LAW REFORM

SUMMARY OF LAW REFORM MATERIAL RECEIVED, APRIL 1987

— *Recodifying the Criminal Law* (with comments by leading experts), Report 30, December 1986, Law Reform Commission of Canada.
— *Classification of Offences — The Framework of a new Criminal Procedure*, March 1987, Law Reform Commission of Canada.
— *Social Indicators and the Delivery of Legal Services*, Peter Hanks, Legal Aid Branch of Attorney-General's Department.
— *Commonwealth Constitution*, distributed by the Commonwealth Commission.
— *Amending the Constitution*, Background Paper No. 12, distributed by the Constitutional Commission.
— *Statement of Preliminary Views: Committee on the Australian Judicial System*, distributed by the Constitutional Commission.
— Bulletin No. 3, March 1987, Australian Constitutional Commission.
— *Sentencing in Australia*, ed. Ivan Potas, Seminar Proceedings No. 13, Australian Institute of Criminology and Australian Law Reform Commission.

Report 30 of the Law Reform Commission of Canada was tabled in the Canadian House of Commons on 3 December 1986. As the first of two volumes of a proposed Criminal Code, it deals with crimes against the person and against property. The old Code is reported to be unwieldly, difficult to follow and outdated, as well as defective. This is partly due to a series of patchwork amendments to it since 1955. Excessive detail and inconsistency create problems, as well as the fact that it ignores current concerns such as terrorism, drunkenness, endangering and pollution.

The proposed new Code uses ordinary language, aims for simple construction and talks in general principles, making the concepts of basic criminal liability readily available to ordinary citizens. Previously scattered offences have been regrouped in one place. Proposed new crimes include 'endangering' (anyone purposely, recklessly, criminally or negligently causing risk of death or serious harm to another person) and 'failure to rescue' (anyone who, perceiving another in danger of death or serious harm, fails to take reasonable steps to assist that person unless unable to do so without risk to oneself).

Another change is to allow only parents and those acting with their consent to inflict corporal punishment, and only in a reasonable way (excluding the previously mentioned shipmasters and school teachers). The defence of drunkenness has been culled by the offence of 'committing a crime while intoxicated'. Terrorism provisions have also been toughened.

Working Paper 54 of the Law Reform Commission of Canada, on *Classification of Offences*, proposes a new and simple way of classifying all federal

offences. These would be classed as either 'crimes' (meriting punishment by imprisonment) or 'infractions' (less serious offences, not included in the proposed Criminal Code). This would dispense with the present classifications of indictable offences, summary conviction offences, or hybrid offences (punishable by either indictment or summary conviction).

The new scheme would allow the procedures applying to that crime, from arrest through to disposition of the convicted offender, to be easily identified once the class of crime was established. The Commission proposes that Parliament should classify and provide a penalty for a crime when creating it. This should eliminate the uncertainty connected with the 65 hybrid offences in the present Criminal Code. The Commission recommends powers of arrest be identical for both classes of crime, but that the Identification of Criminals Act apply only to crimes punishable by more than two years imprisonment.

The proposed scheme dispenses with limitation periods for more serious crimes, and imposes a one-year limitation period to commence proceedings for less serious crimes. The Commission also recommends that an accused have a right to elect or opt for trial by jury for all crimes falling into the more serious category, but that there be no right to trial by jury for crimes punishable by two years imprisonment or less.

Peter Hanks' paper, *Social Indicators and the Delivery of Legal Services*, prepared for the Legal Aid Branch of the Attorney-General's Department, is a booklet of some 58 pages dealing, as the title suggests, with the use of social indicators as the basis for developing service delivery programmes, premissed on a commitment to needs-based development.

Mr Hanks examines the various social indicators projects (*e.g.* Family and Community Services Programme (Vic.), Victorian Housing Ministry's Needs Distribution Study, *etc.*) and concludes with an analysis of the theoretical and practical difficulties these have met, and which are likely to be encountered in the future. He then looks at the experience of the various legal aid agencies, at both commonwealth and state levels, and notes that there is a substantial variation in the degree to which those agencies have used and relied on social indicators in the planning of their operations. A striking contrast is nevertheless revealed between the use of social indicators by legal aid agencies and that by other service delivery agencies.

The author then looks at the frustrating process of defining the goals and objectives of legal aid programmes, and the role legislation, parliamentary debates, policy makers and administrators play in this. Finally, he examines the selection of social indicators: measurement and assumption of legal need, the Henderson poverty line and other indicators of unmet need.

The booklet is too long to examine here in detail, and this only purports to be a brief outline of its contents.

Sentencing in Australia, edited by Ivan Potas, is produced by the combined efforts of the Australian Institute of Criminology and the Australian Law Reform Commission, and contains the proceedings of a seminar in March 1986. A

lengthy document of 554 pages, it is impossible to give any detailed review in the limited space available here. However, an overview may be obtained by noting the range of topics discussed, which include:

— a review of sentencing policy and problems
— discretion in sentencing
— the role of the prosecutor in the sentencing process
— judicial role in sentencing
— the philosophy and practice of the N.S.W. Court of Criminal Appeal
— sentencing in Magistrates' Courts and the Magistrate as a professional decision-maker
— an evaluation of judicial models for sentencing guidelines
— sentencing structures and section hierarchies
— de-institutionalism — description and assessment
— probation and parole in the A.C.T. and N.S.W.
— the future of parole
— preconditions for sentencing and penal reform in N.S.W.: some suggestions towards a strategy for contesting an emerging law and order climate
— correctional services in the A.C.T.
— the victim's role in the sentencing process
— sentencing: perspectives on aboriginal offenders
— federal and A.C.T. offenders: the future of the current laws and practices, and reform proposals
— the limits of sentencing reform.

The paper provides an interesting analysis of both the law as it stands, and possible reforms in this area.

Background Paper No. 12 of the Australian Constitutional Commission (January 1987) considers whether the present method of changing the Constitution under s. 128 is appropriate, compares our system with that of other jurisdictions, and lists possible options for altering the existing method. Problems with the present method are listed as including the facts that:

— there is no provision for States or electors to initiate proposed amendments, or for Federal Parliament to amend the Constitution itself;
— only 8 of 38 proposals put to referendum have met the stringent requirements of s. 128;
— the public is not given sufficient explanation;
— parties tend only to put amendments of immediate interest for political gain;
— oppositions may oppose amendments for political victory, lessening the chance of the success of the proposal at referendum, as state governments may oppose proposals with bipartisan federal support;
— and because the Governor General acts on the advice of ministers, he only puts to referendum proposals that the government supports.

Ambiguities, such as when a House 'fails to pass' a bill, are technical problems with the current system.

Among the alternatives suggested are:

— amending s. 128 so that change can be achieved with the approval of a

majority of total voters and a majority of voters in not less than half of the States;

— replacing s. 128 with another method, such as:

(a) allowing a specified number of voters to require that a proposal be put to referendum;
(b) allowing a majority of State Parliaments to require that a proposal be put to referendum;
(c) appointing or electing a Constitutional Commission or Convention with power to require that a proposal be put to referendum;
(d) an amendment being effective if passed by both houses of Federal Parliament and approved by a majority of State Parliaments;
(e) or an amendment being effective if merely passed by both houses of Federal Parliament.

The questions were posed: should different methods apply to different parts of the Constitution; and should electors be given the opportunity to choose one option for change on a particular subject. The paper discusses the advantages and disadvantages of each proposal and invited comments from the public, to be sent to the Commission by 23 March 1987.

A *Statement of Preliminary views* was published early in 1987 by the Australian Judicial System Advisory Committee of the Constitutional Commission. In considering what structure of the Australian judicial system would be desirable for the future, the Committee favoured a three tiered court system, with the High Court remaining at the apex, having unrestricted appellate jurisdiction. Views differed on the desirability of retaining the present division into federal, state and territory courts. One approach was to regard disbanding this as unrealistic, and to concentrate instead on eliminating jurisdictional problems — for example, by cross-vesting of juridsiction, and increasing federal legislative power by constitutional amendment. A second approach sees the latter as difficult to achieve, and encourages an evolution of consensus among governments for cross-vesting, accepted areas of jurisdiction and mechanisms to direct cases to such jurisdictions. Work would therefore be distributed between three co-ordinated modules, corresponding to the three branches of government. A full-time co-ordinating unit could be developed in the future. The third approach sees substantial change as unnecessary, but is concerned at the possible diminution of the importance of State courts, and hence urges the establishment of an Australian Court of Appeal to replace the Full Courts, Courts of Appeal and Courts of Criminal Appeal existing in the Federal, Family and State Supreme Courts.

A number of technical points relating to the High Court were canvassed, including the number, appointment, retirement and removal of Justices, a widening of the High Court's appellate jurisdiction (necessitating change to s. 73 of the Constitution), and a rearrangement of ss 75 and 76 of the Constitution to redefine the High Court's original jurisdiction.

To remedy jurisdictional problems of the Family Court, two proposals are suggested: a reference of certain family law powers by States to the Commonwealth under s. 51 (xxxviii), and the cross-vesting legislation. Organizational

problems gave rise to four suggested alternatives: return of the federal family jurisdiction to state courts; creation of a new federal trial court to exercise family jurisdiction, some aspects of the Federal Court's jurisdiction and other federal jurisdiction; creation of a Family Law Division of the Federal Court; and retention and reinforcement of the Family Court as a separate federal court specializing in family law matters. Specific suggestions were also made relating to the renovating of staffing and facilities, and the Family Law Act 1975.

A number of points are made regarding the appointment and removal of judges of federal, state and territory courts, including a recommendation that there be a standing tribunal of judges to which Attorneys-General may refer the question of whether there has been misbehaviour or there is incapacity which warrants the removal of a judge. A prescribed procedure for selecting members is seen as desirable.

Trial by jury is stressed as remaining an essential feature of the administration of criminal justice, but the Committee recommends that the requirement that a trial be held in the state where the offence was committed be abolished, and legislative provisions be made for changes of venue.

The Committee favours retaining the *Boilermakers* doctrine that Parliament may not invest a federal court with power that is not part of the judicial power of the Commonwealth, stating that if judicial power is to be exercised, it should be exercised by a court. The Committee's reasons are that if it were otherwise, judicial power would be exercised by persons not guaranteed tenure by the Constitution and therefore the independence of the judiciary would be in jeopardy.

A number of reforms concerning the service and execution of process in s. 51 (xxiv), and recognition of the laws, public acts and records and judicial proceedings of the states (s. 51(xxv)) are also suggested.

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