
Criminal Codes for the Commonwealth and States?

by Belinda Wells

Australia has two criminal law traditions — the common law tradition and a criminal code tradition. This article reviews a conference held to discuss a uniform criminal code for Australia.

The Review of Commonwealth Criminal Law Committee chaired by the former Chief Justice of Australia, Sir Harry Gibbs, has recently published its fifth interim report. As noted in previous issues of *Reform*, the Review Committee was established in February 1987 to examine the possibility of rationalising the criminal law provisions which are scattered throughout various pieces of Commonwealth legislation, and to produce a single Commonwealth criminal statute consolidating these and other provisions. However, the Committee's work has also had a considerable impact at State level, and has precipitated an attempt to achieve consistency, if not uniformity, in the criminal law both as between the various States, and as between the States and the Commonwealth. To this end, a seminar was held in Brisbane from 2nd to 5th April to discuss the content of the Committee's third interim report, *Principles of Criminal Responsibility and Other Matters*.

The Review Committee's Reports

The Committee, comprising Sir Harry Gibbs, Justice Ray Watson and Mr Andrew Menzies, has published 21 Discussion Papers, followed by five interim reports. The interim reports pick up the topics dealt with in the discussion papers and make recommendations which represent the final views of the Review Committee on these matters; each report is only 'interim' in the sense that it does not deal with all of the matters which have been referred to the Review Committee.

The five interim reports deal with the following matters:

- Computer Crime (November 1988);
- Detention Before Charge (March 1989);
- Principles of Criminal Responsibility, Secondary Offences, Common Law Offences, Offences by Corporations, Attempts, Conspiracy and Omnibus Offences (July 1990);

- Offences Relating to the Administration of Justice, Offences Against the Government Involving Property or Money, Bribery and Corruption and Search Warrants (November 1990);
- Arrest and ancillary matters, Sentencing and Penalties, Forgery, Offences relating to the Security and Defence of the Commonwealth and Part VII of the Crimes Act (June 1991).

Each report includes a draft Bill which gives effect to the recommendations made in the report. The draft Bill which was submitted with the interim report, *Computer Crime* formed the basis of amendments made to the Crimes Act 1914 (Cth) by Act No 108 of 1989. Similarly, the draft Bill set out in the interim report, *Detention Before Charge* was the basis for the amendments made to Crimes Act by the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991. The latter Act (no 59 of 1991) was only recently en-

acted and is discussed elsewhere in this issue of *Reform* (see *Questioning suspects after arrest*).

The Review Committee intends to publish a sixth (and final) report dealing with all of the remaining matters referred to it including onus of proof and whistleblowers. It intends to submit with its final report a draft Bill which, if enacted, 'would repeal the *Crimes Act* and consolidate the criminal law of the Commonwealth'. This draft Bill would thus incorporate the provisions of the various draft Bills submitted with the Committee's interim reports.

Impact on State criminal law

In September 1990, the delegates at the Third International Criminal Law Congress in Hobart spent a day discussing the Review Committee's third interim report, *Principles of Criminal Responsibility and Other Matters* ('the third report'). The delegates concluded that the present lack of uniformity between State criminal laws produced injustice, and that the third report and the proposed Commonwealth Criminal Code should be used as starting points for discussion on achieving a uniform criminal code for the States. This was, of course, an optimistic aim since Australia is divided between two distinct criminal law traditions: that of the 'common law States' (New South Wales, South Australia, Victoria and the ACT) and that of the 'Code States' (Queensland, Tasmania, Western Australia and the Northern Territory).

At the February 1991 meeting of the Standing Committee of Attorneys-General, it was decided to establish an officers' committee to investigate uniform codification and to consider the work of the Criminal Code Review Committee established by Dean Wells, Attorney-General of Queensland,

and the codification work being pursued for the Commonwealth government by the Review Committee and in the United Kingdom, Canada, USA and New Zealand.

The next step in the process was the seminar in Brisbane from 2 to 5 April 1991, at which the topics covered by the third report were discussed at length.

The Brisbane seminar

Representatives from every State attended the Brisbane seminar. Participants included members of the judiciary, Crown prosecutors, defence counsel, superintendents of police, academics and members of law reform bodies. The opening address to the seminar was given by Mr Vincent Del Buono who is a Canadian and the President of the Society for the Reform of the Criminal Law (under whose auspices the seminar was held). Mr Del Buono spoke with admiration of the codification work of Sir Samuel Griffith who was the Premier of Queensland, then its Chief Justice and later the first Chief Justice of Australia. The criminal code drafted by Griffith for Queensland in the first years of this century was developed after consideration of the criminal codes of other countries, and was, said Mr Del Buono, circulated to the other States of Australia 'in the hope that all might adopt it and thereby have one criminal law for Australia'. The code was adopted only by Western Australia and British New Guinea. However, as Mr Del Buono pointed out, Sir Samuel Griffith's work had an extraordinary impact outside Australia: his criminal code became the criminal law of Northern Nigeria, Southern Nigeria, Cyprus, Kenya, Uganda, Tanganyika, Nyasaland, Northern Rhodesia, The Gambia, Zanzibar, Palestine, Fiji, the Seychelles and the British Solomon Islands.

Mr Del Buono sought to invoke the spirit of Sir Samuel Griffith in

order to emphasise that would-be codifiers must 'search . . . everywhere for the best ideas' and know how to compromise. He reminded delegates that the importance of codification of the criminal law lay in the increased clarity of the law and therefore its greater accessibility to non-lawyers. In recent years, efforts to codify the criminal law have been made in England and Wales, New Zealand, Canada and the United States.

During the four days of the Brisbane seminar, papers were presented on the various fault elements and defences discussed in the Review Committee's third report. On many issues, papers were presented by representatives from both the 'common law States' and the 'Code States'. The three members of the Commonwealth Review Committee were present, and offered their comments during the general discussions which followed each set of papers. As Justice Michael Murray said in his report on the seminar, '(t)he process involved was to be a search for consensus through consultation'. It was hoped that through discussion of each issue, the delegates would reach a consensus of opinion on the substance of each rule of law. No attempt was made to produce any draft provisions.

The seminar was notable for its high standard of intellectual debate and the precision with which the delegates isolated the underlying principles and the differences in approach between the common law and Code States. An enormous amount of ground was covered.

The next step

The Brisbane seminar was conducted in a spirit of great optimism. Many participants felt that a consistent codified criminal law for the States not only should be achieved but could be. It was con-

ceded that it was realistic to aim for consistency in the law rather than uniformity:

The important result was deemed to be, not a uniform statement of the law in identical terms, but its statement in terms which conveyed the same meaning in each jurisdiction. (Murray J's report.)

However, it is evident that even the aim of Australia-wide consistency in the criminal law is ambitious, as the concepts relied upon by the Code States in the area of criminal responsibility are quite different from the common law concepts upon which the Review Committee's third report is largely based.

The chairman of the Brisbane seminar, the Chief Justice of Western Australia, David Malcolm is hopeful that the communication

between States that is presently taking place will set up 'a habit of consultation for the future so that necessary changes made to any aspect of the law will themselves be of a uniform character' (Australian Law News, July 1991). He said recently that:

. . . attention should now be directed beyond the general principles of criminal responsibility to the content and definition of specific substantive offences. . . procedural law, both pre-trial and at trial, . . . the laws of criminal evidence and . . . appropriate sanctions . . . (Australian Law News).

The Criminal Law Officers' Committee which was set up earlier this year has met once to continue the discussion process, and will meet again in August. The Committee comprises representatives from each jurisdiction. The August

meeting will indicate whether it is worthwhile to pursue the aim of a criminal law which is consistent throughout Australia.

The Commonwealth Attorney-General's Department will await the outcome of this meeting before deciding whether to press ahead and implement the recommendations set out in the third report of the Commonwealth Review Committee. Alternatively, the Commonwealth may choose to continue its participation in the Australia-wide consistent criminal law initiative. In the meantime, it is likely that the Commonwealth will implement some of the Review Committee's recommendations in interim reports 4, 5 and 6 (for example, those on arrest and search procedures) - just as it has already done in relation to interim reports 1 and 2. □