

Outline of presentations

Contents

Session 1: Plenary Presentations	page 2
Session 2: Streamed Presentations and Discussions	
Stream A: Crime Threats, Crime Prevention and Community Justice	page 10
Stream B: Policing and Rights	page 14
Stream C: Court Process, Sentencing and Corrections	page 19

Session 1 – Plenary Presentations

Searching for a social democratic narrative in criminal justice

Professor David Brown, University of New South Wales

David Brown is Emeritus Professor in the Law Faculty at the University of NSW, where he has taught criminal law, criminal justice, criminology and penology since 1974. He has been active in criminal justice movements, issues and debates for over three decades and is a regular media commentator. He has published widely in the field with 30 chapters in books and over 100 articles and conference proceedings published. He has co-authored or co-edited *The Prison Struggle* (1982); *The Judgments of Lionel Murphy* (1986); *Death in the Hands of the State* (1988); *Criminal Laws* in four editions (1990); (1996); (2001); (2006); *Rethinking Law and Order* (1998); *Prisoners as Citizens* (2002); and *The New Punitiveness* (2005).

Paul Keating recently noted that what the Rudd government lacked was an overall narrative or story. I wish to argue that Paul Keating is correct and suggest a narrative: that of retrieving and defending aspects of our social democratic heritage from some of the damaging effects wrought by neo-liberalism.

Criminal justice policy needs to be a part of this broader narrative, which requires it being prised from its current site in the narrative of law and order.

Nicola Lacey in *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*, Cambridge University Press (2008) uses a comparative analysis to try to explain the significant national differences in imprisonment rates and the measures of penal tolerance and severity which underlie them. Looking at the international imprisonment rates, a pattern is discernable.

Those western countries with the highest imprisonment rates are “neo-liberal” countries with liberal market economies: USA 762, South Africa 342, NZ 178, England/Wales 154 and Australia 130. The next bracket with lower rates are ‘conservative corporatist’ with ‘co-ordinated market economies’ such as The Netherlands 117, Germany and France both 91, Italy 83. With lower rates still come the “social democracies” with “co-ordinated market economies” such as Sweden 79, Norway 75, Finland 68, and Denmark 66, followed by ‘Oriental corporatist’ with a ‘co-ordinated market economy’ with Japan at 63.

Lacey argues that the socio-cultural, political and economic variables affecting the capacity to deliver inclusionary and re-integrative criminal justice policies (which should be the aim of liberal democracies) vary in different forms of democracy around the ‘liberal/coordinated market economy’ distinction.

Key factors in the different forms democracy takes include:

- the structure of the economy
- levels of investment in education and training
- disparities of wealth
- literacy rates
- proportion of GDP on welfare
- co-ordinated wage bargaining
- electoral systems

- constitutional constraints on criminalisation
- institutional capacity to integrate ‘outsiders’

In short, the imprisonment rates of various liberal democracies are intimately linked to the institutional pre-conditions for the realisation of penal moderation and inclusionary practices, preconditions closely associated with traditional concerns of social democracy.

Criminal justice debates need to be relocated out of the individualistic register of law and order narratives of responsibility, blame, desert and punishment, and relocated as part of a wider narrative of retrieving and defending social democracy.

Proposals from the legal profession

Stephen Odgers SC, New South Wales Bar

Sydney barrister who became Senior Counsel in 2000. Chair of the Criminal Law Committee of the NSW Bar Association and Member of the Criminal Law Committee of the Law Council of Australia. Adjunct Professor of Law at the University of Sydney. Editor of the *Criminal Law Journal* and author of several legal texts including *Uniform Evidence Law* and *Principles of Federal Criminal Law*.

The Law Council and the NSW Bar Association organised a conference on federal criminal law on 5 September 2008. Apart from proposed reforms in respect of national security and anti-terrorism legislation (outside the scope of this Forum), the major proposals for reform may be summarised as follows.

Federal jurisdiction and criminal procedure

At present, all federal indictable criminal offences are prosecuted in State courts exercising federal jurisdiction but, pursuant to the *Judiciary Act*, applying State criminal procedure (which differs significantly from State to State). This is unsatisfactory – persons charged with offences against federal law should be accorded the same rights and protections regardless of where in Australia they come to trial. The rapidly expanding reach of federal criminal law means that this issue must be resolved.

The Federal Government is considering the conferral on the Federal Court of jurisdiction to determine proposed federal indictable cartel offences and creating a system of federal criminal procedure to be applied by the Federal Court. There may be a push to extend this jurisdiction to other federal offences. However, it is not a practicable solution to expect the Federal Court to hear all criminal trials of federal offences:

- The Federal Court simply does not have the resources or the expertise to hear more than a small number of federal criminal trials.
- The Federal Court is not permitted under the Constitution to exercise State judicial power (which would create insuperable problems where there is a prosecution for connected federal and State offences).

The proposed solution is that, once a system of federal criminal procedure to be applied by the Federal Court for cartel offences has been put in place, the Commonwealth should amend the *Judiciary Act* so that State courts exercising federal jurisdiction would be required to apply federal criminal procedure. To deal with trials where a State court is determining both federal and State offences, the States should be asked to legislate to enable federal criminal procedure to apply to the State offences on the federal indictment. It may be expected that, in time, such reforms will inevitably result in unified practice standards and criminal procedure around Australia.

Proceeds of Crime Act 2002

Under the 2002 Act (in contrast with the 1987 Act) “proceeds of unlawful activity” or “an instrument of unlawful activity” must be forfeited to the Commonwealth – there is no discretion invested in a court to avoid unjust or unduly harsh consequences of such mandatory forfeiture. As regards “proceeds” of unlawful activity, there are two particular problems with this position:

- (a) “proceeds” is defined widely in s 329 to mean property “derived or realised, whether directly or indirectly, from the commission of an offence – the courts have held that:

- lawfully acquired money deposited in a bank account operated in a false name is “derived” from the offence of operating a bank account in a false name
 - money taken into or out of Australia and not properly reported to the authorities is “derived” from the commission of the offence of failure to report
- (b) “proceeds” is defined in s 329 to include property “partly” derived from the commission of an offence, so that if a small part of the money used to purchase a house was derived from unlawful activity, the entire house must be forfeited.

As regards “instrument” of unlawful activity, defined as property used, or intended to be used in, or in connection with, the commission of an offence, the property must be forfeited even if the property was paid for legitimately, the usage (or intended usage) was minimal, and other (completely innocent) persons also have an interest in and /or use the property.

Such mandatory forfeiture is unjust and unduly harsh and this legislation is akin to mandatory sentencing. Judicial discretion should be re-introduced.

Extradition Law

A number of reforms to existing extradition law should be considered:

- The present extradition arrangements assume that all requesting states, other than New Zealand, should be treated in the same way. Plainly enough, the legal processes and individual protections offered by states are not consistent. In some cases, this means that the requirements for extradition are too onerous; in others, inadequate to ensure that extradition will not create injustice. As in the United Kingdom, a requesting state should be required to establish a prima facie case unless the state is specifically designated as not having to meet that requirement.
- The principle of double criminality requires the conduct constituting the offence to be criminal in both the requesting and requested state. As presently applied, the principle is governed by form rather than substance. Requesting states should be required to supply a discrete document that clearly sets out the conduct constituting the offence; that is, the conduct relevant to the ingredients of the offence that has been charged.
- At present a court reviewing a determination by a federal magistrate is confined to a consideration of the material before the magistrate. This creates problems in circumstances where evidence was wrongly excluded by the magistrate. This difficulty can be cured by giving the court discretion to allow additional evidence in such cases.
- The present proscription against leading evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence should not be applied in circumstances where a person seeks to establish an extradition objection (such as discrimination).
- The extradition process is unduly complex, time consuming and repetitive. The involvement of the Attorney-General should be confined to a consideration of the assurances given by the requesting state in relation to the speciality assurance and non-imposition of the death penalty. The courts should be left to determine other issues.
- The present blanket requirement of special circumstances for bail is unduly restrictive and can seriously impinge on individual liberty, particularly given the time (sometimes years) it can take to complete all extradition processes.

War Crimes and Crimes against Humanity

In 2002, the Commonwealth Criminal Code was amended by the introduction of the crime of genocide, war crimes and crimes against humanity. These provisions apply regardless of where the offence was committed (although only to offences committed since 1 July 2002). Conferring jurisdiction on Australian courts in respect of these offences means that it will be unnecessary for Australian citizens to be transferred to the International Criminal Court for prosecution. However, there is no federal body with the responsibility of investigating the alleged commission of war crimes by persons living in Australia. Such a body should be established by the Commonwealth.

Proposals from the policing profession

Jim Torr, Chief Executive, Australian Federal Police Association

Jim Torr has been a sworn member of the AFP for 25 years. His investigational career focused on narcotics, major fraud and internal investigations. Five years ago he became the elected CEO of the Australian Federal Police Association. During his time representing the law enforcement profession he has made a significant contribution to policy formulation, decision making and legislative reform.

Since 1942 the Australian Federal Police Association (AFPA) has continuously represented Commonwealth law enforcement officers. The AFPA and our membership operate in an increasingly complex and dynamic law enforcement, national security and employment environment.

The AFPA welcomes the opportunity to make a contribution to this review. While we respect the democratic process that enables our legislators to govern with the support of citizens, we strongly believe that the process must include careful consideration of the process of enforcement including detection of breaches in law and to penalties for those convicted of those breaches. This needs to include the concept of deterrence on the basis that while most citizens respect the law we all need to know the potential consequences should we consciously decide to break the law. Rehabilitation to avoid future breaches also needs consideration.

Our membership plays a pivotal role in the detection of crime and in identifying persons, groups or organisations responsible for breaking our laws. In order to do this they need the skills and resources appropriate to this role. This includes appropriate powers and governance of those powers.

We understand and accept that there is a balance between the law and its enforcement. Law enforcement can include actions such as detention, search, arrest or surveillance that are not otherwise lawful. In our submission to this review our members have identified several areas of frustration with regard to the extent of their powers. I am sure that in the process of this review we will hear from others who believe that enforcement powers are too broad. Ultimately this balance needs to be struck by our legislators. The best we can do as representatives of the law enforcement profession is ensure that the potential consequences of the legislation include careful consideration of the process of enforcement.

This review gives us all an ideal forum to hold this sort of discussion. It also allows us the opportunity to consider the context for future laws. This includes matters such as the communities growing demand for laws to further protect the environment or the emergence of E-crime. If however we were pressed on our singularly most important concern about the process of law it is that no one should ever be able to benefit from their crime.

Particular concerns highlighted in the AFPA submission include: Proceeds of crime; inefficiencies and duplication of law and process; inconsistent police powers; the practice of utilising state offences due to deficiencies in federal legislation; legislative barriers regarding sharing intelligence between agencies; and harmonisation of provisions.

AFPA members have provided input on various pieces of federal crime legislation that directly impacts upon their operational effectiveness within their AFP operational portfolio. Some members have also suggested consideration of 'potential legislation' based on national and international law enforcement 'best practice'.

The AFPA is looking forward to participating in the federal crime review forum where we can provide further evidence and input on the issues raised on behalf of our members.

Report on pre-forum activities

Dr Karl Alderson, Federal Attorney-General's Department

Karl Alderson is the Acting Executive Director of the Australian Background Checking Service, Auscheck. Until recently he was the Assistant Secretary, Criminal Law Branch. In that capacity, he has led the team responsible for the arrangements for this Forum and the conduct of the regional roundtables. He has worked in the Attorney-General's Department since 1993.

Activities

A range of lead up activities have been held in advance of the Forum, to secure input and ideas from persons not attending the Forum and to help inform the way in which the Forum is conducted.

A mechanism was established through the Attorney-General's Department website for ideas to be submitted. A small number of submissions were received. All of these are contained in the report on pre-Forum activities in the materials provided to participants.

Roundtables were held in Brisbane, Melbourne and Perth. Each roundtable ran for a morning, and included sessions on reform ideas, identifying reform priorities, and for feedback on the reform process. There was also an informal meeting in Sydney with a number of academics from the University of NSW and the University of Sydney. Full details of each roundtable are in the report on pre-Forum activities.

Part of the design of the roundtables was to have participants rank the importance of the ideas generated during the roundtable. In this way some major themes were identified. However, for the Forum we are moving away from a ranking system to enable as many ideas as possible to be developed without being constrained by arguments about the form of words used or the priority each idea may be given.

Two major professional groupings also conduct activities that have fed into the Forum. The Law Council of Australia and the New South Wales Bar Association held a Federal Criminal Law Conference in Sydney on 5 September 2008. Stephen Odgers SC is speaking about that conference. The Australian Federal Police Association canvassed suggestions from members for federal criminal justice reforms. Jim Torr is speaking about those suggestions.

Professor Richard Fox teaches a course on federal criminal law at Monash University. Professor Fox identified the two best essays from this year's course. Copies of these essays are included in the report on pre-Forum activities. The authors, Elisha Marriott and Allison Jones are present at the Forum.

Some examples of ideas to emerge from these processes were as follows.

Substantive issues

- There should be a more coordinated and consistent national approach to combating child sexual assault and abuse.
- Fewer new criminal offences should be created, because the recurrent creation of new offences in response to particular incidents and controversies can make the criminal law too complex and also lead to over-criminalisation.
- There should be a greater emphasis on measures to prevent crime (including through measures such as effective parenting programs), which do not receive the attention they deserve in comparison to enforcement.

- There should be stronger mechanisms to recover proceeds of crime which have been paid into a superannuation fund.
- There should be a specific legislative framework for sentencing corporate offenders.
- There should be a stronger Commonwealth role in assessing the quality of forensic evidence.
- There should be a review of the policies governing application of criminal and civil liability in Commonwealth legislation.

Evidence base / reform process

- Better statistics on the workings of the criminal justice system would be desirable, to better inform policy development and implementation review. Consistent national data collection standards would also be desirable.
- There should be stronger links between policy makers and academic experts, to facilitate a process by which academic expertise can efficiently be 'tapped' in developing reforms.
- The Commonwealth Government should create a communication network for those interested in criminal justice policy and reform, and use this to provide updates on projects in progress.

Session 2 Streamed Presentations and Discussions

Stream A: Crime threats, Crime Prevention and Community justice

Indigenous people and criminal justice

Gerry Moore, Aboriginal Legal Service (NSW/ACT) Limited

Gerry Moore is a well known and respected member of the Shoalhaven Aboriginal community on the south coast of NSW. He has worked in a range of community, government and non government agencies in the fields of law and justice, health, housing, employment and community services. He is currently the Zone Manager of the Central South Eastern Zone, Aboriginal Legal Service NSW/ACT Ltd covering the Central Coast of NSW to the Victorian boarder and from Cooma to Lithgo in the Blue Mountains. Gerry is actively involved in the governance of many local organisations. He is the current Chair of Shoalhaven Community Development Aboriginal Corporation, essential to the local CDEP, Night Patrol and Youth Centre. He is the Chairperson of the Nowra Local Aboriginal Land Council, Secretary of the South Coast Medical Service Aboriginal Corporation and active in a number of other community organisations.

When it comes to Aboriginal people and their interaction with the criminal justice system the statistics speak for themselves. Aboriginal people are less than 2% of the population of NSW, but are more than 20% of its prison population.

In regional areas, non-custodial options are often not available for Aboriginal people. Through extended family networks, it is rare for an Aboriginal person not to have a family member who has been imprisoned for an offence or at least arrested by police in often harrowing circumstances. Aboriginal young people are increasingly questioned by police on the basis, they consider, of their Aboriginality. The way forward is a commitment to communication, consultation and collaboration between such agencies as the ALS and public authorities.

There are three main issues I want to raise briefly today:-

- funding and resources for ATSILS
- opportunities for prevention, and
- the danger of inaction.

Funding and resources

A recent report by Prof Chris Cunneen highlights not only the over-representation of Aboriginal people within the criminal justice system in Australia, but also the inadequate levels of funding provided to ATSILS around Australia.

Prevention is better than cure

Aboriginal & Torres Strait Islander Legal Services (ATSILS) at present struggle just to keep pace with the daily grind of representing people in Courts and acting in criminal matters.

Increased funding is not the only solution. There is an obvious need to implement longer term strategies that address the underlying factors that bring Indigenous people into contact with the criminal justice system.

The factors that impact upon the interaction between Aboriginal people and the criminal justice system are many including systemic marginalisation due to lack of access to appropriate health, education and housing and other services which only promotes the probability of re-offending.

But within the criminal justice system itself more needs to be done to empower Aboriginal people, to make them aware of their rights, both criminal and civil, to improve the quality of representation they receive so that outcomes can be achieved that do not bond them to the criminal justice system and, importantly, to change laws where necessary .

Dangers of inaction

Existing overrepresentation of Aboriginal people in the criminal justice system and the rapid Indigenous population growth highlight the need for immediate action.

Clearly more needs to be done.

The cost of inaction will be borne not only by the Aboriginal people who come into direct contact with the criminal justice system, but by future generations both black and white.

Future directions for crime prevention in Australia

Professor Peter Homel, Australian Institute of Criminology

Peter Homel currently works with the Australian Institute of Criminology. His work is directed at improving the effectiveness of crime prevention programs and policies and the development and implementation of evidence based policy programs across the criminal justice system. Peter was awarded the Australian Public Service Medal (PSM) for outstanding public service in the field of crime prevention as part of the 2000 Australia Day Honours.

- We know crime prevention works.
- We know why and when it will work and why and when it won't.
- We have to built on this knowledge to confront future challenges.
- Crime prevention work has brought us record low crime rates, here and overseas.
- UK Home Office research shows that if we didn't do crime prevention crime rates would be 20% higher.
- Crime still costs Australia around \$36b per year.
- In 2004 the UN Secretary General pointed out that crime prevention is a keystone requirement for a safe and secure society and this is a prerequisite for good business activity and community cohesion.
- Viewed from this context and in the face of potential future challenges Australia's current crime prevention effort is too fragmented, misdirected and inappropriately resourced.
- A renewed leadership is required to establish a new nationally agreed agenda for effective crime prevention action at the local, state, national and international level.
- This action requires a shift away from enforcement towards addressing the underlying causes of crime such as structural disadvantage and improving community cohesion and opportunity.
- A key step is for the national government to invest in a strategic technical assistance program for the dissemination of good practice approaches to crime prevention and the promotion of innovative crime prevention among the wider crime prevention work force.

Identity crime: issues for Australian policy makers

Professor Rick Sarre, University of South Australia

Rick Sarre is Professor of Law and Criminal Justice at the University of South Australia. He currently lectures in criminal justice, policing, media law, sport law and commercial law with the School of Commerce. He has published over 100 scholarly articles and has presented his research while teaching or on research fellowships in Sweden, USA, Canada and Hong Kong.

The prolific growth of identity crime and the ability of its perpetrators to find new avenues to initiate and perpetrate their criminal activity have law enforcement, regulators, victims and academics searching for answers. Identity crime is closely linked to other frauds and criminal activity. Identity theft and identity deception have both traditional crime (theft/deception) and new age crime characteristics (electronic/internet/mobile communications theft/deception) that facilitate identity fraud and related crimes.

It is becoming increasingly apparent that legislatures must clarify definitions to account for the evolving nature of identity crime. There now appears to be some consensus among stakeholders as to the meaning of identity fraud and identity theft. There appears at present to be less agreement about identity deception as evidenced by the numerous labels assigned to acts or events that incorporated the use of an assumed identity, false identity, fictitious identity, identity fabrication, synthetic identity, or some mix of these labels (including with details from identity theft). There is also little consensus on how best to tackle the phenomenon from a policing perspective, although there does appear to be agreement on the value of enlisting the private sector to be in the forefront of prevention and response efforts.

The problematic issue of financial crime

Dr George Gilligan, Monash University

George Gilligan is Senior Research Fellow in the Department of Business Law and Taxation at Monash University. He has taught at the University of Cambridge, Exeter University and Middlesex University in the UK, and La Trobe University, the University of Melbourne and Monash University in Australia. His research interests centre on: regulatory theory and practice, especially in relation to the financial services sector; white-collar crime; organised crime; and corruption, and he has published extensively in these areas and conducted numerous field research projects examining the praxis of regulation.

Key points

- The problem of defining financial crime
- Discussion of Gilligan's Initial Pilot Study re Defining and Measuring Financial Crime, which includes details of sample responses from both Australian and overseas regulatory agencies, (including some police forces), regarding their working definitions and estimates, (if available), regarding financial crime
- Discussion of some of the international dimensions associated with financial crime
- Financial crime and the Crime: Business continuum
- Concluding remarks regarding defining, measuring and evaluating efforts to counter financial crime, and parallels with the white collar crime discourse

Cracking the Code: emerging stress points in Chapter 2 jurisprudence

Associate Professor Ian Leader-Elliott, University of Adelaide

Ian teaches and researches in the areas of criminal law, sentencing law and criminal codification. He has extensive experience as a consultant to state and federal law reform commissions and similar bodies. He was a consultant to the UK Law Commission in 2005 in its reference on homicide law and from 1990-2000 he was a consultant to the Attorney-General's Department (Cth) on the development of the Model Criminal Code and Commonwealth Criminal Code.

Commonwealth criminal law is now codified. The common law of criminal responsibility and common law offences have been displaced by statute law. My particular concern, in this presentation, is Chapter 2 of the *Code* – the *General Principles of Criminal Responsibility* and, in particular, with emerging stress points in judicial interpretation of its provisions. The Code has been in force now for 7 years. It has survived unscathed the interpretive rigours of the High Court in its recent decision on sexual slavery and it has provided, in a recent decision of the NSW Court of Criminal Appeal, the opportunity for incorporation in caselaw of substantial parts of Chief Justice Spigelman's McPherson Lectures on *Statutory Interpretation And Human Rights*. These are positive developments. There is, nevertheless, a need for review of Chapter 2, in particular the provisions relating to the rule that ignorance of the law is no excuse and the fault elements. Chapter 2 was originally prepared by the Model Criminal Law Officers Committee [MCLOC] on a reference by the Standing Committee of Attorneys General. It would be appropriate to refer Chapter 2 to MCLOC for reconsideration. Ideally, the general part of the *Code* should be subject to a continuing and independent process of expert review.

A proposal for a nationally coordinated response to fraud

Dr Russell Smith, Australian Institute of Criminology

Russell Smith is the Principal Criminologist at the Australian Institute of Criminology. He is currently First Vice-President of the Australian and New Zealand Society of Criminology, a Fellow of the School of Social and Political Sciences, University of Melbourne, and Chair of the Victoria Police Human Research Ethics Committee. Previously, he practised as a Solicitor and has also held positions as Academic Adviser to Criminology Research Council, a member of the Medical Practitioners Board of Victoria, and a Lecturer in Criminology at the University of Melbourne.

Crimes involving dishonesty, collectively known as fraud, have been estimated to cost developed nations many billions of dollars each year. In Australia, fraud has been estimated to cost at least \$8.5 billion. The last decade has seen the creation of an extensive range of responses to this problem by government and business alike, some of which are beginning to bear fruit. In both the United Kingdom and North America, dedicated national agencies are being established to coordinate responses to fraud, to prepare statistical analyses of risks and trends, and to provide information on prevention. Much, however, remains to be done – particularly concerning the coordination of the many preventive and response strategies being used by public and private sector organisations. This paper outlines current avenues of fraud reporting that individuals and organisations use, examines the extent of reporting, and considers the various barriers that exist to reporting fraud. It is argued that there are various approaches that could be developed to encourage greater reporting of fraud, and that a nationally coordinated response would assist those who make official reports, and enable information to be gathered which may assist in the development of improved fraud prevention strategies and interventions.

Session 2 Streamed Presentations and Discussions

Stream B: Policing and Rights

Research, public policy and policing

Professor David Dixon, Dean, Faculty of Law, University of New South Wales

David Dixon is Dean of the Faculty of Law at the University of New South Wales. Focusing on the interrelationships between law and policing practice, his research has included projects on regulation, police interrogation; comparative crime control strategies, police reform, and the policing of drug markets.

This paper provides a jaundiced view of the relationship between researchers and policy-makers in Australian criminal justice. In many respects, the quality of this relationship has deteriorated in the last decade. This forum is most welcome as a possible basis from which more productive relationships may grow.

On one side, policy-makers mouth the rhetoric of evidence-based policy, but fail to take research seriously. Empirical evidence and opinion are treated as if they inter-changeable. Study tours provide the basis for learning spurious lessons from other jurisdictions. Perceived success or failure of policy depends more on political opinion than on empirical evidence.

On the other, academics have too often responded to law and order politics with rhetoric convincing only the already convinced. Elsewhere, there has sometimes been a rush to usefulness at the expense of rigour. Exponents of a new 'crime science' speak as if the theoretical and methodological critiques of the 'old criminology' had never happened. The scramble for scant research funding shapes the academic enterprise.

This paper will suggest that a more mutually beneficial and productive relationship between researchers and policy-makers is possible.

A civil liberties perspective

Terry O'Gorman AM, President, Australian Council for Civil Liberties

Terry has been a criminal lawyer since 1976 and has sat on the Queensland Law Society Criminal Law Committee since 1979 and has been an Executive Member of the National Association for Criminal Lawyers since its inception in 1986. Terry was awarded the Order of Australia in a General Division in 1991 for services to the legal profession and is currently the President of the Australian Council for Civil Liberties and Vice President of the Queensland Council for Civil Liberties.

My presentation will concentrate on the English Criminal Cases Review Commission which was set up approximately 8 years ago to deal with a series of demonstrable miscarriages of justice against belated recognition in the UK that having miscarriages referred to the Court of Appeal by the Home Secretary (equivalent of the Australian Attorney General) was unsatisfactory for a number of reasons.

Models of covert policing regulation

Professor Simon Bronitt, Australian National University

Simon Bronitt is a Professor of Law at the ANU College of Law in Canberra. He is widely published in the fields of criminal law and criminal justice, and is author (with McSherry) of *Principles of Criminal Law* (2005, 2nd ed, Lawbook Co).

The regulation of covert policing in Australia is characterized the legal regulation of specific technologies (surveillance devices and telecommunications interception) and particular law enforcement techniques (controlled operations). This complex, overlapping framework of State, Territory and Federal regulation is supplemented by varying degrees of judicial supervision and administrative oversight. This presentation identifies the weaknesses of the present system and the prospects for the developing a new model for covert policing regulation, which is both national in its focus and more effectively integrates existing legislative, judicial and administrative models of covert policing regulation. This change could be achieved by:

- developing a harmonized approach to the legislation and codes of practice regulating covert policing around Australia;
- promoting cross border law enforcement through the mutual recognition of covert policing warrants and authorizations, and
- creating a new specialized law enforcement court or tribunal, supported by a statutory Public Interest Monitor, with the power to issue declarations on the legality and propriety of proposed covert policing methods.

The Australian Commission for Law Enforcement Integrity: strengths, weaknesses and prospects for effective oversight

Associate Professor Colleen Lewis, Monash University

Colleen Lewis' research interests cover two disciplines: criminal justice and public policy. Her research is motivated by the desire to contribute to the shaping of public policy and she publishes widely in various publications as well as engaging in public debate.

The Australian Commission for Law Enforcement Integrity (ACLEI) was established in December 2006 to detect, investigate and prevent corruption in the Australian Federal Police and Australian Crime Commission. It gives priority to matters of serious and systemic corruption. Like other anti-corruption bodies in Australia (Crime and Misconduct Commission Qld; Police Integrity Commission NSW; Corruption and Crime Commission WA) ACLEI has been granted the coercive powers needed to effectively perform its citizens' watchdog role. But, as I will argue in my presentation, being given the necessary powers to detect and prevent corruption is not sufficient. In order to fulfil its public interest function, ACLEI must receive the resources needed to make use of its powers. This Federal body is currently under-resourced and as such is unable, through no fault of its own, to achieve its potential as an effective anti-corruption body.

Providing the Proper Role for Victims of Crime — The Australian Government's Obligation to Treat Victims of Crime Fairly

Michael O'Connell, Commissioner for Victims' Rights (South Australia)

Michael O'Connell is the Commissioner for Victims' Rights in South Australia. Previously Mr O'Connell was South Australia's first Victims of Crime Coordinator and, before that, the State's first Victim Impact Statement Coordinator.

Internationally, the Australian Government encouraged support for, then endorsed, the 1985 United Nations declaration on victims' rights, advocated for the Rome Statutes that establish the International Criminal Court and enshrine victims' rights, and in 2005 became a signatory to the Commonwealth of Nations Statement of Justice for Victims of Crime.

Nationally, the Federal Attorney-General supported the 1993 national charter on victims' rights. Today there are a range of federal crimes (e.g. homicide of Australians overseas, people smuggling, sexual servitude, terrorism, crimes against humanity and internet-based child pornography) covering people as victims.

Despite these developments, currently there is no Federal Declaration on Victims' Rights. The Federal approach to victim assistance is piecemeal, and there is no federal victim compensation scheme (although the ALRC recommended one in 1980). In addition, there is no national framework for victim assistance across state and territory borders.

The Australian Government should act to ensure justice and fair treatment for victims of crime. As a matter of right, the Australian Government should direct agencies and institutions, whether executive or judicial, to treat victims of crime with respect and dignity and to afford them due process. Given the legacy of Australia's international victim activism, the Government should be a strong voice for the legitimate interests of victims across our globe by leading the call for an international convention on victims' rights.

Re-assessing the use of emerging technologies and new forms of expertise (in investigations and prosecutions)

Associate Professor Gary Edmond, University of New South Wales

Gary Edmond specialises in the study of expert evidence and the relations between law and science. Originally trained in the history and philosophy of science, he subsequently studied law at the Universities of Sydney and Cambridge. An active commentator on expert evidence in Australia, England, the US and Canada, he is a member of the Australian Academy of Forensic Sciences, the Society for the Social Study of Science (US), and recently served as an international adviser to the Goudge Inquiry into Paediatric Forensic Pathology in Ontario.

Many different types of expertise are used in the investigation and prosecution of federal crimes. In recent years the proliferation of networked personal computers, mobile phones, and CCTV cameras has created new types of risks and fostered new types of expertise, such as IT specialists, those making identifications from voice recordings, those identifying persons from security images, and even linguistic analysis of SMS and email messages. Yet, Australian federal police, investigative and security agencies, the CDPP and federal courts (and their state counterparts) have not developed a principled approach to the use of these emerging technologies and new forms of expertise. This is unfortunate because few of the techniques, particularly those associated with identification, have been tested or independently reviewed.

This paper proposes standardising approaches to incriminating expert opinion evidence using DNA evidence as something of a benchmark. For, those developing and relying on new techniques should be interested in the reliability of any results. Knowledge of the validity and reliability of emerging technologies and expert opinions would encourage a more rational approach to their use in federal criminal justice and would simultaneously prevent Australian citizens (and others) from being confronted with incriminating evidence of unknown reliability. Infusing emerging technologies and new forms of expertise with scientific rigour will streamline investigations and help to avoid reliance upon unreliable evidence. Federal leadership in this area will place Australia in line with international trends, most conspicuous in Canada, Germany and the US, and may encourage uniformity across states and territories.

A human rights approach to federal criminal justice reform

Dr Tessa Boyd-Caine, London School of Economics and Political Science

Tessa Boyd-Caine has worked in academia, in public authorities and in civil society organisations. She was formerly Administrator of the Institute of Criminology at the University of Sydney, which she left to take up a position managing the forensic jurisdiction of the NSW Mental Health Review Tribunal. Tessa is preparing a research proposal to investigate how the Human Rights Act has been received in British law and culture.

With the establishment of state- and territory-based human rights legislation affects effecting some jurisdictions in which federal suspects can be tried and detained, and the growing calls for a national bill of rights or equivalent, the framework of human rights is increasingly relevant to federal criminal justice policy and administration.

Human rights pose some policy challenges. The rights of individuals need to be balanced against claims that are often seen as competing, such as the interests of national security, or public expectations. Similarly, a strong civil society is central to democracy and good governance, yet non-government public action can expand the gap between the provision of resources and the objectives, efficiency and accountability with which those resources are expended.

However, human rights can also provide policy answers. They provide a framework for incorporating victims into criminal justice processes, such as on the basis of right to information principles. Human rights also enable policy to address the needs of both victims and offenders without constructing them as oppositional, or undermining the interests of one through the realisation of the other.

Overseas law enforcement cooperation

Julian McMahon, Australian Lawyers Alliance

Julian McMahon was admitted to practice in 1992 and joined the Victorian Bar in 1998. Since then his practice has been in criminal matters. He has acted either as sole counsel or junior counsel in numerous complex matters, including police corruption, terrorism, drug, murder, sex, commercial fraud, tax evasion and death penalty cases.

This paper would involve a short talk on how we should approach the question of providing information about targets to countries where that target may be executed.

I would consider what the principles involved are, what safeguards are in place prior to the provision of information and what policies, protocols or legislation we should have in place to ensure that Australians do not assist in the process of the execution of others, whether Australian or non-Australian.

The purpose of this talk is to encourage discussion about a workable model which assists in offshore crime prevention or apprehension of targets even in the most serious of crimes while maintaining principled and effective opposition to the death penalty in accordance with Australian Government policy

Session 2 Streamed Presentations and Discussions

Stream C: Court Process, Sentencing and Corrections

Challenges of running a Commonwealth criminal trial in the Supreme Court

Justice Peter Johnson, Supreme Court of New South Wales

Justice Johnson was admitted as a solicitor in 1976 and as a barrister in 1982, taking silk in 1997. Since the mid 1980s he has been the co-author with Justice Howie of *Criminal Practice and Procedure* (NSW). In Feb 2005 he appointed a judge of the Supreme Court of New South Wales where he sits in the Common Law Division. His Judicial work includes presiding at criminal trials, sitting on the Court of Criminal Appeal and on the civil side hearing a range of common law and administrative law matters.

Key areas covered in presentation:

- Practical issues with a jury in a long commonwealth trials, including possible reform
- Case management issues for a complex criminal trial, including pre-trial disclosure
- Commonwealth Criminal Code issues
- Issues concerning expert evidence

Formalising pre trial conferencing

Christopher Barry QC

Christopher Barry QC holds the degrees of Bachelor of Arts from the University of New England, Bachelor of Laws from the University of Sydney and Master of Laws from the University of Bristol where he was the Rotary Foundation Post-Graduate scholar between 1978 and 1979. He was appointed Queens Counsel in 1992. He has practised in all jurisdictions but is interested in the area of complex criminal trials.

- Informal discussions usually initiated by counsel for the defence to “*test the water*” in relation to such matters as agreeing a plea of guilty in exchange for a lesser charge have always been a feature of the criminal justice system.
- The practice has evolved into informal conferences in some jurisdictions to explore these matters.
- These frequently occur just before trial. This necessarily wastes a considerable amount of public expense.
- The pre trial conference should occur as soon after committal as possible.
- If the pre trial conference results in a guilty plea, sentencing should be in a “*fast track*” list.
- Formalising pre trial conferencing will save time and money for the community.

Seven years of judicial review of Commonwealth criminal appeals

Hugh Donnelly, Judicial Commission of New South Wales

Hugh Donnelly has been the Director, Research and Sentencing at the Judicial Commission of New South Wales since July 2007. He is responsible for the Commission's research program, the legal and statistical content of the *Judicial Information Research System (JIRS)* and the *Sentencing Bench Book*. He convenes the Criminal Trial Courts Bench Book Committee which produces suggested judicial directions for the Commission's *Criminal Trial Courts Bench Book*.

This paper will report on the results of a seven year longitudinal study into conviction appeals in New South Wales in relation to prosecutions for Commonwealth offences. It will analyse the sources of legal error that lead to a change of result on appeal and the reasons given for overturning the result in the court below. This study involves appeals in New South Wales where the largest number of Commonwealth matters are prosecuted.

Children of prisoners: an issue for courts to consider in sentencing

Professor Michael Levy, ACT Health

Michael Levy is the Director of the Corrections Health Program in ACT Health. He currently holds positions at Monash University, the University of Sydney and the Australian National University and the World Health Organisation.

There are over 27,000 full-time adult prisoners in Australia. Behind this number are an estimated 4% of all Australian children, and over 20% of Aboriginal children, who are personally affected by the criminal proceedings around a primary-care giver.

The predictors of subsequent criminality include a strong contribution from parental incarceration – a Victorian study has identified that the children of prisoners are five – to – six times more likely to become prisoners themselves.

The interactions of poor health, poor access to health, housing and employment are exacerbated through the incarceration of a primary caregiver.

The purpose of this presentation is to bring to the attention of the criminal justice sector, hidden consequences of the sentencing process, and raises the prospect of taking into account the future impacts of incarceration when sentencing is planned.

Additionally, where and when incarceration of a parent does occurs, the rights of children need to be better addressed by Australian correctional authorities. The principle of ‘the best interests of the child’ could guide the development of a more humane Australian prison system.

The jury – where’s the Commonwealth’s TLC?

Research, model uniform policies and protocols

Professor Jill Hunter, University of New South Wales

Jill Hunter has published widely on Australian evidence and procedural law. Her areas of teaching and research include police investigations, prosecutorial practice and the criminal trial, with a particular focus on comparative and socio-legal perspectives.

What’s the problem? Lay participation in justice is not trouble-free. All Australian jurisdictions face challenges unforeseen by our Constitution’s generation regarding selection, support, instruction and management of novice, conscripted judges of fact. Examples of juror misconceptions,

misconduct, emotional trauma and intellectual overload reveal that our justice system and our citizens may pay heavily if these challenges are not adequately addressed. Currently jury trial processes are informed and reformed largely through appellate rulings and through state legislation that is piecemeal and reactive to singular issues. But the jury system requires coordinated, managed support, informed by cross-disciplinary research with a juror-focus as well as a process-focus. Unsurprisingly, law and lawyers don't have all the answers. Currently lack of resources is a major obstruction as states' day-to-day operational demands smother institution-building jury reform.

Is this important? Self-evidently, yes. The constitutionally-embedded right to trial by jury reflects the common law's gold standard for adjudication. Australia's embrace of the jury swims with the global trend seen in numerous countries' introduction of lay participation in their adjudication of serious crime. Writ large is a state's willingness to give voice to community values and to create some transparency in its legal processes.

How should the problem be addressed? Jury issues are national, not state-specific. The Commonwealth is well-positioned to support (and draw on existing) top drawer cross-disciplinary research to develop effective model uniform policies and protocols that ensure best practice for jury trials across Australia.

Incorrect acquittals and exceptions to double jeopardy doctrine

Dr David Hamer, University of Queensland

David Hamer is a senior lecturer at the TC Beirne School of Law at the University of Queensland. He has published extensively in Australia and the UK on the logic of inference, evidence law and criminal justice.

NSW, Queensland, and very recently South Australia have created exceptions to the protection against double jeopardy. An acquittal for a very serious offence may be overturned, either on the basis that it is tainted, or where there is fresh and compelling evidence of guilt. COAG has considered the extension of the reforms to other jurisdictions. In introducing exceptions to such an ancient doctrine, the reforms are dramatic. But what is their real significance?

The Australian exceptions remain unused. English exceptions have been in place much longer, but only one acquittal has been overturned. Commentators have suggested that the reforms are merely symbolic and have little practical importance.

And yet, there is reason to expect a high number of incorrect acquittals. The very point of the stringent criminal standard of proof is to minimise the risk of a mistaken conviction, at the expense of an increased risk of a mistaken acquittal. Mistaken convictions are revealed with some regularity, and the expected rate of mistaken acquittals should be much higher. But the effect of double jeopardy protection has been that the authorities have generally lacked motivation to question the accuracy of acquittals. It appears that this reluctance is lingering even where double jeopardy exceptions have been created.

Even taking account of the tight restrictions on the exceptions, they contain considerable untapped potential for improving the accuracy of criminal justice. However, for this potential to be realised there must be both attitudinal and institutional change.