

**SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND  
CONSTITUTIONAL AFFAIRS**

**INQUIRY INTO THE FEDERAL COURT OF AUSTRALIA AMENDMENT  
(CRIMINAL JURISDICTION) BILL 2008**

SUBMISSION BY JOHN R CHAMPION SC

**INTRODUCTION**

1. On 4 December 2008 the Senate referred the provisions of *the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* to the Standing Committee on Legal and Constitutional Affairs for inquiry and report.
2. By letter dated 10 December 2008 addressed to Peter Riordan SC, Chairperson of the Victorian Bar, the Committee invited written submissions to its Inquiry by 12 January 2008.
3. In turn, the Victorian Bar advised the Criminal Bar Association of Victoria of the invitation of the Committee to the Bar, and invited the Criminal Bar Association to make a written submission to the Committee.
4. Having become aware of the invitation to the Victorian Bar to make a written Submission I wish to take the opportunity to make a personal Submission to the Committee.
5. The letter dated 10 December 2008 and addressed to Peter Riordan SC stated the effect of amendments to *the Federal Court of Australia Act 1976* and the *Judiciary Act 1903* would be to “establish a procedural framework allowing the Federal Court of Australia to exercise the indictable criminal jurisdiction which will be given if the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* is enacted”.
6. Further, it is stated that “the Bill will give the Federal Court the full range of powers it will need, including to be able to conduct jury trials and deal with appeals.” It is proposed that the legislation will provide for pre-trial proceedings, bail, empanelling of juries, and sentencing.

7. I note that some of these issues were examined by the Australian Law Reform Commission ("ALRC") in its enquiry into, and reporting on, Part 1B *Crimes Act* 1914 and whether it is "an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders, and what, if any, changes are desirable".<sup>1</sup>
8. On 31 March 2005 the ALRC held a hearing in Melbourne which I attended. Also present were Richard Maidment SC (representing the Victorian Bar); Megan Tittensor (representing the Criminal Bar Association) and Ross Nankivell (representing the Victorian Bar Inc) attended.
9. The Commission indicated that any Submissions on the issue of Sentencing of Federal Offenders could be provided to the ALRC until the end of April 2005. Accordingly, the Criminal Bar Association provided a written submission to the Commission.
10. During that hearing I expressed some views that were personally held. Accordingly I provided a written submission to the Commission about some matters that are now relevant to the Inquiry being conducted by the Standing Committee.
11. I wish to provide the following written submission to the Committee about matters relevant to the current Parliamentary Inquiry. It is necessary for me to make clear that the views I expressed at that hearing, and that I now provide in writing to the Committee, are those personal to me. They are not views expressed on behalf the Criminal Bar Association, which Submission has been provided also today.

## **PERSONAL BACKGROUND**

12. I have been a full-time member of the Victorian Bar since 1977. I practise exclusively in the field of criminal law and have done so since about 1982. For 6 years, between 1999 and 2005, I held the position of In-House Counsel at the Melbourne office of the Commonwealth Director of Public Prosecutions. I was appointed to that position in 1999. The position of In-House Counsel involved appearing exclusively on behalf of the Director to prosecute

Commonwealth matters at all levels. The position generally entailed appearing in and giving advice about matters involving complexity. As well, I was required to give oral and written advice on matters of law and advocacy.

13. I was appointed Senior Counsel for the State of Victoria in 2003.
14. I have been regularly prosecuting cases for the Commonwealth Director of Public Prosecutions since the early 1990's. As well as appearing for the defence, I had regularly prosecuted matters for the Victorian Director of Public Prosecutions from my early years at the Victorian Bar, until my appointment to the Commonwealth Director of Public Prosecutions.
15. In July 2005 I returned to private practice at the Victorian Bar. Since that time I have regularly prosecuted serious and complex indictable trials and committal proceedings on behalf of the Commonwealth Director of Public Prosecutions, and the Victorian Office of Public Prosecutions.
16. I have been a member of the Executive Committee of the Criminal Bar Association of Victoria since 2004. I have been Chairman of that organisation since September 2007. Further, I am currently the Criminal Bar Association representative on the Victorian Supreme Court User's Group; the Sexual Assault Advisory Committee; and for the last 3 years have been involved in the ongoing Victorian Department of Justice Consultative Committee that has been engaged in a substantial and comprehensive review of the substantive and procedural provisions of the *Crimes Act 1958 (Vic)*.
17. I wish to limit my Submission to the Inquiry to one matter. This relates to the fundamental issue of the creation of a separate federal jurisdiction to deal with federal criminal matters.

## **A SEPARATE FEDERAL CRIMINAL SYSTEM**

18. Australian Law Reform Commission Issues Paper 29 raised the question of whether a completely separate federal criminal justice system should be created.<sup>2</sup> My opinion was in 2005, and is now, that the time has arrived when such a system should be created.

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<sup>1</sup> See: Terms of Reference, Issues Paper 29, page 5

<sup>2</sup> Issues Paper 29 at Chapter 3.49 – 3.59  
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19. I note that at present the approach taken by the current Bill is that it “provides a procedural framework which will allow the Federal Court to exercise the indictable criminal jurisdiction which it will be given to deal with serious cartel offences if the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* is enacted. Further, the Explanatory Memorandum notes that “at this stage there is no other legislation which gives the Court indictable criminal jurisdiction and no other such legislation is currently planned or proposed.”<sup>3</sup>
20. I support the Bill, and the proposal that the Federal Court be provided with a criminal jurisdiction, as set out in its proposed provisions.
21. Having stated the above, from what I have read of the present Bill there is every reason to conclude that the provisions provide an appropriate procedural framework for the trial of all federal indictable matters, and that it need not necessarily be limited to the trial of certain types of matters. In my view the jurisdiction and procedure that is provided appears easily capable of extending to the court’s capacity to try all federal indictable matters.
22. I am of the view that the criminal jurisdiction of the Federal Court should not be limited to serious cartel matters. At the initial stages of the increased jurisdiction it may be appropriate for the Court to deal with indictable cases that arise out of the civil work that is usually carried out by the Court, for example, matters concerning trade practices, corporations, bankruptcy, and immigration to name but a few examples. There are more that could be cited.
23. However, it seems to me that the Federal Court should have jurisdiction over all criminal matters involving federal offences. Over many years I have seen at first hand how the federal criminal justice system operates in its interface with the criminal justice system of the State of Victoria, and to a lesser extent, interstate. The mechanical arrangements as to how federal jurisdiction is exercised by state courts is well understood and need not be the subject of repetition here.
24. In the context of whether a separate federal criminal justice system should be created I have witnessed a number of developments in federal criminal law that require mention.

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<sup>3</sup> See: Explanatory Memorandum p.1  
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### Complexity and Amount of Federal Crimes

25. There can be no doubt that in the last 20 years the spectrum of Commonwealth offences has increased exponentially. ALRC Issues Paper 29 recognised the dramatic growth in the scope of federal criminal law.<sup>4</sup>
26. In this regard I agree with the views expressed in Chapter 3 in Issues Paper 29 that the commission of crime has become a transnational phenomenon, more so than ever before. Cases prosecuted by the Commonwealth Director of Public Prosecutions are increasing in complexity, and investigations by law enforcement agencies now use sophisticated techniques, involving various forms of electronic surveillance. The international nature of crime results in more frequent applications for extradition of offenders, mutual assistance applications, and the giving of evidence internationally by video link. In the area of drug importations drug seizures appear to be increasing in quantity, and in sizes of drug seizures. Fraud is becoming more sophisticated due to the use of computers to commit offences from disparate locations. The area of proceeds of crime is growing, resulting in more related applications being made to the Supreme Court of Victoria. This area will also grow in importance and frequency. Regrettably, the area of terrorism is likely to increase, with the prospect of cases being conducted with a high level of security of information, as well as the court proceedings themselves.
27. Further, new offences such as sexual slavery and servitude; sex-tourism; computer offences; and pornography have developed in more recent years.
28. Since expressing the views I did in 2005, it is apparent that cartel criminality has also increased. Like most other criminal activity, this type of offending, and the response to it by the criminal justice system, will be necessarily complicated. Like the type of offending I spoke of in 2005, it is likely that the investigative techniques of this type of criminal activity will be rendered more complex in nature. This type of offending, and the response to it, will also inevitably involve an increased interface with both national and international legal systems.
29. There is no reason to think that the federal criminal law will diminish in its field of operation. On the contrary, it is clear to me that the operation of federal

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<sup>4</sup> See Issues Paper 29 at Chapter 3.50  
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criminal law is bound to increase in numbers of cases, and in their complexity. The stature and importance of the federal criminal law will continue to grow.

30. As a result of these developments, Commonwealth cases have become increasingly complex, frequently requiring a specialized approach by experienced prosecutors. There is no reason to think such cases will become simpler to deal with. Being national and international cases, often well resourced by both the prosecution and defence, these proceedings are frequently hard fought by the prosecution and accused persons. Further, Commonwealth cases are seldom single issue cases and are more often complex circumstantial cases, lengthy, and painstaking to prove by adducing an accumulation of many facts, often unconnected.
31. In turn, judges and juries are forced to grapple with complex factual issues, and legal principles. Cartel offending is likely to increasingly fall within the more complex form of criminal activity, and will be particularly painstaking to prove. Further, the nature of the offending, in my view, warrants the involvement of a court with specialization to deal with the complexities.
32. The area of sentencing of federal offenders also increases in complexity, and importance. It should be remembered that presently State appointed judges deal with federal sentencing – as well as trials - on an ad hoc basis. In Victoria, no judge of the County Court or Supreme Court would deal permanently, or in the main, with federal cases. From my experience, it would seem that judges are required to re-acquaint themselves with federal sentencing principles each time they are required to deal with a federal offender.
33. In my opinion these new circumstances lead to the conclusion that the use of State courts, and ad hoc judges, represents an inefficient means by which federal cases are dealt with. On the other hand, permanently appointed federal court judges dealing exclusively with federal cases should handle those cases more efficiently, and with an ongoing and developing body of knowledge about the prosecution of federal offences, and the sentencing of federal offenders.
34. There is in my view an increasing sense of need for specialization and experience in the way federal cases are pursued. The necessary experience

and specialization not only falls to the practitioners involved. It must also apply to the courts that hear these types of cases.

35. In my view the time has arrived where due to the complexity of federal cases specialised courts and judges should hear these cases. The cases are difficult to move forward and specialisation should provide the most efficient means by which to bring such cases through to a conclusion. In my view this requires more continuous and concentrated experience than can be provided by State courts intermittently exercising federal jurisdiction, with judges appointed on a case by case basis, as required.

36. Another serious issue arises in respect of the resources allocated by states to the criminal justice system. Acknowledging that I can only speak of the circumstances in Victoria, it is clearly arguable that the Victorian State Government is reluctant to adequately fund the criminal justice system in this state. In the County Court of Victoria in particular there exists a serious backlog of cases, and insufficient judges and staff to clear the backlog. With the present concentration on the resolution of state sexual offence cases, it is beyond any question that there are serious delays in the resolution of other types of cases. Commonwealth cases being often long and complex, struggle to be resolved in a timely fashion. Significant delays also exist in the Supreme Court of Victoria, and in the Victorian Court of Appeal.

37. The transfer of a federal criminal jurisdiction to the Federal Court system would, in my view, release a considerable amount of resources to the State of Victoria, to more adequately deal with its own state cases in a more expeditious and timely fashion.

38. As recognised by this Bill, the point has been reached where the need exists for a separate federal criminal justice system constituted by judicial officers who are engaged on a full time basis dealing with the specialised types of cases prosecuted under Commonwealth indictments.

39. Such a national and unified approach would encourage consistency of treatment as between federal offenders from state to state. Such a circumstance can only be desirable prospect in modern Australia.

#### Commonwealth Criminal Code

40. The advent of the Commonwealth *Criminal Code* fortifies in my mind the need for a separate federal court system. The effect of the recently enacted *Criminal Code* is now being felt as cases come before the courts and it is clear the application and interpretation of the *Criminal Code* provisions is not proving to be an easy task.
41. In my view there has been nowhere near sufficient guidance provided by the Australian Government to enable the provisions of the *Code* to be sufficiently understood, and successfully applied to cases now coming before the court system. Those who made the *Code*, and brought it into effect, did not tell us how to use it. Little practical guidance was provided to the prosecutors, to the defence, and to the courts in how to apply the *Code* provisions. The task appears to have been left to the criminal justice system, comprising the judiciary, the prosecutors, and the defence to work out. This task requires expertise, and a consistent approach.
42. In particular, the principles of criminal responsibility provided for in the *Code* are novel, difficult to grapple with, and have and will require careful analysis and development.
43. Further, the inception of the *Code* has resulted in the creation of a wider range of offences than existed before. The *Code* has provided for a more complete package of offences than previously existed.
44. The *Code* has provided a complete package of crimes, and criminal responsibility. In due course it will be expected that new federal sentencing provisions will be enacted. As time passes a whole new jurisprudence will necessarily develop around the application of the *Code*, and new sentencing provisions.
45. In short, there is a strong reason to think that having created a new *Criminal Code* that it deserves to be administered by a court system that has a clear and continuing stake in its future. To my mind this can only be satisfactorily achieved by the Federal Court of Australia not only being provided with the powers set out in the proposed legislation, but also by an extension of those powers to all federal offending.

## CONCLUSION



46. Should the Committee be assisted with any further submissions I would be pleased to have the opportunity to assist. I can be contacted at the my chambers which are located at Aickin Chambers, 27<sup>th</sup> Floor, 200 Queen Street Melbourne.3000, or by email at [john.champion@vicbar.com.au](mailto:john.champion@vicbar.com.au)

47. For the purposes of authenticating authorship, this Submission has been written by John R Champion SC. I can be located at Aickin Chambers, 27<sup>th</sup> Floor, 200 Queen Street, Melbourne 3000. My telephone number is 03 9225 7777.

**JOHN R. CHAMPION SC**

Melbourne

16<sup>th</sup> January 2009