A uniform code will also reduce the cost of trans-border litigation, especially in the area of fraud, and reduce costs to the community for trials and appeals resulting from mistakes in applying the different and sometimes confusing laws.

Apart from making the criminal justice system generally more cost effective and efficient and ensuring equality before the law for all Australian citizens there are consequential benefits. For example, teaching law and learning it will be less confusing, especially for those wanting to practice in other jurisdictions. Criminal lawyers will have more portable skills and admission to practice in other jurisdictions will become easier as a consequence. This in turn will give real impetus to the development of a national profession. Not only will this make legal practitioners more efficient at home but it will help them market their skills in the Asia-Pacific rim countries.

Uniformity is best accomplished in the Australian context by way of the Model Criminal Code because not only does it simplify the law but four of the nine jurisdictions (Queensland, Western Australia, Tasmania and the Northern Territory) already have criminal laws based on a Code. A Code is meant to explain the state of law as it is without the need for practitioners and the public to delve into case law to find definitions and interpretations. Because the Code will contain all the relevant law it will ensure clarity and certainty. The law articulated in the Code will be more reliable.

As for judges having less 'flexibility', in a Code the principles of criminal responsibility are enacted by Parliament, they do not evolve through precedent. Because they are codified they can be applied consistently. This is preferable to the 'flexibility' afforded by the common law where inconsistency of interpretation is likely to be more frequent.

The Model Criminal Code project has been complimented by other reform initiatives such as the uniform evidence laws recently enacted by the Commonwealth and New South Wales. It is hoped the other jurisdictions will soon follow suit.

The Model Criminal Code Committee has another three years to complete its task. Governments are committed to finishing the project by 1998 and ask that the community participates in the process by submitting comments on the discussion papers. This will work to make the model the best possible vehicle for uniformity.

# UNIFORM CRIMINAL LAW & POLICE POWERS

## uniform lowest common denominator legislation?

**Beverley Schurr** offers a very different perspective on uniformity of laws.

*Beverley Schurr is a solicitor with the NSW Legal Aid Commission and a member of the Criminal Law Committee of the NSW Law Society.*

Remember the good old days — 20 years ago — when it was thought that Australian society could be improved by the passage of Commonwealth legislation that would provide a shining standard for the States to follow? The Commonwealth is presently seeking to set standards for State criminal law through the Model Criminal Code Officers Committee and the Standing Committee of Attorneys-General.

The Commonwealth will say, of course, that they have consulted. I have a whole shelf of the discussion papers, interim reports and reports of the Gibbs Committee, the committee to review the Commonwealth criminal law. How many practitioners or private citizens, as compared with those consultants or employees paid to write responses, have been able to assess this vast amount of material?

I am reminded of the Australia Card. For a year or two it was possible for an officious bystander to keep up with the debate, but as the privacy protections were rolled back by innumerable pieces of legislation and subordinate legislation and by hearings conducted by the Privacy Commissioner which ran for days on end, the citizen dropped out of the debate.

The Commonwealth says that it wants to establish a legal system whereby those offending against Commonwealth law are treated the same irrespective of the state in which they are prosecuted. The reverse side of that proposal is that people in some states, in NSW for example, will have fewer rights during police investigations of Commonwealth offences than they have during police investigation of state offences. And fewer rights all round if the Commonwealth legislation is adopted as the model for the States.

An example of this can be seen in the powers given to police the demand the name and address of a person. Under a Commonwealth law which commenced in 1994, it became an arrestable offence for a person — whether or not suspected of any offence — to fail to supply their name and address to a Commonwealth police officer, or to a State police officer investigating a Commonwealth offence.

There is no common law power to do this, and the only statutory exception in NSW is motor vehicle law. In Victoria the power applies only where there is a suspected indictable offence. In Tasmania and South Australia the power exists only in relation to suspects.

Under this law the traditional trifecta — of offensive language, resist arrest and assault police — could turn into a quadrella with the addition of fail to give name and address.

The Australian Law Reform Commission acknowledged in its 1975 report on Criminal Investigation that this power could discriminate against the underprivileged, especially Aborigines. The report stated (at para 81):

> *There is a danger that the proposed power might be misused in relation to particular classes of persons not in the habit of carrying about with them persuasive evidence of their identity.*

The Royal Commission into Aboriginal Deaths in Custody found that this power was often used discriminately and contributed to harassment by over-policing.

Another example is the *Crimes Amendment (Forensic Procedures) Bill 1995* currently before federal Parliament. This Bill gives no right to an interpreter, provides for indeterminate detention for the purposes of obtaining a body sample, does not provide for the forensic procedure to be deferred until the person has had the opportunity to have legal advice and removes the protection of requiring a court order before allowing the fingerprinting of a juvenile.

One provision of the Bill gives police investigating Commonwealth offences the power to swab and photograph the breasts of women suspects. When the Senate Legislation Committee inquired as to which federal offence this power was directed, the representative of the Attorney-General's Department replied — the offence of assault police under the *Australian Federal Police Act*. That is for that well-known and common offence whereby women use their breasts to beat up federal police officers.

The conclusion from a NSW view point is that the Commonwealth wants to lead the way — but often from the position of the lowest common denominator.

At the same time the Commonwealth is reticent to enter the fray to overrule state legislation which sets lower standards. It didn't intervene in February 1992 when the Human Rights Commissioner condemned the Western Australian *Juvenile Crime (Serious and Repeat Offenders) Sentencing Bill 1992* and it only legislated on the Tasmanian homosexual offences law after a finding by the United Nations that the law breached international standards.

We must watch what Canberra is doing, if only to ensure our existing rights are not eroded.