Observations from the Federal Criminal Law Conference

On 5 September 2008 the Law Council of Australia and the New South Wales Bar Association jointly hosted a conference to examine recent developments in federal criminal law. Chris O'Donnell reports.

The predominant topics covered at the Federal Criminal Law Conference were the operation of federal anti-terrorism laws and proposals to criminalise illegal cartel activity. Other topics covered included extradition, war crimes and proceeds of crime legislation.

In her welcome to participants, Bar Association President Anna Katzman SC noted that:

> The inspiration for the conference largely came from some remarks that the minister for home affairs, Bob Debus, made in his maiden speech to the federal parliament. He promised a more consultative approach to law reform than the previous government and foreshadowed a major forum for the discussion of proposals to reform federal criminal justice legislation later this year. That forum will now be held in Canberra on 29 September. This conference is designed in large part to assist and inform that discussion.

After referring to recent controversies arising out of the application of the anti-terrorism laws in the *Haneef* and *Ul-Haque* cases, Katzman SC noted some positive developments emerging since the election of the Rudd Labor government:

> Last month, in a break from the position of its predecessor, the Rudd government agreed to issue a standing invitation to UN human rights experts to come to Australia, to examine, monitor, advise and publicly report on human rights in this country and in this, the 60th year since the Universal Declaration of Human Rights, to show Australia as a leader in international human rights. While the system for mandatory detention of asylum seekers remains intact, the majority of Indigenous Australians live in poverty and legislation permitting preventative detention and arbitrary arrest remains on the statute books, there is much work to be done.
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> With the change of government and the prospect of a change in Washington, too, and with that the prospect of troop withdrawal from Iraq, now is as good a time as any to examine the wisdom of legislation introduced in the wake of the September 11 terrorist attacks and to help the government get the balance right between protecting our security without sacrificing our civil rights.

... when we address the threat of international terrorism, Australia must ensure that the time and resources dedicated to that objective are managed and deployed by a leadership team that always has, as its number one priority, the security and safety of the Australian people.

Delegates at the criminal law conference, 5 September at the Hilton Sydney

In an address titled 'The Clarke Inquiry in Progress: Tentative Observations for Reform', Stephen Keim SC offered insights into his experience as counsel for Mohamed Haneef. After challenging the extent to which restrictions surrounding the Clarke Inquiry enable it to be full and open, Keim concluded with following remarks:

> I make some very tentative observations.
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> The test required to be satisfied, to arrest under s3W of the Crimes Act, reasonable satisfaction that the person has committed the offence, is a good test. I do not think it was applied. Nor does the evidence suggest that the requirement in sub-s3W(2) that one must release, if the reasonable satisfaction evaporates, was ever adverted to. Part 1C of the Crimes Act was never intended to result in detention for 12 days without charge. An express upper limit on the period of detention should be inserted into the legislation.
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> The hearings before Mr Gordon in which orders for increased investigation time and periods of down time were made failed to act as the safeguards they were intended to be. The legislation should make clear that they are not secret hearings; that the detainee is entitled to be told the information on which the application is based; and the hearing should take place in the presence of the detainee, whether he has legal representation or not.
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> The Migration Act is a vehicle of political expediency. It should be completely rewritten. Australia should work to make sure that its public servants are professional and fearless. Minsters will receive better advice if that is achieved.
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> Finally, when we address the threat of international terrorism, Australia must ensure that the time and resources dedicated to that objective are managed and deployed by a leadership team that always has, as its number one priority, the security and safety of the Australian people.

Dina Yehia, a NSW public defender, addressed the conference on the operation of federal anti-terror laws and questioned the need for them in the light of pre-existing legislation. After outlining prominent recent cases in the area, such as *Mallah*, *Lodhi*, *Roche, Khazaal* and *Ul-Haque,* Yehia examined: the application of the laws to acts in preparation for a terrorist act; offences where a specific terrorist act is not alleged; the extended geographical jurisdiction governing the provisions; the fact that a specific perpetrator of a contemplated, though not specified, terrorist act need not be specified; and the extension of the definition of 'terrorist act' to action or threat of action.

After proposing some areas for reform, and noting some pre-existing offences such as murder, kidnapping and possessing or making explosives, Yehia concluded:

> There is a question therefore as to whether the anti-terror legislative regime was necessary when the existing law adequately dealt with 'terrorist' offending behaviour. However, assuming there is an argument that a new regime criminalising terrorist related conduct was necessary post September 2001, the question remains as to whether we have struck the right balance between protecting the community against criminal conduct on the one hand, and protecting individuals against human rights abuses, on the other.

Justice Mark Weinberg considered immediate proposals to vest the Federal Court of Australia 'with indictable criminal jurisdiction in relation to what have been described as hard-core cartels' and the more distant possibility of a separate federal criminal court system in Australia along the lines of that which exists in the United States. After surveying the 'autochthonous expedient' – the uniquely pragmatic Australian solution of vesting state courts with federal jurisdiction - Justice Weinberg outlined developments leading to the expansion of the Federal Court's jurisdiction, notably s39B(1A) of the *Judicary Act 1901*, but noted with respect to criminal jurisdiction that:

> As a result of the limitation contained within s39B(1A)(c), the Federal Court's criminal jurisdiction stands in marked contrast to that of its civil jurisdiction. It is only where a particular federal statute specifically confers criminal jurisdiction upon the Federal Court that it can deal with the matter.

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Copyright is an example of such statutory criminal jurisdiction. The proposed cartel reforms are another. However, practical difficulties associated with the Federal Court becoming a court of more general criminal jurisdiction and hearing indictable matters include questions concerning bail, committals and court design. Justice Weinberg concluded:

> As matters presently stand, the idea of establishing a separate federal criminal court system in Australia is simply not viable. There is, however, a case for conferring upon the Federal Court a limited indictable jurisdiction extending beyond cartel cases, and into other areas where that court has particular expertise. I include in that category tax fraud and serious offences under the Corporations Act. If such a jurisdiction is conferred upon the Court, it would make sense to make it concurrent rather than exclusive. That allows for the possibility of a joint trial of state and federal offences where that is appropriate. The Federal Court could not, as matters stand, conduct such a trial. I should add, however, that it would be unlikely, in the sorts of cases that I am discussing, that state charges would be brought in conjunction with federal charges.
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> Ultimately, there will be pressure upon the Commonwealth to develop its own court system to deal with federal crimes, just as there will be pressure, eventually, upon the Commonwealth to construct and manage its own prisons. In that regard, we will almost certainly emulate what the United States has long done. It will not happen soon, it may not happen in my lifetime, but happen it will.

Other speakers at the conference included Brent Fisse (on the proposed cartel offences under the Trade Practices Act), Tim Game SC, Stephen Odgers SC (on injustices arising out of the operation of federal proceeds of crime legislation), Ned Aughterson (on extradition) and Mark Ierace SC (on war crimes). Copies of the conference papers are available on request from the NSW Bar Association.