

Report on lead-up activities

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Overview

This report provides information about the ideas that were gathered through activities that occurred prior to the Federal Criminal Justice Forum on 29 September 2008.

Roundtables

Roundtables were held in Brisbane, Melbourne and Perth prior to the Federal Criminal Justice Forum. The purpose of the roundtables was to help generate ideas for discussion at the Forum and enable a wider range of people to contribute to the discussion of possible federal criminal justice reforms. This report contains information about the roundtables and the ideas put forward at the roundtables.

In addition, a specialist academic roundtable was held with some academics from the University of Sydney and the University of New South Wales. This report contains information about that roundtable.

Website submissions

This report also includes some ideas from organisations and people who submitted them through the Attorney-General's Department website for discussion at the Federal Criminal Justice Forum.

Student essays

At the end of the report are two student essays, nominated by Professor Fox as being the best essays by students in his 'Federal Criminal Law' course. These essays address the proposal that 'the Australian Federal Constitution be amended to assign to the Commonwealth plenary power with respect to criminal law and procedure in Australia.'

Australian Federal Police Association

In preparation, for the Forum, the Australian Federal Police Association canvassed its members for their reform ideas. The resulting paper, setting out a large number of reform ideas, is included separately in each participant's compendium.

Law Council / New South Wales Bar Association

The Law Council of Australia and the New South Wales Bar Association held a conference on federal criminal law on 5 September 2008. The outcomes of this conference are not included in this report, but will be presented on by Mr Stephen Odgers SC during Session 1 of the Federal Criminal Justice Forum. An outline of this presentation can be found in the document titled 'Outline of Presentations', in participants' compendiums.

Roundtables – General Introduction

Roundtables – General Introduction

A series of Roundtables was organised as part of the lead-up to the Federal Criminal Justice Forum. These were organised by the Australian Institute of Criminology (AIC) held in:

- Brisbane on 21 August
- Melbourne on 29 August, and
- Perth on 10 September.

The purpose of the roundtables was to help generate ideas for discussion at the Forum and enable a wider range of people to contribute to the discussion of possible federal criminal justice reforms.

The invitation list was compiled using the AIC database for consultations, supplemented by recommendations made by the Steering Committee, which was appointed by the Minister to oversee preparations for the Forum.

Pre-reading

The pre-reading for participants gave a general overview of the scope of federal criminal law. There was also some statistical information from the Commonwealth Director of Public Prosecutions on prosecutions under the *Crimes Act 1914* and the *Criminal Code Act 1995*.

Facilitator

Ms Helen Leayr of the Communication Link, facilitated the roundtables.

Method

Participants were divided into three tables of approximately five. The roundtable consisted of three distinct sessions.

In the first session, each table discussed the following:

- shortcomings of federal criminal justice, and
- how these shortcomings could be addressed or ‘fixed’.

Each group recorded their discussion on butcher’s paper. Each group reported to the other groups on their discussions.

The aim of the second session was to obtain the group view of the prioritisation of the matters raised in session one. The butcher’s paper notes were pinned to the wall. Participants reviewed the matters raised by all three groups by walking around and discussing the butcher’s paper notes. Each participant used a large sticker to identify their top priority issue and five smaller stickers to identify second order priority issues.

Each participant had one large dot sticker and five small dot stickers to indicate the priority they gave to particular issues. In this report, a large dot for a top priority issue has a weighted value of five and a small dot for a second order priority has a value of one.

The third session for the roundtable began with an overview of the existing reform process for federal criminal law. Participants discussed how the reform process could be improved or better informed. Again, each group recorded their discussion on butcher's paper. Each group reported to the other groups on their discussions

Reporting

The following reports for each of the roundtables begins with a list of participants followed by an edited overview of the discussions based on notes taken by a scribe provided by AIC. A table is then provided which sets out an exact transcription of the ideas written down by each group on the butcher's paper. Where possible, the ideas from each group are aggregated into themes. Finally, each report gives a summary of the participants discussions regarding the law reform process.

Brisbane Roundtable 21 August 2008

Brisbane Roundtable – 21 August 2008

EcoCentre, Nathan Campus, Griffith University

This part of the report comprises:

- list of participants
- overview of the discussion of the top issues and other matters given lower priority
- a table displaying the comments transcribed from the sheets of butcher's paper used in the roundtable, and
- a summary of discussion concerning the law reform process.

List of participants

Ms Zoe Ellerman	Crime and Misconduct Commission
Ms Marni Feather	QLD Premiers Department (Policy Section)
Dr Hennessey Hayes	Griffith University
Ms Alice Hutchings	PHD student
Ms Hetty Johnston	Bravehearts
Ms Debbie Kilroy	Sisters Inside
Dr Mark Laughs	QLD University of Technology
Ms Sally Lohrisch	Crime and Misconduct Commission
Dr Elena Marchetti	Griffith Law School
Mr Bill Neil	Aboriginal and Torres Strait Islander Legal Service
Mr Cameron Pope	Queensland Police Union of Employees
Dr Janet Ransley	Griffith University
Mr Sean Reidy	Queensland Law Society
Ms Carol Ronken	Bravehearts
Mr Jason Saunders	Queensland Police
Ms Helen Leayr (facilitator)	Communication Link
Dr Karl Alderson	Attorney-General's Department
Dr Tony Krone	Attorney-General's Department
Ms Emma Swinbourne	Attorney-General's Department
Mr David Rees	Australian Institute of Criminology

Edited overview of discussions

High priority issues

Out of all the issues raised by the group as a whole, participants were asked to indicate which matter they gave the highest priority to addressing. The following table shows in descending order the priority allocated to each set of issues by the group.

Most participants gave their highest priority weighting to broad policy coordination issues rather than specific proposals.

The top four issues in descending order of priority accorded were:

- responding to the challenges of multi-jurisdictional offending
- preventing the over criminalisation of behaviour
- securing better research and statistics, and
- placing greater emphasis on crime prevention.

Responding to the challenges of multi-jurisdictional offending

Participants expressed concern about the lack of consistency in responses across levels of government and across agencies. A related issue is the need for greater co-ordination among law enforcement agencies taking into account the privacy implications of greater information sharing. A reported example of a problem in this category is the difficulty of working across jurisdictions to obtain a nationally consistent police certificate. Many of the matters referred to under this category related to child sexual assault and abuse.

- There was a general concern at the lack of consistency between the laws of the States and Territories.
- Suggestions to remedy the situation included abolition of State/Territory involvement in criminal law and increased State and Territory consultation in the development of federal criminal law (with such law taking the place of State/Territory legislation).
- With regard to spent convictions, there is a lack of consistency between States and Territories. This calls for a detailed re-examination of what time limits should apply before a conviction is considered 'spent'.
- Need to consider the impact of National Police Certificates on individuals who have not been convicted.
- Re-invigorate the Police Minister's Council and the Senior Officer's Group as part of improving consultation.
- More emphasis on consultation with practitioners.
- More consideration of the practicalities of service delivery; more guidance on 'how' to implement policy.
- Government should explore the use of public hearings (such as those used by the Crime and Misconduct Commission Queensland) and roundtables to generate ideas.
- There is a need to consider the balance between privacy and operational imperatives.

- There is a need for greater coordination (at all levels) and more mechanisms for information sharing.
- There should be more effort made to ensure that Commonwealth, State and Territory agencies know what bodies exist across Australia and what sort of information each body collects.
- There needs to be a coordinated effort to list what information each Commonwealth, State and Territory agency holds.

Actual and potential over-criminalisation of behaviour under federal criminal law

A specific example in this category is the perceived over-criminalisation of the socially disadvantaged under some Commonwealth fraud offences.

- Participants expressed concern regarding an emphasis on criminalisation, which they believe is disproportionately affecting the socially disadvantaged. This is particularly so where people have to repay a debt, pay a fine and incur a criminal record for the same behaviour
- Laws should not be based on a 'knee jerk' reaction; they should only be passed if they actually solve a problem
- Legislation needs to take account of technological developments and the increased pace of change
- Participants suggested consideration of an initial non criminal court response such as a US style community court
- Concern at perceived increase in number of offences and Government emphasis on spending on enforcement rather than prevention
- Concern that people often do not come to the attention of social services until they have also come to the attention of the criminal justice system
- Indigenous people in remote communities need holistic solutions which are not just about criminal justice
- There should not be duplication of laws ie to avoid the perception that new offences are needed if existing offences already cover the relevant ground, and
- Legislation should not try to solve every possible issue.

Desire for better statistics and research for law reform

Participants noted the need for better statistics and for better 'translational research' to focus on the implementation of evidence based reform measures.

- Consistent statistics are required to help create more accurate typologies of offending.
- There needs to be more consistency between States with regard to issues such as the definition of basic terms such as 'child'; without such consistency it is very hard to make comparisons between States.
- Evidence based research will mean laws are not based on anecdotes.
- More should be spent on the use of trained consultants who could more rigorously identify relevant community interest groups and consult accordingly.
- There should be more consultation with academia; this would assist in understanding existing research and identifying groups with a legitimate interest in the topic under discussion.

- Recognition that not all issues may need consultation and that others may need very detailed consultation; government needs to be more flexible on this point and not use a standard consultative model, which is often very detailed and very time consuming.
- More interim reports on law reform could be issued so that people would have a chance to see in what direction law reform is progressing.
- Technology can be used to speed up the consultation process eg video conferencing and use of online consulting.
- Legislation should be framed so that it is not technology specific.
- There should be genuine consultation, and reform that is long term and community specific.

Greater focus on crime prevention

This is expressed in terms of a bigger and more systematic focus on crime prevention and linking social service delivery to the reduction of criminal justice interventions. Participants highlighted the needs of Aboriginal and remote communities in relation to crime prevention.

- More focus on crime prevention with the systematic implementation of evidence based programs.
- Strong emphasis on crime prevention for young (eg pre-school and up) and parenting programs: such programs should be universal or at least in high crime/indigenous areas.
- Crime prevention strategies: need to build on existing strengths eg tribal elders in indigenous communities who can mentor younger people, sports organisations in school where to be involved you need to attend school.
- The lessons of Murri Court need to be considered and adopted.
- Education of public on financial benefits of crime prevention ie the more spent on crime prevention early in a person's life probably means much less spent further down the track through involvement with the criminal justice system.
- There needs to be more understanding of the links between criminal justice and issues such as education, health, housing, income levels and general social services.

Other high priority issues

At least one participant considered each of the following to be a top priority issue.

Rehabilitation in sentencing

Those on short term or suspended sentences should be given access to treatment/rehabilitation programs.

Avoiding policy conflicts in the intersection of federal proceeds of crime with State laws

Concern was expressed that provisions in federal legislation (specifically the Family Law Act and the Superannuation Regulations) undercut the operation of Queensland laws.

Responding to treaty obligations under the United Nations Convention on the Rights of the Child

Participants suggested adoption of United Nations Rights of the Child into Commonwealth law and implementation of best practice law relating to child protection issues across Australia.

Lower priority issues

The remaining issues were given second level but not top priority by any participant.

Measures to combat identity theft

Call for greater consistency in laws across jurisdictions relating to this issue. A way of combating identity theft may be to allow people to check that their credit rating is accurate.

Oversight mechanisms for the use of police and investigative powers

Who monitors the performance of Commonwealth law enforcement bodies and to whom are they accountable? Greater public accountability may be required.

Further measures to promote victim's rights

Concern was expressed that geography affects the level of support a victim receives eg with regard to services such as assistance with drafting victim impact statements. Remote areas have particularly poor access and yet they often very badly need such services.

Child sexual assault and exploitation

A number of distinct concerns were raised in relation to child sexual assault and exploitation. Other related concerns are the duplication of laws for child pornography offences at the federal and State and Territory levels, the need to acknowledge the widespread nature of abuse and tighter controls on offenders and accused persons.

- There is a need to acknowledge all children are potentially vulnerable to child sexual assault and exploitation.
- There is a need to find a consistent definition of terms such as 'child'.
- In cases involving sexual abuse, there should be more emphasis given to video conferencing for young offenders, and the use of techniques such as polygraph testing.
- There should be consideration of the possibility of reporting child sex offenders to the community (even those who have not been convicted).
- There is a need for more treatment options for sex offenders, particularly in remote geographical areas; many treatment options are often only available in urban areas.
- Treatment for child sex offenders should be more directed towards the actual offence and involvement in such programs should be compulsory.
- With regard to child pornography, there should be consideration of overseas examples where people cannot access public internet facilities without providing identification.
- There should be more discussion with private sector regarding the improvement of security on sites with regard to sexually explicit material.

- Possibly introduce more accountability for ISP's regarding the content of their sites.
- Ensure that parents can check the contents of the children's Facebook, regardless of privacy concerns, and
- Concern regarding aspects of operations of the Family Court (including issues relating to transferability of court orders across borders, issue of lack of consistency in what evidence judges will accept, and the perceived need to educate judges on a range of issues).

Some reference was made to anti-terrorism laws. However, this falls outside the scope of the Forum and roundtables.

Brisbane Roundtable overall priority rating of issues – transcribed from butcher’s paper record

Category	X = top priority x = second order priority	Problem	Suggested solution
Multi-jurisdictional issues	XXXXXX	Non-standard response to multi-jurisdictional offences/offending despite prioritisation at national and commonwealth and international levels: Eg. New technology-based offending development commitment priority translating into practice Prescriptive legislation fails to keep pace with criminal movement. Eg. website	Feedback mechanism on operational difficulties from states when using/exposed to CMW provisions – assess impact Assess problematic areas and address Engage with industry/service provider Assess functional/responsibilities and inform states (? rationalise) Informing standardise harmonised approach Advise of changing criminality (early advice) Reconsider legislative framework – constant review – less prescriptive/technical language? Recognise commercial imperative
	XXXXX	Better coordination across law enforcement/regulatory bodies – privacy implications on investigation outcomes: range of agencies – silos maintain own information/holdings in isolation difficulties in information sharing to support criminal justice response and persons(s) involved	reconsider capacity for information exchange balance privacy and operability imperatives coordination and information sharing mechanisms and feedback process at right level identify what holdings agencies have consistent integrity WRT information transfer
	XX	National Police Certificate: issues about presumption of innocence and need to know adverse impacts on individuals who have not been convicted pending the hearing of charges	abolish requirement for disclosure when not yet convicted
		One country, one law	

Category	X = top priority x = second order priority	Problem	Suggested solution
Over-criminalisation	XXXXXXXXXX	Criminalisation of social policy and increase in new offences (eg. Drug offences, 75% funding on enforcement): don't get access to social services unless come to attention of CJS – not preventative first reaction is to criminalise limited access to social services	
	x	Centrelink Fraud: - criminalising socially disadvantaged	proper consideration before introducing criminal responses including increasing penalties recognise 'sector' aspects explicit link between CJS and social services (considered on periphery) 'double-whammy' – crime record and re-pay funds Non-criminal court response – eg Community courts?
Statistics and research	XXXXXXXXXX	Better statistics: Eg. Typologies of fraud Eg. Comparing police and DOCs and numbers of children that have been harmed Comparisons between states – eg. Defence of children, age of consent, age of majority age in correctional centre	Consistency in legislation across the Nation: Definitions (eg 'child') Police statistics (and verified data) a problem Set std measures for government and police to use in recording statistics Improve access to core information and intelligently deal with offenders
	XXXXXX	Better translational research – 'leadership' focus on the 'how'. Release their evidence to states. Better coordination at senior and practitioner level (not APMC and SOG) – more effective agenda setting. Participation.	Rejuvenate APMC and SOG: Focus on implementation Commit to real consultation Recognise role/input of practitioners in supporting decision making

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
			Consider feedback implications at local level (service delivery) Focus on informing 'how' to implement Evidence base – evaluation Harmonising statistics for evidence-based policy
Crime Prevention	XXxxx	Crime prevention	Bigger and more systematic focus on crime prevention Provide money for systematic implementation of evidence-based programs universally or in <u>high crime areas</u> – including Indigenous communities Eg. Parenting programs (Peri pre-school etc)
	Xx	Better integration across portfolios – eg. Criminal justice, education, health, social services, housing, income	linking social service delivery to its capacity to reduce work on criminal justice
Proceeds of crime	Xxxxx	Administration of proceeds of crime legislation: amendments in Family Law Acts and Superannuation Regulation that have impeded Qld state legislation	Written submission to follow from CMC
Treaty obligations	Xxxxx	UNROC adopted into Federal Law	scrap state laws on child sex offences and replace with best model/practice Federal Law (consult with states and Territories to determine 'best' legislation) this will provide national consistency and will work better for DOCs and Family Law Courts
Anti-terrorism laws	Xxxx	Terrorism laws: rights of the accused – the deterioration of basic process rights – see recent decision of Bongiorno J discriminates against certain ethnic groups	complete reconsideration of the legislation targeted workshop/community consultation (of experts in area)

Category	X = top priority x = second order priority	Problem	Suggested solution
Indigenous and remote communities	Xxxx	Indigenous people in remote communities	recognition of particular problems in such communities need for holistic approach (not simply criminal justice focus) need to incorporate a ‘true’ consultative approach need for recognition that reform needs to be long-term and community specific
	Xxxx	Indigenous/Remote issues	Prevention strategies: food, transport, aid, sport connection/mentor community integration early intervention and rehabilitation Murri Court learning needs to be absorbed and adapted into Federal Law
Sentencing	Xx	Crime prevention and sentencing: allowing offenders on short term or suspended sentences to access treatment/rehabilitation programs	proper data collection for research educating the public about benefits of crime prevention rather than retributive approach
	xx	Lack of consistency and overlap across States and Territories: diversionary options sentencing options treatment and management of offenders appeal options victim compensation defences under the Criminal Code	prevention and early intervention strategies to reduce crime scrap state government criminal law (change the Constitution) increase state and territory consultation in the development of federal law – identification of best practice federal law should mandate provision of rehabilitation and treatment
	x	Conferencing	Sexual abuse needs to use conferencing more for young offenders

Category	X = top priority x = second order priority	Problem	Suggested solution
Identity theft	xxxx	ID Theft: Easier access to credit rating Consistency in laws across jurisdictions Overlap between jurisdictions	More prevention Mandatory reporting of victimisation by financial institutions (ie. Disregard their concerns about consumers confidence)
Oversight mechanisms	xxxx	Law enforcement integrity to mirror existing state provisions eg. CMC. Who monitors CMW law enforcement agencies: expanding role accountability	Strengthening CMW Integrity Commission eg. Provisions, resources adopt reporting/communication strategies (public accountability establish integrity standards (and articulate)
	x	Investigative powers/limitations	public interest monitor appointed
Child abuse	x	Child Pornography: securing wireless – need public information on how to do provide ID (eg. Drivers license, passport) to access public access internet libraries, cyber cafes, etc	work with private industry standards for wireless passwords and access review Italy’s requirements for ID to use public access internet make public access internet providers responsible for who uses their internet clean feed to schools and opt-in clean feed for families parents can access their kid’s facebook to see who are on their sites
		Paedophilia/Child Abuse/Pornography	Acknowledgement of who is at risk – all genders and all backgrounds. Eg. Is not solely a problem in Aboriginal communities
		Sexual Abuse	expand re-offending defendants to include those who have not been convicted due to problems with successful convictions and investigations

Category	X = top priority x = second order priority	Problem	Suggested solution
			polygraph testing need better treatment options unavailability in community and in corrections child contact plus child pornography programs to be more directed at offence committed make treatment mandatory for child sex offenders
		Duplication of child pornography laws and other legislations relating to computer crime	
		Spent convictions legislation: Impact of lengthening the time required for disclosure of convictions eg. On employment prospects	repeal spent convictions legislation and reconsider what is appropriate disclosure requirements
	x	Family Law Courts – State and Territory DOCs: difficulties in dealings with cross border issues/DOCs and Police Evidence issues (research, police etc.) transferability of state orders	educate judges
Victims	x	Victims rights: lack of assistance for victims to prepare victim impact statement (particularly in remote areas) – eg Aurukun rape case	- national standard (or response)
Treaty power		Reform of Treaty consultation process prior to ratification	effective implementation of treaties implies local level service delivery obligations call stake-holders

Summary of suggestions relating to law reform process

The concerns expressed by the Brisbane roundtable participants can be grouped into a number of themes.

Consultation process

Participants pointed out that the standard consultation process is very lengthy and formal and produces a great deal of documentation. Depending upon the nature of the proposed law, participants supported the idea of broad consultation with a variety of stakeholders from different areas, led by an independent consultant/coordinator. Participants were of the view this would allow feedback from service providers on the ground. This would allow for more evidence to be obtained regarding the practical implications of any proposed law (and whether a law in fact is necessary). They also suggested that there should be more involvement with the academic community, as this would facilitate the identification of little known stakeholders and allow more access to overseas research and experience.

Participants emphasised that some proposed legislation does not require broad consultation. They suggested that the Commonwealth should show flexibility and tailor the consultation process to the particular proposal. They also pointed out consultation participants need to be given sufficient time to respond to a proposal, and that participants should receive feedback regarding how their comments have been acted upon.

Consultation methods

Participants emphasized that technology could assist with consultation e.g. with on-line consultation and video/phone conferencing. They also suggested that roundtables and public forums could be useful methods for generating ideas (depending upon the nature of the issue). Participants emphasized the need for better coordination and collaboration between levels of government and the possible use of interim reports to keep stakeholders up to date on progress.

Nature of proposed legislation

Participants emphasized that law reform should be research rather than opinion based, and early consideration of any proposal should include a study of existing research.

There should be consideration of whether legislation is required, or the most effective method, for dealing with an issue. There should also be consideration whether existing laws already deal with the issue. Legislation should be succinct and address major issues; it does not always have to cover every possible contingency.

A further proposal was that service providers should have Advocacy Funding Agreements, which would assist in providing such bodies with the resources to undertake advocacy.

Melbourne Roundtable 29 August 2008

Melbourne Roundtable – 29 August 2008

Monash Centre Collins Street Melbourne

This part of the report comprises:

- list of participants
- overview of the discussion of the top issues and other matters given lower priority
- a table displaying the comments transcribed from the sheets of butcher's paper used in the roundtable, and
- a summary of discussion concerning the law reform process.

List of participants

Emeritus Prof Richard Fox	Monash University
Assoc Prof Jeremy Gans	Melbourne University
Assoc Prof Colleen Lewis	Monash University
Dr Jonathan Clough	Monash University
Julia Cook	Victoria Police
Matthew Richman	Australia and New Zealand Policing Advisory Agency
Professor Alan Hayes	Australian Institute of Family studies
Stella Stuthridge	Law Institute Victoria
Alison Lui	ANZ Bank
John Purcell	Certified Practising Accountants
Karena Viglianti	Australian Bankers Association
Stephen Farrow	Sentencing Advisory Council
Jonathan Kaplan	Corrections Victoria
Ms Helen Leayr (facilitator)	Communication Link
Greg Byrne	Department of Justice, Victoria
Dr Karl Alderson	Attorney-General's Department
Dr Tony Krone	Attorney-General's Department
Ms Julia Galluccio	Attorney-General's Department
Mr David Rees	Australian Institute of Criminology

Edited overview of discussions

High priority issues

Out of all the issues raised by the group as a whole, participants were asked to indicate which matter they gave the highest priority to addressing. The following table shows in descending order the priority allocated to each set of issues by the group.

The top five issues in descending order of concern are:

- police powers
- the Criminal Code
- sentencing
- E-crime
- information sharing for law enforcement

Police powers

Participants were concerned about a range of matters related to police powers.

- A primary concern was the need to update surveillance interception laws to take into account technological advances. Participants were particularly interested in addressing laws for the interception of data.
- A related issue is coping with the volume of material generated electronically and the difficulty in terms of data storage when exercising a search warrant.
- The law for search warrants and for controlled operations should be rationalised to eliminate differences across jurisdictions.
- The police oversight agency Australian Commission for Law Enforcement Integrity should be expanded to include responsibility for other federal investigative agencies. ACLEI could be expanded to have oversight over elected officials. ACLEI needs additional funding to function more effectively.

Criminal Code

The Commonwealth Criminal Code is seen as a positive development that could be taken further.

- Greater consistency between Commonwealth and State and Territory law is to be encouraged.
- A special committee could be established to work on the issue of uniformity.
- While the Code provides a simple framework, a criticism is that this simplicity is not suited to complex matters. For example, a particular concern is the definition of dishonesty.

The Commonwealth should adopt a principled approach to the criminal law. Specific concerns are the use of the reverse onus of proof and of absolute liability provisions. There should be a review of the balance between the use of criminal and civil liability provisions.

Sentencing

Participants discussed the lack of principles for the sentencing of corporate offenders.

- Information about offenders and victims needs to be more easily shared, perhaps using a central database available to investigators and corrections in Australia.
- Information should also be shared internationally.
- Federal offenders should receive standardised treatment across Australia.

E-crime

Participants raised the nature and extent of e-crime. Resources are required to cope with the scale of the problem. There should be greater emphasis on compliance by ISPs. Given the pace of change in this area, the law is always playing catch-up.

It is important to improve mutual assistance between law enforcement agencies internationally and nationally. This would be assisted by encouraging consistency and harmonisation. Consideration should be given to setting up a specialist tribunal to deal with e-crime. Cybercrime generally and child exploitation online were cited as concerns.

Information sharing for law enforcement

Participants drew attention to the complex mix of legislation and policies that prevent information sharing and intelligence exchange for law enforcement purposes. It should be compulsory to exchange information in certain circumstances. Structures are required to establish information sharing between public sector agencies and with the private sector.

Other issues

The remaining issues were given lesser priority.

Trial

Participants wanted to see an emphasis on human rights values in formulating trial procedure. The Commonwealth could issue a statement of fair trial norms for federal defendants regarding criminal procedure. The remaining provisions of the Crimes Act 1914 could also be incorporated into a Procedural Code.

The Commonwealth needs to articulate fundamental human rights norms and values for Commonwealth criminal process because of the risk of inconsistency across State and Territory courts.

It was also thought that Commonwealth trials are often not properly focused and that further education of the profession may be required.

Research and statistics

Participants called for better Commonwealth justice sector data. National standards are required for information and data collection. Implementation of such standards would improve consistency and comparability. Further research is required into the nature of federal offenders and victims.

Education

Federal criminal law and procedure are subjects that receive little attention at universities in Australia. It is important to educate people about Commonwealth criminal law and procedure. It would help to better market the prospects for careers in federal criminal justice.

Education should be directed to academic study and practical education for regulators and law enforcement officials.

Over-criminalisation

Under this heading participants called for the removal of old 'poorly drafted' laws. Laws should be rationalised using general over-arching offences. Administrative penalties should be considered for offences that arise out of social problems such as social security fraud.

Director's liability

The main concern here was with requirements such as Occupational Health and Safety laws.

Treaty obligations

The Commonwealth Criminal Code should conform to international human rights standards. The Victorian Charter of Human Rights could be considered as a model for developing fair trial standards.

Coordination

Legislation that is meant to work in a complementary fashion often does not work as intended. Early consultation is required in the development of legislation.

There should be a scheme for suppression orders to operate across State and Territory borders. This is a role for the Commonwealth.

Cross-border enforcement of orders including simplifying the extradition warrant process is necessary.

Forensics

Federal leadership is required to provide quality assurance for forensic procedures. This could involve establishing standards, conducting audits and sharing data.

Human rights

The whole profession must be involved in the debate about human rights standards.

Melbourne Roundtable overall priority rating of issues – transcribed from butcher’s paper record

Category	X = top priority x = second order priority	Problem	Suggested solution
Police powers	Xxxxxx	Surveillance interceptions (data): sim cards/identity	updating surveillance interception laws to make more relevant to technology advancements
	Xxx	Australian Commission for Law Enforcement Integrity (ACLEI) Act: too narrow resources inadequate	need anti-corruption agency at federal level legislate to broaden jurisdiction: other law enforcement agencies public sector serious misconduct parliamentarians appropriate funding: \$2.02 Million at present 9 staff (to 12 this year and 17 next year but this is still grossly inadequate)
	X	Search warrants: storage issues volume	more education law schools and law enforcement of judiciary current commonwealth powers
	xxxx	Controlled operations: consistency High Court decision pending	prompt to keep going with review/recommendations
	x	Warrant	rationalise law in relation to warrants procedure having regard to state projects such as Law Reform Commission Reports/Acts already in existence

Category	X = top priority x = second order priority	Problem	Suggested solution
Criminal Code	XXXx	Criminal Code: simple/complexity issues copyright	review – AGD more use of communication Commonwealth powers ‘suppression’
	Xxx	Chapter 2 Criminal Code and State uniformity	
	xxx	Need to review general principles in Cth Criminal Code especially in relation to fit with dishonesty	
		Criminal Code/Consistency	
		Reverse onus/absolute liability	
		Criminal liability: principled approach consistency balance criminal/civil absolute/strict liability (alternate liability)	
Sentencing	XXxxxx	Sentencing of corporate offenders: no statutory principles Sentencing Act (Criminal)	specific sentencing procedures for ‘corporate offenders’
	X	Federal Offenders: Portability of information about offenders/victims eg. Sex offenders: no gateway in-coming/out-going notification of movements convicted registered sex offender NB: Commonwealth policy reform – initiative to better manage State based registers not uniform	Central database or register sex offenders/victims: amalgamating the state registers corrections access international sharing of this information
	x	Special treatment of federal offenders	Victorian Terrorism Trial Prisoner: Classification/assessment equity issues in risk/needs assessment within corrections

Category	X = top priority x = second order priority	Problem	Suggested solution
			Standards of treatment setting Interpretation of standards for federal prisoners within state facilities – Victorian Charter of Rights
E-crime	XXXXXX	Technology/E-Crime resources Compliance (by eg. ISP always playing ‘catch up’ identity/fraud child porn	
	XXXXXX	E-Crime: mutual assistance	encouraging consistency harmonisation specialist tribunal to deal with E-Crime implementation of Model Criminal Code (remainder of ID Crime and Theft/Fraud)
		Child exploitation online	
		Cybercrime	
Information sharing	XXXXXXXX	Information sharing: information/intelligence exchange is affected by complex mix of FOI/HR/Privacy legislation/Judicial review that prevents it from taking place lives can be put at risk as a result of information not being exchanged	legislation needed to <u>compel</u> information exchange inter state/inter agency (when certain conditions are met) structure to be established to allow sharing of information between public sector agencies and with the private sector
	XXXX	Model (simplified legal structure) for information and intelligence sharing between public sector agencies and private sector (including inter-agency)	

Category	X = top priority x = second order priority	Problem	Suggested solution
Trial	XXxx	Human Rights	Cth statement of fair trial norms for federal defendants regarding criminal procedures Bring Crimes Act 1914 into a Procedural Code May need Cth to look at articulating 'fundamental' human rights norms and values for Cth criminal process because of risk of inconsistency across State and Territory courts
	xxx	Trials: difficulties getting things focussed education profession	
Research and statistics	XXXXXXXX	Justice Data – AIC; Justice Dept; ABS; Police; Corrections	National standards for information/data collection – greater consistency/comparability Where no or little information on federal offenders/victims and defendants – drill down further
Legal system	xxxx	Ensuring legislative framework exists and planned for over long-term Ensure resources Who responsible? Relevance	structure to allow continuing monitoring
Education	xxxx	Teaching federal criminal law/federal law generally	policy initiatives including careers better 'marketing' of Cth/Federal justice system/careers
		Education – Commonwealth legislation: academic level regulation level law enforcement level	

Category	X = top priority x = second order priority	Problem	Suggested solution
Over-criminalisation	xxx	Decriminalisation	removing 'old' laws poorly drafted laws etc – especially fraud offences – rationalisation general overarching offence Use of 'administrative' penalties or civil penalty systems aimed at looking at 'social problems' eg. DSS fraud
Director's liability	xx	Director's liability: OH&S impediments	Needs to be reviewed – Treasury/AGD?
Treaty	xx	Cth Code – International Covenants: uniformity	Victoria Charter of Human Rights, fair trial – Judiciary Act
Coordination	x	Legislation that is intended to work in complementary way not meshing as intended	early consultation re development of legislation intended to work in complementary way across jurisdictions
	x	Suppression orders: beyond state borders role of commonwealth	
		Cross border enforcement/issues eg. Extradition warrants	
Forensics	x	Federal leadership role re quality assurance for forensic procedures	standards audit data sharing sex offenders register
		Forensic procedures interaction must be addressed	National standards Database/communications/sex offenders registry

Category	X = top priority x = second order priority	Problem	Suggested solution
Human rights		Human Rights	must get the criminal profession involved from the start cannot just be left up to 'HR' practitioners

Summary of suggestions relating to law reform process

Involvement in Law Reform process

Participants commented that it should first be determined whether a legal solution (or a legal solution alone) is really suitable for any particular issue. They suggested that a social policy response should be considered before a criminal law one.

Participants commented that stakeholder consultation needs to be strategic ie targeted towards relevant groups. They suggested that academics should be involved because this would facilitate access to the latest information.

Consultation process

Participants commented that the Commonwealth does not need to use only one consultative model, and that the **method of consultation should be determined by the nature of the issue.**

They also noted that for success there must be political backing for any proposed change. Participants suggested that the Commonwealth can assist with the law reform process by emphasizing the need for clear definitions of key terms, a clear consultative process, acknowledgement of any contributions by stakeholders, reimbursement of expenses incurred by stakeholders, and providing stakeholders with certain rights of appeal if they believe their concerns have not been taken into account.

Use of technology

The participants commented that use of technology may allow for easier consultation.

Individual law reform issues

There was support for **evidence** based reform, and that evidence should be used to determine priorities. Participants noted a number of individual issues, including:

- Specialist courts for complex fraud.
- Further clarification of the purpose behind the legislation relating to money laundering.
- Clarification with regard human rights legislation, and the impact of State legislation in this area.

Perth Roundtable 10 September 2008

Perth Roundtable – 20 September 2008

Trinity College University of Western Australia

This part of the report comprises:

- list of participants
- overview of the discussion of the top issues and other matters given lower priority
- a table displaying the comments transcribed from the sheets of butcher's paper used in the roundtable, and
- a summary of discussion concerning the law reform process.

List of participants

Frank Morgan	Crime Research Centre
Thomas Crofts	Law School, Murdoch University
John Acres	Inspector of Custodial Services
Susan Anthony	Centrelink
Assistant Commissioner Wayne Gregson	WA Police
Cameron Mitter	Australian Federal Police
Elizabeth Needham	Barrister
Andrew Robson	Legal Aid
Catherine Eagle	CEO, Welfare Rights and Advocacy Service
Dr James Beven	Murdoch University
Wendy Murray	Director, Office of Crime Prevention WA
John Whitehead	AFP/AFP Association
Judith Fordham	Law Society of WA
Sue Ash	WA Council of Social Services
John Burrell	Deputy Director, Angelhands Inc
Ms Helen Leayr (facilitator)	Communication Link
Dr Tony Krone	Attorney-General's Department
Ms Kate Orange	Attorney-General's Department
Mr David Rees	Australian Institute of Criminology

Edited overview of discussions

High priority issues

Out of all the issues raised by the group as a whole, participants were asked to indicate which matter they gave the highest priority to addressing. The following table shows in descending order the priority allocated to each set of issues by the group.

The main issues in descending order of concern are:

- Information sharing for law enforcement
- Police investigative powers and procedures
- Social security
- New technology
- Sentencing
- The policy process
- Proceeds of crime
- Extradition
- Offender management
- Refugees

Information sharing for law enforcement

There was a call to review the interaction between laws for the protection of privacy and confidentiality and the need to share information for law enforcement purposes. It was stated that human rights issues are relevant to finding the right balance.

Concern that obstacles exist between levels of Government and between agencies at the same level of Government

Another issue placed under this heading is the need for an information collection plan and standardised definitions to allow for better comparative analysis

Police investigative powers and procedures

Participants were concerned about the law on the use of DNA and other methods for identification. In part, this concern also related to the ability for agencies to exchange information.

There was a general call to harmonise a range of police powers including those in relation to warrants and fingerprints.

- Provision ought to be made to allow law enforcement to issue notices to produce information against third parties such as banks where there is no need for a search by law enforcement to locate material, and

- Production orders should be obtainable from a Magistrate.

In relation to arrest some participants called for arrest on suspicion rather than belief.

Procedures for international cooperation should be improved.

Social security

There was concern about the resources devoted to the prosecution of Centrelink offences. There should be a focus on prevention strategies.

New technology

It was suggested that identification be required in order to purchase a mobile phone.

There should be consideration given to making internet service providers more responsible for the material that is posted on their sites.

Sentencing

Nationally consistent sentencing principles were supported.

The policy process

There was a call for the standardisation of offences and operating processes.

Proceeds of crime

Some participants suggested that change is necessary to prevent the unjust operation of proceeds of crime legislation. Discretion is necessary to avoid injustice.

Extradition

A complaint against extradition law is that it is too complex. The Attorney-General may not need to be involved in as many steps in the process.

Offender management

There was a call for greater access to diversion programs for federal offenders.

Refugees

There needs to be greater attention to the causes of crime where it exists among members of refugee communities in Australia. Dealing with people as unlawful non-citizens on conviction may produce injustices.

Perth Roundtable overall priority rating of issues – transcribed from butcher’s paper record

Category	X = top priority x = second order priority	Problem	Suggested solution
Information Sharing	XXXXXXxxxxxxx	Sharing of information (including intelligence) between Governments, States, Departments and Agencies	Standardisation of laws relating to privacy and confidentiality Boundaries Conjoined policy response Standardised information collection plan of both criminal statistics and social indicator information at regional level Standardised definitions (which allows for better comparative analysis) Outcome based reporting
	Xxx	Privacy	HR issues have become relevant to finding the right balance Victim/witness protection relevant but should not impede prosecution of accused. There needs to be a review of this issue. There is a need for greater standardisation of provisions relating to secrecy and release of information across agencies eg ATO, Centrelink There is a substantial shortage of analysts- if there was central homeland intelligence office this might allow for centralisation of analysis?

Category	X = top priority x = second order priority	Problem	Suggested solution
Police powers	XXxxxxx	Harmonisation of laws	Legislation regarding DNA Revision of identification laws generally Photo board evidence problem at Federal level Identification data-there are a number of different rules regarding the sharing of such data CRIMTRAC operations affected by the different State legislative regimes regarding records Abolish “Federalism” in this area More recognition that different substantive legislation leads to different outcomes between states.
	Xxxxxx	Investigative powers and procedures	More harmonisation on: minor changes to specific Acts warrants devolution fraud warrants privacy handover of information fingerprints Concern that privacy exception for law enforcement is not effective Crimes Act: insert notice and production provisions All investigative agencies need to be able to obtain Notices at agency level Production orders should be obtainable from

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
			magistrates Review of law relating to ID evidence which is “dogs breakfast” Greater use of video for ID evidence Reintroduce (course of conduct) s 29D between date offences Tax offences: Section 400.9: need laundering timeframe for lifestyle calculation Issue of use of tax information obtained under the <i>Income Tax Information Act</i> in criminal matters
	<p>Xxxxx</p>	Cautioning and arrest issues	Analysis of UK PACE provisions with regard to Australia Allow for arrest based on suspicion rather than belief Double jeopardy: allow for new trial where new technology can provide further evidence but NOT where prosecution has simply made a mistake Arrest periods: need to be extended to allow more investigation
		Overseas cooperation	The theoretical process is convoluted In reality there are many unofficial international contacts eg particularly with regard to child abuse. Not easy to defend legally.

Category	X = top priority x = second order priority	Problem	Suggested solution
Social security	XXxxxxx	Social Security	<p>Excessive CDPP resources devoted to social security fraud Centrelink practices and policies often contribute to people being overpaid Notional entitlements to another payment should be a defence The focus should be on best prevention strategies eg:</p> <p>Use of interpreters Explanation of key terms Debt prevention strategies Tax file declaration form-need box for person to tick if already in receipt of Centrelink benefits</p>
New technology	XXxxxxx	Investigational issues	<p>Need to produce identification in order to purchase mobile phones Increased protection of informants in controlled operations eg use of certificates Extension of investigative period beyond 4 hours Revision of 72 hr rule relating to computer seizures</p>

Category	X = top priority x = second order priority	Problem	Suggested solution
Sentencing	xxxxxx	Sentencing	There needs to be set of consistent (both Commonwealth and State) sentencing principles Proportionality should be an overarching principle Sentencing guidelines should be simple Need for spent conviction orders for Commonwealth offences at time of sentencing (which will involve legislative reform and training of magistrates).
Policy process	Xxxx	Shared policy process (both Commonwealth and State)	Need vision of end to end process-criminal justice process which involves shared practices and shared/agreed outcomes Standardisation of offences and operating processes Established shared and agreed outcomes Shared published policy framework Establishment of time frames
Proceeds of crime	Xxxx	Proceeds of Crime	Concerns there can be injustice Solutions include: Power for examination prior to restraining asset Search under no disclosure provision (s 225) Freezing notice provision in short term (WA) Look at cash seizure provisions used in the UK Look at unexplained wealth Look at definition of “accounting record”

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
			<p>Not used in mitigation where forfeiture and imprisonment/punishment occur together Provide judicial discretion to avoid injustice, particularly where property of mixed origin. Need to more probing of origin of asset</p>
Extradition	Xxx	Extradition	<p>Extradition too complex and inadequate Solution difficult because different countries have different requirements Is an allegation enough or do you need a prima facie case? AG should be taken out of equation as he/she is involved at too many steps. Review processes cause delay when a court could deal with the issue Need to take more account of treatment of accused in other country</p>
Offender management	xxx	Commonwealth prisoners	<p>There is a need to access diversion programs for commonwealth offenders eg drug court and alcohol programs, with federal offenders being allowed access to state programs.</p>
	x	Federal prisoners in State prisons	<p>Problems like WA refusal to hold Federal prisoners needs to be resolved Solutions include ensuring State systems have capacity for Commonwealth prisoners, more training for corrections staff, funding on capacity basis</p>

Category	X = top priority x = second order priority	Problem	Suggested solution
Refugees	Xxx	Refugees	With regard to offences, need to look at issues such as violent background, poverty, social dislocation Migration Act often unclear Unlawful non-citizens provision is a streamlining mechanism but could involve denial of justice and people may be vulnerable upon return to country of origin Allow for appeal process with continued residence in Australia
Cartel offences	Xx	Cartel offences	Need to ascertain whether conduct anti competitive Definitions in this area are uncertain Current law allows unmeritorious offence Possible solution: review of this area
Customs	Xx	Customs offences	Sanctions/penalties for such offences need a greater range eg on the spot fines for quarantine matters and maybe organising for offenders to pay fines once they have returned to country of origin
New crime threats	Xx	Standardisation of Laws	There are gaps emerging in legislation due to technology eg credit card fraud, ID crime, biological stem cell issues Need a proactive research centre to pre-empt requirements Need more interchangeability of roles eg State DPP v CDPP, police and courts/judiciary Need agreed timeframes

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
	X	Internet	There are problems with material that is designed to bypass spam filters ISP's should be required to implement protection
Trial	Xx	Procedure	Need to decide whether majority verdict can be used for Commonwealth offences Trial by judge alone should be available
	x	Trial procedure	There needs to be more pre trial disclosure Defence should indicate what facts in issue in trial Police/prosecution should provide disclosure (look at UK PACE model)
Victims of crime	Xx	Victims of Crime	Look at the impact of investigation and prosecution on victims Criminal records do not record acquittals on the grounds of mental incompetence (in WA can retain DNA) Victims have limited direct contact available to them There needs to be protection of victims who are not witnesses Needs to be harmonisation of State/Territory laws regarding this issue Need for legislative basis for protection of victims
Anti-terror laws	X	Anti terror laws	There should be review of these laws regarding interrogation and detention of non suspects in secret; this is in contravention of UN conventions

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
			Need transparent process for prescribing organisations Need review of detention times
Drafting	X	Simplification of Commonwealth law	Commonwealth law is too complex and convoluted Solutions include introduction of plain English, possibly involving the rewriting of the Crimes Act 1914 and the Criminal Code 1995
Child abduction		Child Abduction	There needs to be greater responsiveness and timeliness Realisation that such matters impact on international issues
Evidence		Evidence Laws	Problems with prosecution of Commonwealth offence using state based evidence laws which are different in each state, and which leads to different outcomes
Federalism		A new form of federalism?	With regard to things like Commonwealth intervention in NT, there should be more guidance on how this will work; not clear which legislation to apply Needs to rationalisation of federalism because economic crimes are not limited to one state and the impact of electronic elements on the way crime is carried out. Need to look at precedent of reference to Commonwealth of social security power Need to decide jurisdictional issues as to where offences should be prosecuted eg look at Cross Border Act where prosecution occurred at most

New voices

New Visions

New Directions

Category	X = top priority x = second order priority	Problem	Suggested solution
			<p>convenient venue Should look at possibility of one Criminal Code for whole of Australia; possibly for at least some offences such as e crime and child offences There are now both new capacities and new technology which makes for greater opportunity The number of committee's means there is a bottleneck at State AG level.</p>
		Compatibility of State laws	<p>There should be agreement on new laws as they are developed Need to work on compatibility before laws are decided eg in new areas such as GM laws and cybercrime</p>
National Police Certificates		National Police Certificates	<p>There is the question of whether pending charges or findings of not guilty should be included Solutions suggested included that pending charges should not be listed (possible exception for charges such as paedophilia) and more flexibility. Needs to be more recognition of impact on employment, reputation and privacy. EEO issues need to be taken into account</p>

Category	X = top priority x = second order priority	Problem	Suggested solution
Proceeds of crime		Clarification of Commonwealth/State responsibilities	Often responsibilities are blurred or uncertain eg with regard to Commonwealth/State proceeds of crime, sentencing Possible solutions include: Published position statements Enhanced agency networks Education programs at the operational level Outcome based reporting

Summary of suggestions relating to law reform process

Engagement in the process of law reform

Participants were asked to discuss how the Commonwealth can better engage the community in the process of law reform. The following ideas were generated by the group.

General issues of law reform

Participants suggested that a range of stakeholders should be consulted and this should include people at an operational and practitioner level, both inside and **outside** the legal field.

The participants suggested that in some areas both victims and perpetrators need to be consulted, and said that perpetrators have a valuable perspective as to whether the criminal justice system works. Participants supported the idea of more being spent on criminological research to determine whether the criminal justice is effective or appropriate for a particular issue, and for more effective research coordination.

Participants expressed supported for the roundtable concept and also suggested there should be a **regular** series of forums to consider law reform issues. Any law reform process needs to be supported by politicians through forums such as COAG. It was suggested that there needs to be a new “Federal approach”, which would look at new issues and take into account regional differences as it does so.

Consultation process

Participants suggested that to assist with the consultation process that AGD should have a liaison officer posted to every State and Territory. This would allow for feedback on law reform proposals to flow more easily and earlier in the process. They also suggested that AGD should produce executive summaries for all major law reform issues (at various stages of the law reform process) and that early drafts regarding law reform should be distributed for comment.

The participants were supportive of the idea of roundtables (and also public forums and debates) and suggested they be topic specific. They suggested the use of the internet and You Tube to get young people involved. They also suggested the use of “virtual” Think Tanks which would allow stakeholders to discuss ideas and proposals. They believed there needed to be a more proactive approach to identifying issues needing reform (legal or otherwise), which would make the issue of deadlines less important.

Participants emphasized that there should be as much early consultation as possible with stakeholders regarding early drafts, and this could include release of drafts through journals such as the Alternative Law Journal and the National Association of Community and Legal Aid Centres, and relevant Government and professional bodies.

Sydney Academic Roundtable 22 August 2008

Sydney Academic Roundtable – 22 August 2008

Boardroom Faculty of Law University of New South Wales

This specialist meeting was held to focus on the intersection of academic research and policy development. A wide range of academics with an interest in federal criminal justice held an open discussion of their work and ideas for reform with members of the Attorney-General's Department. This report represents a collation of the issues and ideas raised by the academics attending the roundtable.

List of participants

Professor David Dixon	Dean, Faculty of Law, UNSW
Professor Mark Findlay	Director, Institute of Criminology, University of Sydney
Emeritus Professor David Brown	Faculty of Law, UNSW
Professor Jill Hunter	Director, Indigenous Legal Education, Faculty of Law, UNSW
Professor Chris Cunneen	Global Chair in Criminology, Faculty of Law, UNSW
Nicola McGarrity	Gilbert and Tobin Centre of Public Law, Faculty of Law, UNSW
Associate Professor Andrew Lynch	Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, UNSW
Dr George Zdenkowski	Visiting Fellow at Faculty of Law, University of NSW and University of Tasmania
Alex Steel	Faculty of Law, UNSW
Associate Professor Gary Edmond	Faculty of Law, UNSW
Dr Michael Grewcock	Faculty of Law, UNSW
Dr Leanne Weber	School of Social Science and Policy, UNSW
Dr Arlie Loughnan	Law School, University of Sydney
Dr Richard Kemp	Psychology, Faculty of Science, UNSW
Dr Karl Alderson	Attorney-General's Department
Dr Tony Krone	Attorney-General's Department
Andrew Lawrence	Attorney-General's Department

Edited overview of discussions

Communication

- The Attorney-General's Department (AGD) could commission reviews as required and place small amounts of information in issues briefs.
- Constraints of academic writing may inhibit exchange. Ideas need to be carefully thought through and presented in accessible language. This is sometimes more important than producing an abstract, heavily footnoted paper.
- Other options for engagement include phone, use of one-page dot point summaries.
- There could be benefit in establishing a policy research unit.
- Consider model provided by the CrimNet listserv to enable interested people to be kept informed and to exchange information – small and contained audience already attracted to material on offer.
- Another important communication model is provided by *Criminal Justice Matters* produced by the Centre for Crime and Justice Studies see <http://www.crimeandjustice.org.uk/> This series provides an accessible digest of research and academic writing with direct relevance to policy development. It also allows interested people to be kept informed about Government initiatives and consultations.
- AGD could consider secondments to open up exchanges and networks – AGD could sponsor expert groups to be available in person or by phone to discuss issues – institutional seminars within AGD could also be utilised – the International Criminal Court provides a model for the holding of expert consultations and meetings.

Consultation

- Experience has been of being called in too late to make sensible comments.
- Currently policies are developed and journalists come to academics for comments and then criticisms may arise that have not been considered in the policy making process – then journalist goes to the Minister.
- It is important for academics to know what is being considered – some areas of government consult more readily for example, indigenous policy.
- Need to normalise drawing insights into the policy making process – without being dependent on academics to raise issues.
- Create systems that people want to be part of – establish a register or opportunity for discourse so that States and Territories want to join.
- Talking fora do not work so well.
- Ways to change existing culture include through education.
- Submissions to government inquiries should be recognised as publications for the Excellence in Research for Australia criteria, this would actively encourage academic involvement.

- Given current levels of interest in the Department the media should be used as a resource for disseminating information.
- Policy makers should use researchers in a similar way that journalists do for quick/informed commentary to accompany urgent policy debate.
- Mechanisms for exchange are required – want to see on-going relationships not high water marks – should be able to include seminars, blogs, ability to pick up the phone and canvass issues.
- Lesson from web-based learning is that people require engagement and feedback.

Deliberate law reform

- Current law reform model is one of immediate response law reform.
- Necessary to set new agendas and not just act responsively to operational demands – tackle awkward research areas – look at different levels – social democracy – governance and policy making.
- In era of globalisation, policy making transcends the individual nation state.

Developing policy

- It should be possible to canvass ideas as possibilities – however it is also understood that policy development is sensitive and has no real democratic legitimacy until endorsed by the Government of the day – hence the value of involving an institution that is distanced from Government.

Human rights

- Necessary for Commonwealth to reclaim agenda in relation to human rights obligations and ensure standards set for federal prisoners – this could set template to bring States and Territories into line.
- Constitutional right to jury trial – not well understood – no real federal measure of fairness for conduct of jury trials.

Institutions

- The kinds of issues looked at by research agencies Bureau of Crime Statistics and Research (NSW) and of the Australian Institute of Criminology (Commonwealth) can be limited, and there is clear opportunity for broader academic input to policy.
- An arm's length group may be useful to inform State/Territory and federal government – would need funding and infrastructure – may be made up of series of networks and advisory groups.

International issues

- Australia is reclaiming its international reputation.
- Overseas justice sector aid – could be much improved – in Pacific and elsewhere we need to try and influence aid delivery in criminal justice capacity building to recognise research which challenges the cost efficiency of resourcing the formal sector when there may be an alternative/indigenous sector with greater local law and justice outreach.
- May need to go beyond international treaties for definition of human rights standards.
- Border control and policing non-citizens – border crossing – international context and international arrangements are often inadequate – look to take leadership role – international frameworks not working particularly well – questions of mobility and the right to work – necessary to look beyond state interests.

New laws

- Concern at normalisation of anti-terrorism powers (ie use of equivalent provisions in other contexts eg to combat outlaw motorcycle gangs at a State level) requires careful consideration of spread of new models.

Research

- Research funding dislocation – also academics may currently get involved in a proposal half way through the development cycle and not see the end product.
- Create research networks using new technology – could have blog discussions – serves also as a repository of knowledge and discussion.
- Reconsider nature and composition of the Criminology Research Council.

Research-policy nexus

- Example given of study of police interrogation – police training from Canada introducing north American methods – as opposed to English model – both problematic – Australia has its own system of criminal justice and overseas models have to be applied carefully.
- The experience of the Home Office in the UK provides a good model informing policy – an internal research unit has over time provided really good work – this has also enabled robust links to be established with academia.
- Really useful research generated but of lessening value given emphasis on narrow evidence based research.
- Also vital to access critical evaluations of research – research must also be supported by police not good enough that research depends on the goodwill of a particular Minister.

Ideas submitted through
the Forum website
<http://www.ag.gov.au/forum>

Ideas submitted through website

Idea One

Provided by the Crime and Misconduct Commission, Queensland, to the Commonwealth Attorney General's Department for the 2008 Federal Criminal Justice Forum

On 21 August 2008 in Brisbane, officers from the Crime and Misconduct Commission (CMC) attended a roundtable discussion convened by the Commonwealth Attorney-General's Department and the Australian Institute of Criminology. This roundtable discussion was part of the consultation process for the Federal Criminal Justice Forum to be held in Canberra in September 2008.

Following on from that roundtable discussion, the CMC would like to provide further information detailing its specific recommendations that were briefly discussed for the amendment of Commonwealth legislation as it affects the work of the CMC.

Confiscation of proceeds of crime in Queensland

The *Criminal Proceeds Confiscation Act 2002* (Qld) (Qld Proceeds Act) is the governing legislation providing for the confiscation of the proceeds of crime in Queensland. It details two separate confiscation schemes, one that is conviction-based and the other that is dependent upon neither charge nor conviction. The latter scheme, commonly referred to as the 'civil confiscation scheme', is administered by the CMC¹ whilst the Queensland Director of Public Prosecutions has responsibility for the administration of the conviction-based scheme.²

Amendments to the *Family Law Act 1975* (Cth)

Recent amendments to the *Family Law Act 1975* (Cth) (Family Law Act) have enacted provisions to prevent persons from using family law proceedings as a device to place property beyond the reach of confiscation proceedings under the Commonwealth's *Proceeds of Crime Act 2002* (Cth) (Cth Proceeds Act).

The amendments require a court to stay pending family law proceedings for property settlement once notified of the existence of a proceeds of crime order.³ The amendments also allow the court to set aside property settlements where a proceeds of crime order has been made against the property.⁴

A 'proceeds of crime order' is defined under the Family Law Act to be a restraining order or forfeiture order under the Cth Proceeds of Crime Act.⁵ As such, the application of the aforementioned amendments to the Family Law Act do not extend to proceeds of crime orders made under corresponding State law including the Qld Proceeds Act.

¹ Section 4(5) of the *Criminal Proceeds Confiscation Act 2002* (Qld).

² Section 4(4) of the *Criminal Proceeds Confiscation Act 2002* (Qld).

³ Section 79C *Family Law Act 1975* (Cth).

⁴ Section 79A(1)(e) *Family Law Act 1975* (Cth).

⁵ Section 4 *Family Law Act 1975* (Cth).

Recent amendments to the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) to give priority to confiscation proceedings over bankruptcy proceedings⁶ are not similarly limited, with the Bankruptcy Act defining a 'proceeds of crime law' as the *Proceeds of Crime Act 2002* (Cth), the *Proceeds of Crime Act 1987* (Cth) or a corresponding law.⁷ A 'corresponding law' is defined by the *Proceeds of Crime Act 2002* (Cth) to include the *Criminal Proceeds Confiscation Act 2002* (Qld).⁸

Recommendation 1: The Commonwealth extends the operation of the relevant provisions of the *Family Law Act 1975* to corresponding State laws such as the *Criminal Proceeds Confiscation Act 2002* (Qld). This would involve expanding the definition of a 'proceeds of crime order' in section 4 of the *Family Law Act 1975* (Cth) to include proceeds of crime orders made under corresponding State law.

Forfeitability of Superannuation Assets

Superannuation benefits are 'property' within the meaning of the *Criminal Proceeds Confiscation Act 2002* (Qld) and subsequently, may be restrained. However, there is considerable doubt as to whether funds held in a superannuation account are forfeitable. The *Superannuation Industry (Supervision) Regulations 1994* (Cth)⁹ prevent a trustee of a superannuation fund from recognising any charge over superannuation benefits and would seem to prevent any forfeiture order from taking practical effect.

Legislation at both the State and Commonwealth level enabling the forfeiture of superannuation benefits are applicable only in circumstances of public officers acting corruptly and do not apply to the circumstances seen in most confiscation matters.¹⁰

A recent matter in Queensland involved an individual depositing a large sum of cash held in a bank account into a superannuation product immediately after his arrest but prior to a restraining order being obtained. The payment into the superannuation product appears to have been intended to protect the funds from possible forfeiture.

The applicability of proceeds of crime legislation to property held in a superannuation fund will be dependent upon changes to Commonwealth superannuation legislation permitting a trustee to pay all or part of accrued superannuation benefits in satisfaction of a proceeds assessment or forfeiture order.

It is noted that the Commonwealth Attorney General recently announced changes to the *Bankruptcy Act 1966* (Cth)¹¹ which ensure that superannuation contributions made prior to bankruptcy in order to defeat creditors are now recoverable by the trustee in bankruptcy. It may be that similar amendments are necessary to recover superannuation contributions made with the proceeds of illegal activity.

⁶ See sections 58A, 114A and 114B of the *Bankruptcy Act 1966* (Cth).

⁷ Section 5 *Bankruptcy Act 1966* (Cth).

⁸ See section 338 *Proceeds of Crime Act 2002* (Cth) and regulation 4 *Proceeds of Crime Regulations 2002* (Cth).

⁹ Regulation 13.13 *Superannuation Industry (Supervision) Regulations 1994* (Cth).

¹⁰ See the *Public Officers Superannuation Benefits Recovery Act 1988* (Qld) and the *Crimes (Superannuation Benefits) Act 1989* (Cth).

¹¹ See Attorney General's media release 138/2006 made 27 July 2006.

Recommendation 2: The Commonwealth make the necessary amendments to relevant superannuation legislation to enable the recovery of superannuation contributions made with the proceeds of illegal activity, at both the State and Commonwealth level.

Idea Two

Diversion and sentencing

I am not only a senior academic researcher at Murdoch University, but have a conviction recorded against me in 1992 in the supreme court of WA for sexual assault. I have been involved with the Chief Magistrate and his deputy examining alternative restorative and transformative practices as well as working among remote indigenous communities in response to their willingness to have alternative healing circles in place to assist them to reduce reoffending.

My thesis and major writings have been around the notion of being perpetually seen as guilty, with its ramifications for continued citizenship and positive social roles. I would like to see the committee take on board some of the ideas now surfacing throughout the UK especially from Prince Charles' charity 'Clinks' and to the attention that they have given to unlocking the potential of ex-prisoners. Throughout society we have fear, but how it is promoted and managed is always in question. Here I suggest that the government seeks ways in which it can unlock the potential of ex-prisoners, use them as role models, seek to find out more on how others can do likewise and run away from crime and replicate their story line. The notion of being forever guilty is one that denies the human rights and respect of people who have been through their sentence, survived and made every effort to rehabilitate themselves and those around them.

My voice is that of a service user, a service provider, an academic and an ex-prisoner. I doubt if you will have any other applications for participation from a senior convict criminologist and you would be the first government to have a person such as me provide support, advice and encouragement to the discussions on how to best deal with the current trends in the criminal justice system.

Idea Three

Victim's rights

In my role in Good Shepherd Social Justice I have met several women trafficked into Australia. I am concerned at the ad hoc way in which women trafficked into Australia access crimes compensation. The women I have met are not particularly fluent in English, have no understanding of crimes compensation in Australia, and are surprised that they, who have been so vulnerable and powerless, actually have rights under Australian law. I would like the Forum to explore automatic crimes compensation for victims of human trafficking.

Idea Four

Prisoner Transfer Agreement with Indonesia

I believe that the Australian government must act quickly to finalise a Prisoner Transfer Agreement with Indonesia for the following reasons:

- Australians detained in Indonesia are forced to live in appalling conditions. E.g. There is no sewage system. Poor nutrition. The cells are contaminated with overflowing waste, rats, snakes. An Indonesian prison sentence is a death sentence.
- Indonesia's judicial system is notoriously corrupt as observed by the UN, Transparency International and the Australian government. There are Australians who are possibly innocent, but have been sentenced without a proper and fair trial. Australian prisoners must be brought back to Australia so they can survive their sentence while waiting for Indonesia to improve their justice system.

Student Essays Monash University Law School

Student Essays

Our Federal Criminal Justice System: A Vision

Allison Jones, LL.B. Law Student, in Federal Criminal Law 5112, Faculty of Law.
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This paper was submitted in satisfaction of a research requirement of the above course and was awarded a High Distinction grade, 2008

Proposal: “That the Australian Federal Constitution (‘the Constitution’) be amended to assign to the Commonwealth plenary power with respect to criminal law and procedure in Australia”.¹²

Introduction

Advances in technology, globalisation and far greater freedom of movement have opened up traditional jurisdictional barriers and with threats to our national security lingering in the air, there are questions brewing about how Australia’s Criminal Justice System should evolve to meet these challenges head on. The effects of climate change, rapid technological and scientific advances, and world political and economic shifts will also loom large on the criminal law agenda in the future.

Nine separate jurisdictions in Australia dealing with the same subject matter can cause fragmentation, overlap and inconsistency in some areas of criminal law. Such a state of affairs is no longer viable and is set to get more even more complicated.

It is of interest to note that our current Labor government appears to support a national approach to criminal law. Principle 14 of the ALP’s National Platform endorses the creation of national uniform criminal laws, claiming that such an approach offers significantly better outcomes.¹³ Rumblings of a proposal to formally shift power to the Commonwealth, by amending the constitution, have not yet been heard. However, the government has already shown a keen interest in the future direction of the criminal law, evidenced by the Minister for Home Affairs, Hon Bob Debus, hosting the Federal Criminal Justice Forum this September to generate ideas about the future of our Federal Criminal Justice System.¹⁴

Defining the proposal for change

Assigning ‘plenary power’ to the Commonwealth with respect to criminal law and procedure would provide the Commonwealth with *unlimited* legislative capacity to make laws in the area of criminal law and procedure,¹⁵ in stark contrast to their current *limited* ability to make criminal laws under section 51 of the constitution. Further, any amendment to the Constitution will have to comply with the onerous procedures laid down in section 128 of the Constitution.¹⁶

¹² This will be referred to as ‘the proposal’ throughout this paper.

¹³ Australian Labour Party, *ALP Platform and Constitution 2007* (Canberra, 2007)

¹⁴ Australia, Minister for Home Affairs (Bob Debus) 2008 *Federal Criminal Justice Forum: Minister’s Welcome* <<http://www.ag.gov.au/forum>> (August 2008)

¹⁵ Butt P, *Concise Australian Legal Dictionary* (3rd Ed, LexisNexis Butterworths, Australia, 2004), p332

¹⁶ Australian Constitution s 128

The Vision

Section 51 of the Constitution will be amended to include a new head of power for the Commonwealth, namely to make criminal laws and procedure for Australia. State, territory and Commonwealth elected representatives will collaborate on a package of new uniform Commonwealth legislation codifying the substantive criminal law, criminal procedure, sentencing and correctional issues. New joint intergovernmental committees will be established to facilitate a pro-active approach to ironing out differences between jurisdictions and to guarantee that individual state and territory interests will be taken into account in reforms, amendments and criminal justice initiatives.

There will be a lengthy transition phase, where the Criminal Justice System will undergo a complete overhaul to complement this shift in power. Criminal jurisdiction will be invested in Federal Courts and judicial officers across the country, existing courts modified to cater for custodial arrangements, new courts built and in some instances existing state courts taken over through negotiation with the states. State and territory prison and correctional systems will come under a Commonwealth regime. Perhaps the most controversial, the Australian Federal Police (AFP) will undergo a complete restructure to absorb state and territory police forces, much the same way the AFP take responsibility for community policing in the Australian Capital Territory (ACT).

Federal Criminal Law – From Teenager to Adult

Approximately 90 per cent of criminal activity occurring in Australia falls within the responsibilities of the states and territories, with 10 per cent falling within Commonwealth responsibility.¹⁷

The Commonwealth currently does not have a formal head of power to make criminal laws under section 51 of the Constitution. However, there are clear indicators that it was in the contemplation of the framers of the constitution that there would be federal criminal laws, section 120 of the Constitution, for example, proscribes that States must make provision for the detention of persons accused or convicted of federal offences.¹⁸ States and territories do, however, still carry the burden of adjudicating criminal matters, administering sentences and imprisoning convicted persons.¹⁹

Over the years, the Commonwealth's ad hoc expansion of federal criminal laws has reflected the government's national priorities of the day. Following federation the Commonwealth enacted the *Customs Act 1901* when protection of our borders was high on the agenda. Also, the timing of the *Crimes Act 1914*, enacted when Australia was at war, reflects the Commonwealth's interest in protecting the government's infrastructure and establishing support of the Defence Force at that time. Even the Commonwealth establishing its own law enforcement agency (the AFP) and prosecution body (Commonwealth Department of Prosecutions) was a result of the Commonwealth responding to a new era of organised crime, following Royal Commissions revealing the limited reach of conventional state based enforcement agencies.

¹⁷ Australia, Australian Law Reform Commission, *Same Crime Same Time: Sentencing of Federal Offenders*, Report 103 (2006)

¹⁸ Australian Constitution s 120

¹⁹ Section 77 (iii) of the Australian Constitution allows Parliament to invest state courts with Federal jurisdiction and Section 39(2) of the *Judiciary Act 1903* (Cth) has invested state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions.

Up until recently, it was presumed that the states were better placed to carry out the function of enacting criminal laws for their own regions, unless there was an issue of national or international concern, such as offences against the Commonwealth government, border control, national security issues or an offence with an international aspect. Some still hold this view passionately. However, having reached a point in time where there are significant challenges and demands facing our Criminal Justice System (outlined below), it is clear the Commonwealth will need to again respond, and this time the response will require full power to legislate uniformly across the country.

States

To deflect criticism that Commonwealth intervention into this function is merely opportunistic federalism, it needs to be shown that this shift is necessary to satisfy national needs and is not simply for ideological or political purposes.²⁰ The Commonwealth is obviously better placed to enact criminal laws within their traditional domain, where the interests affected are predominately that of the Commonwealth. The contentious issue is whether it is suitable that the Commonwealth enacts all criminal laws in general. Canada is a useful example of a common law based country that opted for centralised criminal law making.

Canada

Unlike Australia, section 91 (27) of the *Constitution Act 1867* in Canada, provides that the enactment of criminal law is within the exclusive jurisdiction of the Federal Government in Canada, with the *Canadian Criminal Code* applicable uniformly throughout the entire country.²¹ Despite their inability to enact criminal laws, Canadian provinces are responsible for the administration of criminal courts within their respective provinces.²² Provinces have a limited power to introduce quasi-criminal offences²³ and the prison system is split so that offenders sentenced to two or more years go to federal penitentiaries while those with lighter sentences go to provincial prisons.²⁴

It has been argued that federal legislators, such as Canada, are not as attuned to the priorities and customs of local communities and local law enforcement agencies.²⁵ In Australia this is of particular importance in smaller states like Tasmania and regions with unique landscapes and socio-demographics like the Northern Territory. State law makers are also said to be more directly accountable to local voters in comparison to federal legislators, thus state's enacting criminal law can be said to provide a firm barrier to the dominance of the majority.²⁶

This is not something that can not be remedied through states and territories engaging in a consultative process with the Commonwealth prior to legislation being passed. There is no doubt that this may tack on extra time to the law making process, but surely it is preferred that discrepancies in state and territory perspectives on laws are ironed out and made into one single

²⁰ Twomey A, 'Aspirational Nationalism or Opportinistic Federalism?' [2007] *Quadrant* 38

²¹ Canada: About Government, <http://www.parl.gc.ca> (August 2008)

²² Section 92 (14) of the *Constitution Act 1867* (Canada) provides that the provinces are delegated the power to administer justice, "including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdictions, and including procedure in civil matter in both courts."

²³ Canada: About Government, <http://www.parl.gc.ca> (August 2008)

²⁴ Section 91 (28) of the *Constitution Act 1867* gives the Canadian Parliament exclusive power over penitentiaries and section 91 (6) gives the provinces power over the prisons. Canada: About Government, <http://www.parl.gc.ca> (August 2008)

²⁵ Bouck, Canada's Dysfunctional Criminal Justice System, 24 February 2008

<<http://www.slaw.ca/2008/02/24/criminal-law/>>

²⁶ Id.

law as opposed to joint committees having to bridge gaps and inconsistencies among various state laws further down the track. There is always the risk that the Commonwealth will fail to adequately reflect the needs of all states and territories in enacting a criminal law, however, given we are no longer isolated to our regions and have full freedom of movement throughout our country there is really no pressing reason for criminal laws to be localised.

In Canada the principle of responsible government is undermined with regard to the criminal law. Given it is the executive branch of each Canadian province that administers their criminal laws, the federal executive are in no position to advise on how the laws will be administered in the provincial criminal courts. Therefore, this means that legislating is done in the dark as the federal legislators are deprived of the advice on the effectiveness of the legislation from an executive branch of government who is set to administer the proposed laws.²⁷ The vision does not propose such a set up as this is clearly unacceptable.

A positive side effect of Australian state and territory governments enacting different laws to other states, is that it provides for an environment of experimentation in ways to tackle social problems and provides for mutual learning among the states in a way that could not occur if one central government made all laws.²⁸ It also allows for governments to learn from others mistakes, the controversial Western Australian Mandatory Sentencing laws being one such example. I reject this argument wholeheartedly as with proper collaboration, planning and consideration the Commonwealth and States are likely to come up with more innovative laws than one legislature alone, and besides the criminal law should not be approached with a 'trial and error, live and learn' attitude when our citizens' liberty may be at stake.

Future Pressures

With the uncertainty and change the 21st century is set to bring, national law enforcement agencies, such as the AFP, must come up with innovative strategies in crime 'prevention' as opposed to crime 'reaction'. In November last year the AFP hosted a forum entitled 'International Policing Toward 2020' ('AFP Forum') where the impact of the geo-political landscape, the science and technology revolution and environmental concerns were highlighted as likely contributors to shaping policing in the future.²⁹ I will focus on four key effects, namely globalisation, advances in technology, national security concerns and the environment. Professor Sohail Inayatullah from Tamkang University (Taiwan) warned the international community must not be overwhelmed by the magnitude of change but must move now to adapt, innovate and integrate.³⁰

Globalisation

Globalisation can be defined as a process in which geographic distance becomes a factor of diminishing importance in the establishment and maintenance of cross border economic, political and socio-cultural relations.³¹ As P.N Grabosky points out 'the global village has its dark alleys.'³² It is within these dark alley's that crime will continue to flourish beyond the reach of

²⁷ Bouck, Canada's Dysfunctional Criminal Justice System, 24 February 2008
<<http://www.slaw.ca/2008/02/24/criminal-law/>>

²⁸ Id.

²⁹ Australia, The Australian Federal Police, *International Policing Toward 2020: The Outcomes* (2007) 1

³⁰ Ibid at 6.

³¹ Lubbers R, Globalisation, Economics and the Real World, March 1998

<http://www.mgimo.ru/files/2004/kafedry/mirec/konf_2-12-05/global_econom.pdf> (August 2008)

³² Grabosky P 1998. *Crime and technology in the global village*, paper presented at the Internet crime conference, 16-17 Feb 1998

the law unless uniform laws can be implemented and enforced without jurisdictional limitations. It is on this platform that my vision could aid in combating the challenges in criminal law that comes with the rapid mobility of people, money, information, ideas and commodities.

In this spirit, it is suggested that it is of the utmost importance in the ever increasing globalised community, that we do not cling to our outdated federalised criminal justice system if it is simply going to inhibit national and international solutions. Indeed, Dr Keith Suter, Social Commentator at the AFP forum suggested that the upcoming era will see the decline in patriotism, with people feeling more loyalty to brands and logos than even their own countries,³³ further reiterating that this effect should not be overlooked.

Advances in technology

With the volatility and transient nature of evidence, global reach, speed at which crimes are committed and anonymity in technology based crime, don't we have enough troubles? Throw in deliberate exploitation of cross jurisdictional differences by perpetrators into the mix and Houston, we have a problem. The internet has not only created new crime but has also facilitated new means by which people can commit existing crimes. Such rapid developments in technology may also lead to growth in identity theft, fraud on major financial markets and cyber-terrorism on government infrastructures. Isn't it difficult enough to cope with the transnational dimension, without wasting precious resources in sorting out internal inconsistencies within our own borders?

The Environment

Another key area predicted to be on the future criminal law agenda identified by International Futurist, Mr Watts Wacker, at the AFP forum, is water crime.³⁴ Mr Chris Abbott, Oxford Research Group, also recognized that legal mechanisms in relation to carbon trading and corruption or fraud of this system are likely to develop in the future.³⁵

National Security

There will not only be the direct issue of legislating for the further criminalisation of environmental misbehaviour but also the ramifications of climate change on the political stability of states and economic progress which will effect national security.³⁶ As Professor Alan Dupont from the University of Sydney pointed out at the AFP Forum, climate change may increase the likelihood of more fragile and failing states, accelerate the flow of refugees and fuel terrorism if environmental problems disenfranchise populations.³⁷ Australia is a large land mass completely surrounded by water, our borders are difficult to protect and with the issues touched upon here this is only going to get more difficult.

Inconsistency in the Application of Federal Law by State Courts

The need for uniformity in the criminal law and procedures of Australia 'in general' is discussed and highlighted throughout this paper. I now turn to a specific inadequacy of the way our current system operates. This serves to further highlight the need to adopt the vision.

³³ Australia, The Australian Federal Police, *International Policing Toward 2020: The Outcomes* (2007) 19

³⁴ Australia, The Australian Federal Police, *International Policing Toward 2020: The Outcomes* (2007) 5

³⁵ *Ibid* 16.

³⁶ *Id* 17

³⁷ *Id* 15

Currently, there is a dual Criminal Justice System at work in Australia. There are state and territory systems dealing with offences against their own laws, operating independently of each other and using their own procedural provisions for conduct of the matters and sentencing of offenders through their own courts. Then there is a Federal system that deals with offences against the Commonwealth and does not have its own procedural structure, but rather operates within the framework of the state and territory systems. It is not that the state and territory courts have drastically different techniques in judging cases and in the interpretation of the Commonwealth legislation, the problem lies in the fact that the courts must still interpret its own legislation regarding procedure, thus causing inconsistency overall.³⁸

Although federal offence provisions predominately provide for only two types of sentencing options, fines and imprisonment, many other state sentencing options are 'picked up' by the *Crimes Act 1914* (Cth)³⁹ and can be legitimately applied to federal offenders. However, as the sentences available throughout states differ, this in turn means a federal offender in ACT or New South Wales (NSW) could have the option for weekend detention yet this would not be available for an offender having committed the same crime in Victoria.⁴⁰ It should be noted that the constitutional soundness of this inconsistency has been put to rest by the High Court.⁴¹

In favour of the current system, is the notion that state and federal offenders will be housed side by side and so their punishments should be assimilated and further the convenience of hearing combined state and federal matters together appeals to practicality.

Although consistency is only one of five core values of sentencing it is an important one. Upon review of this area, it becomes apparent that the legislature has essentially sacrificed procedural uniformity for the cost effective, convenient option of state court's administering federal criminal law. This is all well and good, however, it fails to recognise the current and emerging pressures on the Commonwealth outlined above. With these pressures the federal criminal law has already expanded its coverage into areas such as terrorism, transnational crime, cyber crime and international sex offences and it remains to be seen whether these discrepancies, although constitutionally sound, should nevertheless be remedied to uphold the fundamental legal principle of equality before the law. In addition, an expansion of federal criminal laws is also likely to overload the already clogged state court systems and cause unacceptable delays in both state and federal systems.

In 2006, the Australian Law Reform Commission's Final report, *Same Crime, Same Time: Sentencing of Federal Offenders*, was published making several recommendations aimed at reducing inconsistencies in the application of federal criminal law across the jurisdictions.⁴² The report should be applauded for identifying the deficiencies and attempting to devise improvements.⁴³ On the other hand, the report endorsed the existing arrangements, claiming they

³⁸ Ross D, 'The Theory: The Present and The Future of Criminal Law in Australia' (2004) 1 *IJPS*

³⁹ s 20AB of the *Crimes Act 1914* (Cth) picks up and applies to federal offenders certain sentencing options available under state and territory law. Some of these options are specifically identified by that section, while others must be prescribed by federal regulation.

⁴⁰ Australia, Australian Law Reform Commission, *Same crime, different time? Inadequate federal sentencing need reform*, Media release 3 February 2005 (August 2008)

⁴¹ *Leeth v Commonwealth* (1991) 174 CLR 455

⁴² Australia, Australian Law Reform Commission, *Same Crime Same Time: Sentencing of Federal Offenders*, Report 103 (2006)

⁴³ Such as enacting a separate Federal Sentencing Act that is clear and logical to aid in consistency across jurisdictions and establishing a Commonwealth Sentencing Database, designed to provide judicial officers with reliable, accessible and up-to-date information on penalties imposed for breaches of Commonwealth laws.

had generally ‘withstood the tests of time, convenience and economics’⁴⁴ suiting the geographical distribution of the Australian population, but ultimately failing to give sufficient weight to the challenges our nation faces.

I respectfully disagree with this position. Surely precious resources dedicated to law reform are better utilised in preparing our legal system for the diverse and monumental changes about to affect us in the near future, rather than for devising half hearted solutions by dancing around our federal structure.

Pro-active vs. Reactive

The pressures outlined above have one key thing in common, they require a pro-active, consistent and uniformed national approach. Unfortunately, the federal nature of our criminal law makes for a very reactive approach to collaborative efforts.

Currently, there are methods to assist in uniformity and consistency in the application of the criminal law throughout Australia without alerting the words of the Constitution. Unfortunately, even collectively, these mechanisms are unlikely to fulfil the growing need for consistency in the application of all criminal laws throughout Australia. As discussed below, they may attain consistency in special areas of concern (like terrorism) and assist in bridging the gap for law enforcement agencies in multi-jurisdictional crimes, however, they are incomplete, reactive solutions and no replacement to what the Commonwealth could do if it had full power to legislate.

Existing Commonwealth Heads of Power and Referral

It cannot be denied that the Commonwealth has already found ways to stretch their allocated heads of power to enact new criminal laws and that the High Court’s expansive reading of the certain powers, the external affairs and corporations power in particular, provides future scope for new criminal laws to be enacted far beyond traditional areas.⁴⁵ However, as demonstrated by the terrorism legislation, the Commonwealth may still require the states and territories to remove lingering doubt about the validity of such laws by seeking a referral of powers under section 51 (37) in order to be confident they can withstand constitutional scrutiny.

It is one thing, in the current international climate, for our states and territories to be persuaded to refer powers to facilitate a national approach to combat terrorism, it is another for our states and territories to oblige the Commonwealth in the referral of powers relating to other less controversial issues. In fact, in order to avoid any unintended displacement of state or territory laws the ‘Terrorism laws’ referral text includes provisions dealing with consultation and agreement with the states and territories on future amendment of the Federal Terrorism Offences and the possible rollback of the offences if need be.⁴⁶ This clearly indicates that the states will be willing to co-operate when necessary but they will not be surrendering law making power easily or completely. The Murray-Darling Basin debacle between the Commonwealth and Victorian governments last year is prime example of where failure of one state to refer powers can undermine and delay a national based approach.⁴⁷

⁴⁴ Australia, Australian Law Reform Commission, *Same Crime Same Time: Sentencing of Federal Offenders*, Report 103 (2006) at para 3.7

⁴⁵ *XYZ v The Commonwealth* (2006) 227 ALR 495

⁴⁶ Williams D, ‘The War Against Terrorism’ [2002/2003] *NSW Bar News* 42

⁴⁷ *Id.*

Model Codes and the Adoption of Uniform legislation

If model codes and uniform legislation was enthusiastically adopted the proposal may not be as urgently required. In a federal system like Australia's, where most of the criminal law and procedure lies with the states, systematic reform is a messy business.⁴⁸ The adoption of the *Commonwealth Criminal Code 1995*, has been slow coming with the Commonwealth being the only jurisdiction to have significantly codified the law, the ACT adopted it but only partially implemented it and NSW taking a piecemeal approach incorporating substantive chapters of the code into pre-existing criminal law legislation. Queensland has largely ignored the code and undertaken separate review and amendments of its own code, an example of the inherent difficulty in getting the code jurisdictions⁴⁹ to disregard their familiar 19th century principles in favour of common law based general principles.⁵⁰ It is not as though the states and territories did not have their say either, there were representatives from each state on the Model Criminal Code Officers' Committee.⁵¹

Intergovernmental Negotiations and Agreements

Under my vision, these will be more likely to take place before national legislation is enacted rather than in order to plug gaps and bridge inconsistencies. There is no doubt that joint committees and agreements have assisted in facilitating uniformity within the criminal law. However, it is hoped that the Council of Australian Governments (COAG) and the Standing Committee of Attorney-General (SCAG) will be able to take on a more pro-active role in facilitating cooperation and harmony in the criminal law under my vision.

Judicial Review by the High Court

The High Court can come up with rulings that apply across all jurisdictions and even reinterpret legislation to give meaning to the concepts in the *Criminal Code*. It would be wonderful if we could have the High Court on speed dial to get a judicial opinion on every inconsistency, jurisdictional language difference and differing concept between Australia's various jurisdictions. But to have to wait for a suitable matter to come before the High Court to get a 'national approach' on a criminal law issue is beyond reactive and it is not something that should even remotely be relied upon to solve our problems.

Law Enforcement – Joint Task Forces

Even before 9/11 there was no shortage of joint taskforces between respective state forces and state and federal law enforcement agencies in response to the emergence of technology based and cross border crime. Post 9/11 even more initiatives, particularly centering around terrorism and transnational crime have been developed. One such example is the Australian High Tech Crime Centre established in 2003 and hosted by the AFP, providing a coordinated approach to combating serious, complex and multi-jurisdictional technology enabled crimes, especially those beyond the capability of a single jurisdiction.⁵² Uniting police forces under the vision is only going to increase co-operation and coordination of interstate investigations. The prosecution of multi-jurisdictional offences will be less complicated as the procedural requirements of one jurisdiction, the Federal, will need to be met. On this point, I note that the Standing Committee of the Attorney General and Australasian Police Ministers Council Joint Working Group on

⁴⁸ Kirby M, 'Criminal Law Futurology' [2005] (17) 1 *Current Issues in Criminal Justice* 123

⁴⁹ Western Australia, Queensland, Tasmania and the Northern Territory

⁵⁰ Goode M, 'Codification of the Criminal Law,' (2004) 28 *Crim LJ* 226

⁵¹ Id.

⁵² Australia, Australian High Tech Crime Centre <<http://www.ahtcc.gov.au/>> (August 2008)

National Investigation Powers in 2003 recommended model laws for a national set of powers for cross-border investigations covering controlled operations, assumed identities, electronic surveillance devices and witness anonymity.⁵³ Under my vision, there will be one uniform set of powers to be applied nationally.

Limitations of the Vision

The Vibe of Constitutional Amendment in Australia?

The constitution aims to provide sufficient political power to the government to perform the will of the people, while at the same time limiting that power to ensure the liberty of the people is not compromised.⁵⁴ If a government was ambitious enough to initiate this proposal under section 128 of the constitution certain conditions would have to be met, namely a bill would have to be passed by an absolute majority in each House of Parliament, followed by a referendum being accepted in a majority of the states as well as an overall majority of all of the electors votes.

Based on Australia's track record a constitutional change of this magnitude is unlikely. However, to justify this by trotting out the low 8 out of 44 rate of successful Australian referendums⁵⁵ is insufficient in itself, though a closer look at the trend in referendum voting is rather telling.

Firstly, according to a Parliamentary research paper, 'Constitutional Referenda in Australia' (2002), Australian referenda voters have been cautious and conservative.⁵⁶ Success in amending the constitution appears more likely if the referendum relates to social issues or are 'tidying up' machinery matters.⁵⁷ Voters have shown to be unsupportive of altering aspects of the federal system if they perceive its basic structure to be under threat.⁵⁸

Ensuring the protection of the colony was a notion that was drummed into voters in the Federation referenda and over the years state leaders following suit in consistently warning voters against Commonwealth intrusion on state powers.⁵⁹ A staggering 21 attempts to increase Commonwealth power have been rejected and another 2 attempts regarding Commonwealth involvement with local government (1974 and 1988) have also failed.⁶⁰

A reform to give the Commonwealth plenary power with respect to criminal law and procedure clearly involves the states and territories surrendering one of the most significant legislative powers they have and one that goes to the very heart of our society. Given Australia's reluctance in the past to approve power shifts to the Commonwealth, one would think that if it was to be accepted by the Australian public there would have to be a considerably strong case for a change of this nature. Despite the inadequacies in need of addressing and pressures of the 21st century, it still appears unlikely at this stage that a referendum for this proposal would prove successful with the Australian community.

⁵³ Australia, Standing Committee of the Attorney General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, Cross Border Investigative Powers for Law Enforcement (2003)

⁵⁴ Miles R, 'Matters of the Heart and the Heart of the Matter,' (2002) 25 *Alternative Law Journal* 53

⁵⁵ 'Warnings About Constitutional Reform', (2008) 33 *About the House* 64

⁵⁶ Parliament of Australia, *Constitutional Referenda in Australia*, Research Paper 2 (1999-2000)

⁵⁷ Parliament of Australia, *Constitutional Referenda in Australia*, Research Paper 2 (1999-2000)

⁵⁸ Id.

⁵⁹ Miles R, 'Matters of the Heart and the Heart of the Matter,' (2002) 25 *Alternative Law Journal* 53

⁶⁰ Parliament of Australia, *Constitutional Referenda in Australia*, Research Paper 2 (1999-2000)

Police Culture

Given the rich history and cultural differences between police forces I predict that there would be strong resistance by them to amalgamate. Although not ideal, the vision would still work without taking this step by simply investing police forces with federal power rather than state. Some uniformity in procedures should be insisted upon however.

Cost

The cost of each of our states and territories legislating on the same matters would be saved. However, the initial costs of 'the vision' would be substantial. It can be justified on the grounds of being a necessary investment in our future.

Conclusion

Given Australian's past attitude in referendum's, an attempt to amend the constitution by referendum could be considered both grandiose and futile. Irrespective of this, the proposal is a highly desirable step towards a much needed overhaul of our criminal justice system. It would be naïve to think that such a change is without challenges itself and the sheer magnitude of the adjustments makes it tempting to cast aside. However, we must persist with this proposal because not only is a formal amendment by referendum far more transparent and democratic in nature than ad hoc tinkering with the constitutional heads of power, sleight of hand or judicial creativity, it is what the 21st century demands to secure Australia's future.

As far back as 1990, at the Third International Law Congress in Hobart, where the codification of Commonwealth Criminal law was being considered, the then Attorney General of Queensland said the following:

“Why should a person's criminal responsibility, the punishment which a certain offence carries, or even, indeed, whether certain conduct amounts to an offence, vary simply by crossing of State boundaries? In a country as homogenous as Australia, this amounts to at worst lunacy or at best illogicality.”⁶¹

Eighteen years on, we must opt for uniformity over lunacy. As Justice Kirby states the old aphorism 'all crime is local' must be reconsidered in the contemporary world.⁶²

⁶¹ Goode M, 'Codification of the Criminal Law,' (2004) 28 *Crim LJ* 226 at 226

⁶² Kirby M, 'Criminal Law Futurology' [2005] (17) 1 *Current Issues in Criminal Justice* 123, 127

Federal Criminal Law: A Co-operative State and Commonwealth Perspective

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This paper was in response to a Federal Criminal Law 5112 research assignment which addressed the question: ‘*Is it desirable that the Australian Federal Constitution be amended to assign to the Commonwealth plenary power with respect to criminal law and procedure in this country?*’

A High Distinction grade was awarded, 2008

As it currently stands, the Commonwealth has restricted powers in regards to criminal law and procedure due to the allocation of powers under the *Commonwealth Constitution*. As such, there is an inconsistency in laws and procedures from State to State and a limitation on the Commonwealth to make laws that require national attention and uniformity. Granting the Commonwealth with plenary power over criminal matters is one possible solution to overcome these issues and as such its viability needs to be examined.

While this paper acknowledges the recent challenges facing criminal law and procedure, it is believed that these challenges can be more adequately addressed through intergovernmental cooperation rather than the granting of Commonwealth plenary power. How the Commonwealth can still achieve its desired goals through this means is therefore considered.

It is first necessary to define plenary power and outline the distribution of power in Australia between the Commonwealth and the States as prescribed under the *Commonwealth Constitution*.

The Division of Power in an Australian Federation

Plenary power can be defined as an ‘unlimited legislative capacity’⁶³ where a government who holds such power is seen to possess a general and unconfined power to make laws. However, limitations can still apply and therefore a government will have plenary power only to the extent that it does not violate limitations within a superior constitutional instrument.

Before the federation of Australia, the States were granted power by the Imperial Parliament to establish their own laws under section 5 of the *Colonial Laws Validity Act 1865 (Imp)* and were vested with plenary powers to make ‘laws for the Peace, Order, and good Government’ of the States. Each State therefore possessed the power to make any law which related to that particular State. However, this plenary power was subject to British legislation.

When Australia became a federation by the *Commonwealth of Australia Constitution Act 1900*, powers were necessarily distributed between the States and the Commonwealth. While powers conferred on the Commonwealth were expressly assigned to it under section 51 of the Act, all other non-specified powers were to remain with the States under section 107. Therefore, the States continued to possess plenary power in that they were entitled to make any laws which related to that particular State, provided that it was not a law exclusively given to the Commonwealth and was not inconsistent with British law.

⁶³ LexisNexus Butterworths, *Concise Australian Legal Dictionary*, 3rd ed, Australia, 2004.

The *Australia Act 1986 (Cth)* finally removed the restriction on the States to comply with Imperial laws under section 1 and upheld their plenary power under section 2(1) which read that each State has the power to make laws ‘for the peace, order and good government of that State’. The continued existence of State plenary power is also evident in the State Constitutions. For example, section 16 of the *Constitution Act 1975 (Vic)* states that ‘The Parliament shall have the power to make laws in and for Victoria in all cases whatsoever’.

Unlike the States, the Commonwealth does not possess any general plenary power, and as noted above, instead has enumerated powers under section 51 of the *Commonwealth Constitution*. The consequence of this is that any law created by the Commonwealth will only be valid if it comes within the scope of a head of power defined under section 51.

Commonwealth Criminal Law Power

Due to the abovementioned system of the allocation of powers between the Commonwealth and the States, the absence of criminal law and procedure as a specific head of power under section 51 of the *Commonwealth Constitution* results in ‘the general criminal law and the laws of criminal procedure [being] areas of responsibility for the States’.⁶⁴

Despite that at the time of the creation of the *Commonwealth Constitution* ‘it was beyond the contemplation of the founding fathers that the Commonwealth required plenary power over criminal matters’,⁶⁵ the Commonwealth nevertheless still has the ability to deal with criminal matters. However, as it does not have a plenary power to do so, the Commonwealth is restricted to criminal matters falling within a head of power under section 51. For example, Commonwealth legislation validly established under its enumerated powers in regards to taxation, customs and environmental protection all ‘contain criminal offence provisions to serve the objectives’ of the legislation.⁶⁶

Over the years, the Commonwealth has drawn upon its enumerated powers to establish a fairly comprehensive class of federal criminal offences. Specifically, section 51(i) relating to trade and commerce with other countries has ‘given the Commonwealth responsibility for the prohibition of the import and export of illegal drugs’.⁶⁷ Such offences previously found in the *Customs Act 1901* have been replaced by new serious drug offences under the *Criminal Code Act 1995*.⁶⁸ Also, section 51(v) relating to postal, telegraphic, telephonic, and other like services has allowed the Commonwealth to deal with cybercrime offences.⁶⁹ These offences are found in Part 10.7 of the *Criminal Code Act 1995*. Further, due to its broad scope, the external affairs power under section 51(xxix) has allowed the Commonwealth to enact criminal offences in regards to child sex tourism, war crimes and crimes against humanity, and the banning of drugs.⁷⁰

64 Australian Government Attorney-General’s Department, ‘About Federal Criminal Justice’,

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~About+Federal+Criminal+Justice.pdf/\\$file/About+Federal+Criminal+Justice.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~About+Federal+Criminal+Justice.pdf/$file/About+Federal+Criminal+Justice.pdf) (accessed July 25, 2008).

65 Fox, R, *Future Directions in the Criminal Law* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001) p7.

66 Australian Government Attorney-General’s Department, ‘About Federal Criminal Justice’,

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~About+Federal+Criminal+Justice.pdf/\\$file/About+Federal+Criminal+Justice.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~About+Federal+Criminal+Justice.pdf/$file/About+Federal+Criminal+Justice.pdf) (accessed July 25, 2008).

67 Ibid.

68 Ibid.

69 Ibid.

70 Ibid.

The most serious Commonwealth criminal offences can be found in either the *Crimes Act 1914* or the *Criminal Code Act 1995* and include offences relating to matters such as treason and sedition, terrorism, fraud against the Commonwealth, people trafficking, dangerous weapons and money laundering.⁷¹ The *Criminal Code Act 1995* is of great import as it provides ‘a complete and revised criminal law for the Commonwealth’ and is intended to ‘produce a model Criminal Code to be adopted by each Australian Jurisdiction’.⁷²

The continued expansion of Federal criminal offences calls to question whether the Commonwealth should be granted plenary power over criminal matters. The benefits and weaknesses of such a proposal will therefore now be considered.

The Benefits of Federal Plenary Criminal Law Power

This paper recognises two justifications as to why granting the Commonwealth with plenary power may be beneficial. Firstly, due to the changing nature of crime, criminal activity has become increasingly borderless and transnational. As such, the capabilities for State governments to adequately deal with such crimes are questionable. Secondly, as a result of this increase in borderless crime, uniformity across the nation to ensure consistency and transparency of these crimes is necessary.

⇒ The changing nature of crime

Due to technological and economic developments post-federation, there has been an evident change in the nature of crime. This has resulted in the ‘growth of organised, sophisticated, and serious transnational crime at national and international levels’.⁷³ Crime is no longer confined within jurisdictions and instead seamlessly moves across borders. Not only is this shift the result of technological and economic developments which aid in conducting such crimes, but it is also due to the difficulties governments currently face in enforcing and combating such multi-jurisdictional crimes.

While States may have previously been perceived as well equipped in dealing with criminal activity, their capabilities have since depleted due to this shift in ‘a variety of forces which include changing conceptions of what constitutes serious crime, a greater awareness of its scope and its cross-jurisdictional nature and the impact of globalisation as a feature of contemporary life’.⁷⁴ This change in the nature of crime consequently requires a change in policing and ‘contemporary policing requires law enforcement agencies to undertake covert investigations that extend beyond the boundaries of any one jurisdiction’.⁷⁵

Further, combating transnational and cross-border crimes require a large degree of cooperation and communication between international organisations. If the Federal government lacks authority to deal directly with certain criminal matters that become transnational, then cooperation and communication between the Commonwealth and the States are also necessary. This would undoubtedly impede the enforcement process as it would slow down and complicate procedure. In 1994, this was acknowledged by the establishment of the Commonwealth Law Enforcement Board. Its purpose was ‘to improve the management and enforcement of criminal

⁷¹ Ibid.

⁷² Fox, R, *Future Directions in the Criminal Law* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001) p9.

⁷³ Ibid, p2.

⁷⁴ Ibid, p2.

⁷⁵ Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement* (Report, Leaders Summit on Terrorism and Multijurisdictional Crime, November 2003) pi.

justice at a federal level and to facilitate better coordination between agencies in the interest of pursuing national and international law enforcement issues'.⁷⁶ The Board focused in 'providing 'over the horizon' assessments of potential crime problems of national import, particularly those involving sophisticated criminal networks whose influence spans the world'.⁷⁷

Also, what constitutes transnational and cross-border crimes continues to expand and grow. As such, it is important that the Commonwealth has the ability to deal with crimes that were once considered local but become multi-jurisdictional. As noted by David Collins of the Australian Customs Service:

'it is also becoming very evident that crimes classified as 'organised crime' should come under specific legislation on organised crime, irrespective of the nature of the crime perpetrated by the organisation. The fact that a criminal organisation might be responsible for smuggling or for murder should not mean differences in terms of procedures, international co-operation, investigative powers, preventive or repressive measures and penalties'.⁷⁸

A prime example of how Federal agencies have a greater ability to address cross-border crime is the role of Customs in criminal matters. Noted by Collins, 'Customs administrators recognised very early on that Customs would be a key agency in any fight against transnational organised crime'.⁷⁹ Responsibilities assigned to Customs have included 'identifying the movement of illegal drugs, firearms, cigarettes, and people: the same commodities that are the stock in trade for transnational crime syndicates'.⁸⁰ As organised crime involves trafficking of illegal goods, it is obvious that Customs 'play a key role in combating crime in any of its forms'.⁸¹

It would thus be unrealistic to believe that since federation the nature of crime has remained stagnant or that it will not continue to change in the future. As it currently stands, these transnational and borderless crimes comprise a significant portion of criminal activity and the difficulties of enforcing these crimes should be addressed. Altering the *Commonwealth Constitution* so as to allow the Federal government to deal with all criminal matters accordingly is one possibility of ensuring that any new transnational crimes are quickly and adequately addressed.

⇒ Uniformity

As evidenced above, 'organised criminal networks...operate with relative ease across jurisdictional borders'.⁸² Noted by the Joint Working Committee Report in 2003 on 'Cross-Border Investigative Powers for Law Enforcement', 'to address this increasing threat it is critical that law enforcement agencies adopt a nationally coordinated and cooperative approach to law

⁷⁶ Fox, R, *Future Directions in the Criminal Law* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001), p8.

⁷⁷ Ibid.

⁷⁸ Collins, D, *Cross Border Crime and Customs* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001) p3.

⁷⁹ Ibid, p2.

⁸⁰ Ibid, p2.

⁸¹ Ibid, p2.

⁸² Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement* (Report, Leaders Summit on Terrorism and Multijurisdictional Crime, November 2003) pi.

enforcement'.⁸³ Without uniformity, dealing with cross-border crimes 'can result in delays, loss of evidence, and other impediments to effective investigation'.⁸⁴ On the other hand, uniformity can prove beneficial 'in terms of simplifying joint federal/state investigations and trials, and adding to the power of investigators and prosecutors to pursue insidious crime throughout the country and beyond, thus reducing, if not overcoming, many of the deficiencies of the federal system from a crime-fighting perspective'.⁸⁵ As it currently stands, there exists 'significant differences in the type of outcome and the severity of the outcome for similar crimes prosecuted in different jurisdictions' in regards to both State and Federal crimes.⁸⁶ Not only is uniformity essential for adequately dealing with transnational and cross-border crimes, but is desirable for criminal law and procedure generally. This is critical to avoid confusion of offences and penalties, to ensure justice and equality and to present an unambiguous understanding of what constitutes unacceptable criminal behaviour.

The importance of such uniformity can be demonstrated by the enactment by the Commonwealth of the *Criminal Code Act 1995* which was intended to provide the States with a model criminal code which they were then to adopt. However, as the Federal government lacks the authority to compel its implementation by the States, this attempt may prove to be futile. Nonetheless, 'the national adoption of a uniform criminal code at some stage during this century is urgently required so that all criminal legislation dealing with serious offences in Australia will be constructed in accordance with the same underlying principles of criminal responsibility'.⁸⁷

If the Federal government is granted plenary power in regards to criminal matters this would certainly overcome the States reluctance in adopting the *Criminal Code* and would in turn 'more effectively deliver international co-operation in fighting crime that knows no borders'.⁸⁸

83 Ibid.

84 Ibid.

85 Fox, R, *Future Directions in the Criminal Law* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001) p9.

86 ALRC, 'Fact Sheet – June 2006' <http://www.alrc.gov.au/media/2006/fs1.htm> (accessed August 6).

87 Fox, R, *Future Directions in the Criminal Law* (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology, June 2001) p9.

88 Ibid.

The Weaknesses of Federal Plenary Criminal Law Power

⇒ The Framers' Intention

Evidently, the framers of the *Commonwealth Constitution* did not believe it desirable to award the Commonwealth plenary powers. This belief was due to the recognition that 'the true protection for the small States lies in the limitation of the power given to the Federal Parliament'.⁸⁹ It was noted during the Adelaide Constitutional Convention in 1897 that:

'The true protection of the smaller States lies also in insisting that no subjects which cannot be better dealt with by the Federation are to be given to the Federation, and that all those subjects which can be best dealt with by a colony, as a colony, should be still left to the colony'.⁹⁰

Not only does this composition protect the States, but it is also argued that the States are often better equipped to exercise certain powers and that 'functions should, where practical, be vested in the lowest level of government to ensure that their exercise is as close to the people as possible and reflects community preferences and local conditions'.⁹¹

However, as evidenced by the previous above arguments, 'the allocation made by the framers of the Commonwealth Constitution in the 1890's may no longer be appropriate today and deserves to be revisited'.⁹²

⇒ The Commonwealth already possesses too much power

A second concern lies in the already immense and expanding power that the Federal government has over the States. Since Federation 'our constitution has, over time, evolved to deliver the Commonwealth greater constitutional and fiscal power than the States'.⁹³ Despite belief that the *Commonwealth Constitution* was intended to protect the States and its powers, it is now argued that the Constitution is 'being used to reduce [State] powers and subordinate its position in the federation'.⁹⁴ This has been achieved predominantly by the use of the 'courts of expansive interpretations of implications drawn from the Commonwealth Constitution to limit the legislative powers of the States'.⁹⁵

Most notably is the existing vertical fiscal imbalance that has occurred due to the Court's broad interpretation of the Commonwealth's Grants power which has allowed the Commonwealth to significantly influence State policies that would otherwise lie outside of its constitutional powers. This has been achieved through the use of specific purpose grants which allows the Commonwealth to allocate revenue to areas of State responsibility, such as education and health.⁹⁶

⁸⁹ Senate Legal and Constitutional Affairs Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, Parliament of Australia, 1995), ch8.

⁹⁰ Ibid.

⁹¹ Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p3.

⁹² Ibid.

⁹³ CEDA, 'Six myths of federal-state financial relations', http://ceda.com.au/public/research/federal/six_myths_federal_state.html (accessed August 3).

⁹⁴ Twomey, A, *The Limitations of State Legislative Power* (Paper presented at the 2002 Gilbert + Tobin Centre of Public Law Constitutional Law Conference, University of New South Wales, February 2002) p2.

⁹⁵ Ibid.

⁹⁶ Senate Legal and Constitutional Affairs Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, Parliament of Australia, 1995), ch8.

⇒ Differing interests and priorities

Finally, it must be recognised that the Federal government will often have differing interests and priorities to that of the States. Always high on the Federal agenda is defence, international relations and national security. While these issues are indeed highly important, there is the fear that they will overshadow distinctly local economic and social needs and priorities. For example, while a State government may address its drug problem by targeting the dealers, the Commonwealth would likely address the issue by focusing on the importation by organised international drug syndicates.

Amending the Constitution

Due to the changing nature of crime and the need for uniformity, it is essential that the Federal government has power over necessary criminal matters. This may be achieved by amending the *Commonwealth Constitution* through the inclusion of a new head of power under section 51 relating to criminal law. However, if the Commonwealth is to be granted plenary power over criminal law and procedure, it must comply with the strict procedures required for constitutional amendment.

Any alteration to the Constitution is governed by section 128. In brief, section 128 states that:

‘The proposed law for the alteration thereof must be passes by an absolute majority of each House of the Parliament.And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen’s assent’.

The effect of this provision is that any successful amendment must receive a ‘double majority’ in that there must be a majority of voters in a majority of States and a majority of voters nationwide.⁹⁷ This provision has proved to be an arduous requirement and it has often been criticised for the poor record of successful constitutional amendments.⁹⁸ Since the creation of the *Commonwealth Constitution*, there have been 19 referendums with a total of 44 proposed amendments, only 8 of which have been successful.

However, several other reasons have been argued as the cause of the overwhelming number of unsuccessful referenda. For example, it has also been suggested that party politics plays an important role due to ‘the inconsistency in their stance on constitutional amendment’.⁹⁹ There has been a common occurrence of parties ‘supporting issues while in government, which are then opposed when submitted by their opponents’.¹⁰⁰ ‘Voter ignorance and conservatism’ has also been suggested as another cause.¹⁰¹

Despite these hurdles and past failed attempts in altering the *Commonwealth Constitution*, it should be kept in mind that the looming possibility of seeking to become a republic creates a prime opportunity for amending the Constitution. However, this paper still suggests that other means should be adopted by the Commonwealth to gain necessary criminal power, rather than through Constitutional amendment.

97 Bennett, S and Brennan S, *Constitutional referenda in Australia* (Research Paper, Parliament of Australia, 1999-2000) (available at <http://www.aph.gov.au/library/Pubs/rp/1999-2000/2000rp02.htm>).

98 Ibid.

99 Ibid.

100 Ibid.

101 Ibid.

Alternative methods: Relying on the States and the External Affairs power as viable sources of power

To date, the Commonwealth has managed to increase its powers when it has so desired predominately by three means: the broad interpretation by the Courts of the external affairs power, the referral of power by the States under section 51(xxxvii) and federal-state cooperation.

⇒ The External Affairs power

In the cases of *Koowarta v Bjelke-Peterson* and *Commonwealth v Tasmania* the courts have held that the Commonwealth's external affairs power under section 51(xxix) should be interpreted broadly so that any treaty can be incorporated into domestic law so long as it has been ratified by the Commonwealth. This has provided the Commonwealth with a powerful method of making laws which would otherwise fall outside its powers.

One such example was the Commonwealth's enactment of the *Human Rights (Sexual Conduct) Act 1994* which adopted a provision from the First Optional Protocol to the *International Covenant on Civil and Political Rights* preventing any State or Territory from criminalising 'sexual conduct involving only consenting adults acting in private'. This forced a previously resistant Tasmania to repeal provisions to its *Criminal Code* that criminalised adult private consensual homosexual conduct.¹⁰² As noted by Justice Kirby, this 'is a singularly vivid illustration of the practical way in which, today, international law can be brought to bear upon domestic law'.¹⁰³

The limitation preventing the Commonwealth from using international law to infringe upon all areas of State power is the necessity of the existence of a relevant treaty. However, due to the ever increasing number of treaties, this limitation appears to be of little consequence.

⇒ Referral of State power

Under section 51(xxxvii) of the *Commonwealth Constitution*, the States have the power to refer certain matters to the Commonwealth, enabling the Commonwealth to have powers not specifically provided for under the Constitution. This has been implemented in areas such as family law, railways, State banking, industrial relations and corporations.¹⁰⁴ A recent example has been the referral of powers relating to terrorist acts by the States and Territories in 2002.¹⁰⁵ This has enabled the Commonwealth 'to amend the *Criminal Code* to include counter-terrorism laws and apply those laws in the States and Territories'.¹⁰⁶

However, this referral of power does not necessarily result in uniformity of laws, as the Commonwealth will only be entitled to make laws for the particular State which has referred its power.¹⁰⁷ Further, 'it is not realistic to expect the States to refer power over every issue for which a national scheme is needed'.¹⁰⁸

102 Kirby, M, *The Future of Criminal Law-Some Big Issues* (Presented at Bali Conference, Criminal Lawyer's Association, June 1999).

103 Ibid.

104 Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p8.

105 Rose, G and Nestorovska, D, *Australian counter-terrorism offences: necessity and clarity in federal criminal law reforms* (Paper, University of Wollongong Law Faculty, 2007) p23.

106 Ibid, p24.

107 Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p7.

108 Ibid, p9.

⇒ Federal/State cooperation

The Federal government has often been able to achieve desired goals through intergovernmental cooperation. Here, the Commonwealth relies not on any constitutional power but on the States' cooperation to enact uniform or mirror legislation in areas where the Commonwealth suggests it necessary.¹⁰⁹ This provides for a middle ground approach whereby the Commonwealth can influence laws in matters which it has no power to do so, whilst the States can still claim responsibility and maintain a sense of control over the subject matter.

Previous instances of cooperation have concerned areas of 'classification and censorship, taxes in Commonwealth places, crimes at sea, electronic transactions,...the international transfer of prisoners,...child protection, [and] defamation'.¹¹⁰ Such cooperation has been achievable through the existence of the Council of Australian Governments (COAG), a peak intergovernmental forum seeking cooperation on issues of national strategic importance and cross-jurisdictional concern.¹¹¹

A downfall to this method is that the Commonwealth cannot impose desirable laws on the States, the States must be willing to cooperate. However, faith is held in the Federal and State governments to recognise the necessity for uniform criminal law and procedures in Australia. As noted by an OECD report, 'one of the features that 'characterises Australia is the relatively high level of co-operation through the Council of Australian Governments that provides a mechanism to deal with problems when they are perceived to be serious'.¹¹²

Adopting the Middle Ground

This paper suggests that while there is a necessity for certain criminal matters to be uniform and within the reach of Commonwealth power, this is best achieved by federal-state cooperation rather than by awarding the Commonwealth plenary power.

There is great resistance by the States in granting the Commonwealth more power and doing so would only eliminate any 'incentive for innovation and cooperative problem-solving'.¹¹³ Such cooperation is necessary. Employing intergovernmental cooperation has 'the advantage of drawing all governments into supporting a common cause....and ensuring that the resulting Commonwealth law is better integrated with existing State laws, resulting in more effective outcome'.¹¹⁴ This therefore overcomes many of the abovementioned weaknesses that federal plenary criminal law power presents as it enables the States to maintain a degree of power and also ensures 'consistency with other State laws and interests'.¹¹⁵ Allowing the States to maintain control and participation also ensures that the Commonwealth can rely on State expertise and departmental services. This is highly relevant to the area of criminal law and procedure where there exists well established local police agencies.

Further, cooperation consists of a level of flexibility. If uniform legislation is desirable, cooperation enables the States to 'shape this [national] standard and the means for its

109 Ibid, p9.

110 Ibid, p10.

111 Council of Australian Governments, 'About COAG', <http://www.coag.gov.au/> (accessed August 3, 2008).

112 Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p10.

113 Brown, A.J and Bellamy, J.A (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANZSOG Monograph, Australian National University, August 2007), ch10, (available at http://epress.anu.edu.au/anzsog/fra/mobile_devices/ch10s06.html).

114 Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p8.

115 Ibid, p9.

application' so that 'the law will be better crafted to suit the needs of each State'.¹¹⁶ Also, 'not all provisions need to be absolutely uniform' and therefore, 'while some national standards may need to be set, the detail regarding implementation may reasonably be adapted to local circumstances in many cases'.¹¹⁷ This allows the Commonwealth to control criminal law matters which are of a transnational and borderless nature and the States to continue to police localised crimes that are best understood and controlled at a local level.

Where States may initially be reluctant to cooperate, the Commonwealth's financial dominance should be considered as 'an important tool in inducing support'.¹¹⁸ Financial control over the States has been noted above.

The possibility of amending the Constitution to formally recognise intergovernmental cooperation is worth considering as another means in which to overcome State reluctance.¹¹⁹ This would ensure a structured and legitimate source of intergovernmental cooperation which governments would be unable to deny. However, the problems associated with any constitutional reform have been acknowledged. If such an approach is to be adopted provisions specifying when cooperation should be initiated and the methods to undertake cooperation should be included.

Recommendations for such a constitutional reform are as follows:

- It be specified that where a government believes an issue to be serious and to require a national approach, the Commonwealth and the States are legally required to cooperate. This is already the objectives of the COAG.¹²⁰
- 'Serious' should be defined under the legislation and not be left for the interpretation of the court as the governments will have a more informed understanding of any problems that need addressing.
- As COAG is the current key intergovernmental forum in Australia, the Council should be formally recognised so as to strengthen its power, legitimacy and accountability.
- The current structure and goals of COAG should be evaluated and, where found to be effective, followed.

With these recommendations in mind, it is essential that any constitutional recognition of intergovernmental cooperation should not be utilised as a means for controlling the States, but as a means for ensuring the States cooperate when necessary. Otherwise any benefits of intergovernmental cooperation will become obsolete.

116 Ibid, p11.

117 Ibid, p11.

118 Brown, A.J and Bellamy, J.A (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANZSOG Monograph, Australian National University, August 2007), ch10, (available at http://epress.anu.edu.au/anzsog/fra/mobile_devices/ch10s06.html).

119 Twomey, A, *The Reform of Australia's Federal System* (Research Paper, Sydney Law School, November 2007) p27.

120 Ibid, p10.

Conclusion

Due to the changing nature of crime and the consequential need for uniformity, there is an evident need for reform. The Commonwealth must have the ability to address these issues and while the Commonwealth, in one way or another, has been able to extend its powers and legislate in areas such as cybercrime, international sex offences and terrorism, the Commonwealth is nonetheless limited.

While granting the Commonwealth plenary power over criminal matters would clearly allow the Commonwealth to cover all areas of criminal law and procedure, this paper believes that this is not only unnecessary and difficult to achieve but undesirable as the States are better suited to deal with criminal matters of a local nature.

This paper concludes that utilising intergovernmental cooperation is a more beneficial method of ensuring the Commonwealth can legislate in required areas and the States can continue to control other areas and also provide the Commonwealth with assistance and local expertise. Amending the Constitution so as to formally recognise intergovernmental cooperation would be an appropriate means of ensuring such necessary cooperation is achieved.