Ms Carmel Niland, attacked the decision as inconsistent. 'This is the same judge who, when a Tasmanian Aboriginal was refused a drink in a pub, was awarded $6000 for the refusal of the service' she said.

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further update on the review of commonwealth criminal law

> The more featureless and commonplace a crime is, the more difficult it is to bring it home.
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> Sir Arthur Conan Doyle,
> 'The Boscome Valley Mystery',
> *The Adventures of Sherlock Holmes*, 1891

The Review of Commonwealth Criminal Law is being conducted by Sir Harry Gibbs, former Chief Justice of the High Court, Mr Justice Watson and Mr Andrew Menzies. The aim of the review is to update, consolidate and rationalise the Criminal Law of the Commonwealth. To date 14 Discussion Papers have been produced. DP's 1 and 2 were discussed in the October 1987 issue of *Reform* and DP's 3 to 10 in the April 1988 issue. The following article seeks to alert the reader to the subject matter and main themes of the Review Committees most recent work. All views of the Committee are at this stage only tentative and submissions are sought on all issues raised.

dp 11: matters ancillary to arrest. In this DP the Review Committee raised many issues though came to few conclusions. On the issue of personal searches they sought submissions as to when, if at all, federal police should have the power to search an arrested person and as to what

safeguards should be provided in respect of the exercise of such powers. One issue that they were clear on was that where intimate body searches are permitted the law should expressly prescribe the conditions under which such searches may be conducted.

In respect of medical examinations the Review Committee saw merit in adopting the English approach whereby a distinction is drawn between the taking of intimate and non-intimate bodily samples. As to the former they thought that the law should make provision for the taking of such samples but that either the written consent of the arrested person or the approval of a magistrate should be obtained before intimate bodily samples are taken.

Other matters dealt with in the DP included the law relating to the taking of fingerprints, voice recordings, handwriting samples, etc and the issue of their destruction where cases are not proceeded with or there is an acquittal. Also considered were the appropriate safeguards when identification parades are used or photographic evidence relied upon. The Review Committee recognised that mistakes in identification evidence have in the past led to some grave miscarriages of justice. Finally, they considered the issue of whether or not a police officer should be able to require a person to furnish his or her name and address when the officer believes on reasonable grounds that such a person may be able to assist with inquiries in respect of an offence that the officer has reason to believe has been, may have been or is likely to be committed. The Committee found no objections to such an expansion of police questioning powers.

dp 12 computer crime. The Review Committee's consideration of the issue of computer crime arose from a request from the Attorney-General's Department that it deal with certain issues being considered by the Standing Committee of Attorney Generals (SCAG). Amonst the issues raised by SCAG were:

- should there be offences of unlawful access to information stored on computers and unlawful use of computer equipment
- should there be special criminal offences in relation to unauthorised access to, or unauthorised use of information obtained from particularly sensitive areas such as national security, social security, taxation and Medicare
- should misuse of Commonwealth facilities, especially Telecom facilities, for the purpose of obtaining information be made a specific offence.

In raising these issues the Department was mindful of the argument that 'the mode of storage of information should not be a determinant of the affording of legal protection to information' and that the issue should not therefore be examined in isolation from the broader issues of unlawful access to information and unlawful use of equipment generally.

In considering the desirability of creating certain specific computer related offences the Review Committee took into account the protections currently afforded under Commonwealth, State and Territory law; the recommendations made recently by various Law Reform Bodies that have dealt with the issue; overseas trends; constitutional limitations and the extent of the threat posed by each of the types of conduct considered. In each instance a distinction was drawn between offences in relation to Commonwealth computers and those relating to private computers. The tentative recommendations of the Review Committee were:

- They favoured legislation to prohibit unauthorised access to information

stored on a Commonwealth computer but sought submissions as to whether such a prohibition should be absolute or qualified in some way (eg by fraudulent intention, intention to obtain gain, the information meeting certain descriptions or the access causing damage or obstruction to authorised use).

- They thought that although existing law contains provisions that, properly construed, may apply to unauthorised destruction, erasure or alteration of data in Commonwealth computers, the situation should be free from doubt because of the seriousness of the issue. Therefore, it would be appropriate to have legislation that specifically prohibited the unlawful destruction, erasure or alteration of data in Commonwealth computers.

- In respect of frauds effected by means of a Commonwealth computer or frauds on the Commonwealth effected by means of any computer, the Review Committee was of the view that existing legislation sufficiently covers such matters. They recognised however, that there is a case for a law along the lines of sub-section 135B(2) of the Crimes Act (NSW) in its application to the ACT. That provision relates specifically to tricking a machine.

- The Review Committee did not favour an unqualified prohibition on unauthorised use of a Commonwealth computer. They are, however, considering a prohibition on unauthorised use for a dishonest purpose or which results in obstruction or interference with the Commonwealth's own use of the computer or which results in damage.

- They thought that there was no need to create an offence of failing to record or store data in a Commonwealth computer as this was already covered by section 72 of the Crimes Act 1914 (Cth) and disciplinary sanctions where appropriate.

The Review Committee also considered the creation of offences of the type referred to in respect of private computers. In each instance, however, they rejected the option because of the limited scope such laws could have constitutionally and the ability of the States and Territories to adequately deal with such problems. (see for example the New Crimes (Computers) Act 1988 (Vic)).

dp 13: drug offences. Numerous options for change are convassed in this DP, however, by far the most significant recommendations relate to the operation of the controversial sections 233B and 235 of the Customs Act 1901. These provisions deal respectively with the major Commonwealth drug offences and their applicable penalties. In respect of s 233B(1) the main area of controversy has been the mental element implied in the concept of possession. Although 2 recent significant cases have done much to settle the ambiguity and controversy in this area, the Review Committee was of the view that it is undesirable to have any doubt existing on the question of how the mental element necessary to constitute posession should be proved and that the matter should therefore be dealt with by specific legislation. In considering the appropriate test they rejected the two extreme views, namely:

- it would be enough for the prosecution to prove physical possession, or

- the prosecution must prove actual knowledge by the accused of the existence and nature of the narcotic drug.

Instead, they put forward two possible midway options and invited submissions on the matter. These were:

- to place on the prosecution the burden of proving physical possession of a substance proved to be a narcotic drug together with knowledge by the accused of the existence of that substance, and, those things being established, to place on the accused the evidential burden of proving that he or she neither knew nor suspected nor had reason to suspect the true nature of the substance.
- to provide that to establish possession by the accused of a narcotic drug it would be sufficient to prove that the accused was in physical possession of the narcotic drug and was aware of its existence or of the likelihood of its existence and that it was or was likely to be, a narcotic drug.

Another problem that has arisen in respect of s 233B is whether a person has the physical control necessary to amount to possession, especially when the amount involved is extremely small. The Review Committee felt, however, that the principle in *Williams v The Queen* (1978) 140 CLR 591 satisfactorily dealt with the issue and that there was thus no need for a legislative provision on it.

The Review Committee was critical of several aspects of s 235, the penalties provision. They noted that it is preferable to deal with penalties in the section which creates the offence and thought it desirable, if a consolidating law is to include drug offences, to consider whether such elaborate restrictions as those in s 235(2) on the sentencing power of the Court are necessary. The Committee's principal criticism of s 235, however, was that it deals with additional matters of fact over those in the offence provisions in s 233B and, where these are found to exist, the accused is liable to a far greater penalty. It has been held that it is the court and not the jury that must be satisfied of the matters mentioned in s 235(2) as they relate to the maximum sentence and not the elements of the offence. The Review Committee disagreed with this situation and suggested that:

> in principle matters of fact which render the accused liable to a penalty very much greater than that which could have been imposed if those matters did not exist should (if the trial is on indictment) be found by a jury.

They also thought that the same principle would apply to circumstances of mitigation which do not merely affect the sentencing discretion but which govern the maximum penalty that may be imposed.

Other matters raised in the discussion paper included;

- moving the major penal narcotics offences and listening devices provisions in the Customs Act into the proposed consolidating law
- creating uniformity of terminology in drugs legsislation
- inserting a provision in the consolidatory law that would enable the prosecution to meet the 'isomer defence'
- whether or not to attempt to legislate against 'designer drugs'
- making it an offence to recruit persons to carry drugs into or out of Australia or to carry or otherwise deal with drugs which have been brought into Australia or are reasonably suspected of having been brought into Australia.

Finally, while the Review Committee accepted the present division of responsibility between Commonwealth and State legislation in this area they thought that there are good arguments and legislative competence for creating Commonwealth legislation that extends to prescribing the supply or carriage of illegally imported drugs.

dp 14: omnibus provisions to replace provisions in common form in particular acts. As part of its Terms of Reference, the Review Committee was required to examine the possibility of including in the future consolidating law omnibus provisions creating general offences that would do away with the need for provisions in future particular Acts creating like offences and result in the repeal of some particular provisions to similar effect in existing Acts. Omnibus provisions were considered for:

- offences relating to the administration of legislation
- offences relating to licences and permits
- offences relating to Commonwealth officers
- offences relating to procedures to obtain evidence under relevant legislation.

In respect of most of the offences considered, the Review Committee did not favour the creation of Omnibus provisions because of the need to give consideration to the user of the legislation and the inconvenience of having to refer to two Acts. In two areas in particular, however, the Committee did favour omnibus provisions. The first of these was in respect of offences relating to obstructing or hindering Commonwealth officers in the execution of their duty. Here it was thought that a general omnibus provision in the consolidating law would be desirable, particularly as the offence provision here would not need to be as intimately linked with provisions in other Acts. In respect of offences relating to the obtaining of information it was thought that much of the area could be covered by an omnibus provision similar to s 39 of the National Companies and Securities Commission Act 1979 (Cth), though modified in respect of the protection against self-incrimination. This course was favoured because the issues involved are 'of such significance in the administration of law and justice that there would seem merit in developing provisions capable of application in relation to particular Acts on thoroughly thought out principles rather than relying on ad hoc solutions as each case arises'.

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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the 1988 review of ancerta

> Merchants have no country. The mere spot they stand on does not constitute so strong an attachment as that from which they draw their gains.
>
> Thomas Jefferson, 1814

The 1988 review of ANCERTA (The Australia New Zealand Closer Economic Relations Trade Agreement) produced agreement between Australian and New Zealand Government Ministers on full free trade in goods across the Tasman by 1 July 1990. Agreement was also reached on the harmonisation of business laws and technical barriers to trade, the harmonisation of customs policies procedures, and a protocol of quarantine. The agreement aims to further accord with the objectives of ANCERTA delevoping closer economic relations between the two countries, eliminating trade barriers and developing trade while ensuring fair competition.

Under the Memorandum of Understanding on the Harmonisation of Business Law signed by the governments of Australia and New Zealand on 1 July 1988