Paul Byrne SC Memorial Lecture

Keeping the Criminal Law in 'Serviceable Condition': A Task for the Courts or the Parliament?[*]

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The Paul Byrne SC Memorial Lecture was delivered last year by the Hon Dyson Heydon AC QC (Heydon 2014). When Dyson Heydon left the Court of Appeal of New South Wales to take up his appointment on the High Court he spoke in flattering terms of the quality of advocacy at the appellate Criminal Bar at his ceremonial farewell (Heydon 2003). To my certain knowledge, this was not conventional flattery; it was a generous recognition, by one who had been sequestered at the Chancery Bar, of the knowledge and forensic skill of advocates appearing in the Court of Criminal Appeal. As last year's lecture revealed, Paul Byrne was in no small measure responsible for that high estimate.

Paul was an outstanding criminal lawyer. I speak of him as a colleague and I remember him as a very decent man; a man whose practice of the criminal law reflected a commitment to its values and belief in its importance in civil society. Paul had a deep knowledge of, and intellectual delight in, both substantive and procedural aspects of the criminal law. I also speak as a judge with an awareness not only of Paul's ability as an appellate advocate but also as a trial lawyer. They are skills that do not always go together. Paul was a consummate all-rounder. It is an honour to be invited to deliver this year's lecture in memory of a fine criminal lawyer who died at the peak of his powers, displaying dignity and essential decency to the end.

Among the many leading cases in which Paul appeared was *McKinney & Judge v The Queen* ('*McKinney*'). Paul appeared for Mr Judge. Peter Hidden QC and Sean Flood appeared for Mr McKinney. The appellants contended for a rule requiring the jury to be warned of the danger of returning a conviction in any case which was substantially dependent on admissions made in a police interview unless the interview was electronically recorded. My contribution to the case was the emphatic, unsolicited advice given to Sean Flood that the argument would not succeed.

The argument was better received in the High Court. The majority held that, in light of the availability of recording technology, a rule of practice should be adopted along the lines for which the appellants contended (*McKinney* at 473–6).

Brennan J was in the minority in *McKinney*. His Honour acknowledged that courts of ultimate appeal possess wide power to mould the law in order to serve the contemporary needs and aspirations of society (*McKinney* at 485). However, he considered that to require judges to give the warning, in order to induce the executive government to make recording equipment available in police stations, was to overstep the boundary between judicial and executive functions (*McKinney* at 486).

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Brennan J, again in dissent, took the same view in *Dietrich v The Queen* (‘*Dietrich*’). The question in that case was the right of an indigent accused to be provided with counsel at public expense. The High Court was unanimous in holding that the common law of Australia does not recognise such a right. The majority considered that the court’s inherent power to protect against abuse of its process might be engaged to relieve against unfairness in the case of an unrepresented accused. It was held that, in all but exceptional cases, it would be appropriate to stay the proceedings until the accused had obtained the benefit of legal representation (*Dietrich* at 311 per Mason CJ and McHugh J; 337 per Deane J; 357 per Toohey J; 369–70 per Gaudron J). Consistently with his views in *McKinney*, Brennan J considered that a court may not indefinitely adjourn a trial to force the executive to provide legal aid (*Dietrich* at 324).

The title to this lecture is taken from Brennan J’s analysis in *Dietrich* of judicial law-making. His Honour saw it as the work of the courts to keep the common law in ‘serviceable condition’, expanding or modifying common law rules in line with contemporary values so as to make the law fairer or more efficient (*Dietrich* at 319, citing *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*) and, on occasions, to change rules that have been seen to produce manifest injustice. By way of a modest example of the latter, his Honour instanced *Mabo v Queensland [No 2]* (*Dietrich* at 319).

By the early 1990s there was nothing remarkable about Brennan J’s acknowledgement of the law-making function of the senior judiciary. The decisions in *McKinney* and *Dietrich* were controversial because they involved development of the law at the boundary of judicial and executive functions. I propose to be less sensational. In ‘keeping the criminal law in serviceable condition’ I have in mind the respective roles of the courts and the parliaments in moulding the general part of the criminal law. In the common law Australian jurisdictions much of the general part remains judge-made law. In those jurisdictions which have adopted a criminal code based on Sir Samuel Griffith’s draft (‘Griffith Code’), there has been significant judicial development of the code’s treatment of the general part.

Dixon CJ was trenchantly critical of the Griffith Code’s ‘wide abstract statements of principle’ in *Vallance v The Queen* (‘*Vallance*’). They were, he said, framed ‘to satisfy the analytical conscience of an Austinian jurist rather than to tell a judge at a criminal trial what he ought to do’ (*Vallance* at 58). His Honour said the principles provided no assistance in answering a question which he mischievously described as ‘one of the simplest problems of the criminal law’ (*Vallance* at 58): in a prosecution for unlawful wounding was it incumbent on the Crown to prove that the accused’s intent in firing a weapon was to wound or was it sufficient to prove the wounding was the result of an intentional act unaccompanied by a specific intent (*Vallance* at 67)? Dixon CJ’s view of the utility of the statutory statement of wide abstract statements of principle governing criminal responsibility is criticised, by those who favour the rationalisation of the criminal law, as stalling the cause of codification (Hemming 2010:77; Leader-Elliott 2006:450).

Be that as it may, by the late 1980s momentum was building in Australia for codification of the criminal law. The impetus was largely the product of the increase in the volume of Commonwealth criminal law. The *Crimes Act 1914* (Cth) (‘*Crimes Act*’) provided for the principles of the common law with respect to criminal liability to apply to the offences for which it provided (*Crimes Act* s 4). However, the Commonwealth had enacted a great many offences across a range of statutes. Liability for these offences was subject to s 80 of the *Judiciary Act 1903* (Cth), which picked up the common law in Australia as modified by the statute law in force in the State or Territory concerned. In the result, offences against Commonwealth law were subject to differing principles of criminal responsibility depending

upon the jurisdiction in which the prosecution was brought. This situation was understandably considered to be unsatisfactory.

A committee chaired by Sir Harry Gibbs was appointed by the Commonwealth Attorney-General to review Commonwealth criminal law. The Committee addressed the principles of criminal responsibility in an Interim Report. Annexed to that Report was a draft Bill for the amendment of the *Crimes Act* by the inclusion of provisions governing criminal responsibility for Commonwealth offences. The proposals in the draft Bill were modest in comparison with the scheme of Ch 2 the *Criminal Code* (Cth), which now governs the principles of criminal responsibility for all offences against Commonwealth law.

The Gibbs Committee delivered its Interim Report in mid-1990. This was at a time when there was interest across the Australian jurisdictions in the uniform codification of the criminal law (Criminal Law Officers Committee 1992:(i)). The Standing Committee of Attorneys-General ('SCAG') placed the issue on its agenda. Subsequently, SCAG established the Criminal Law Officers Committee ('CLOC'), later the even more euphoniously named Model Criminal Code Officers Committee ('MCCOC'), to develop a model criminal code.

The CLOC commenced its work by giving priority to the principles of criminal liability. It produced its Final Report on this topic in December 1992. Its recommendations, with comparatively little alteration, were adopted by the Commonwealth and enacted as Ch 2 of *Criminal Code* (Cth).

The scope of Ch 2 is ambitious. It is expressed to contain all the general principles of criminal responsibility that apply to any Commonwealth offence (*Criminal Code* (Cth) s 2.1). Its commencement was staged to allow for the re-drafting of offences to align them with the new conceptual framework. Chapter 2 has applied generally since 15 December 2001 (Attorney-General's Department 2002:i). As Professor Leader-Elliott, author of the *Practitioner's Guide to the Code*, observes, Ch 2 is a more completely articulated statement of the elements of liability than the American Model Penal Code or the UK Draft Criminal Code proposed by the English Law Commission in 1989 (Leader-Elliott 2006). He points out that codification always has as its object the exertion of control over the interpretative discretion of courts (Leader-Elliott 2006:403). While Professor Leader-Elliott sees Ch 2 as falling short of the Benthamite panopticon, he considers that it does hold the promise, and the threat, of 'more transparent communication between legislature and courts' (Leader-Elliott 2006:404).

The Australian Capital Territory has enacted a *Criminal Code* along the lines of the Model Criminal Code. The Northern Territory has adopted parts of Ch 2 in its *Criminal Code*. Other jurisdictions have adopted parts of the Model Criminal Code selectively. However, no other jurisdiction has adopted Ch 2 of the Model Criminal Code, a circumstance that has attracted criticism (Law Council of Australia 2008). Nevertheless, there may be reasons apart from inertia which explain the limited uptake of Ch 2. The inflexibility associated with the codification of the general principles of criminal responsibility can make faint-hearted, practising criminal lawyers nervous.

Professor HLA Hart suggests that 'we should not cherish, even as an ideal, the conception of a rule so detailed that the question of whether it applie[s] or not to a particular case [is] always settled in advance, and never involve[s], at the point of actual application, a fresh choice between open alternatives' (Hart 1994:128). Memorably, Professor Hart considers: '[I]t is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some

sphere of conduct by means of general standards' (Hart 1994:128). The first handicap is 'our relative ignorance of fact' and the second 'our relative indeterminacy of aim' (Hart 1994:128).

The arguments in favour of codification derive from democratic ideals that have not changed since Jeremy Bentham expounded them: the law is made accessible to the interested citizen who wishes to know it and law-making is taken out from the hands of judges and restored to the parliament.

Among the modern champions of codification is the eminent criminal lawyer Professor Andrew Ashworth. Professor Ashworth is critical of the absence of statutory definition of key concepts in the general part of the criminal law (Ashworth 1991:421). He sees the judiciary and the parliament as engaged in a 'power-sharing' relationship in which the parliament has allowed the balance to tilt too much in favour of the judiciary (Ashworth 1991:421). He is particularly critical of the flexibility with which judges approach the interpretation of statutes, complaining (at 436) that: 'Many judges seem to regard it as part of their task to ensure that manifest rogues and villains are convicted and duly sentenced.'

For Professor Ashworth, too many cases can be explained by 'result-pulled reasoning'. It is, he says, undemocratic and unconstitutional that the judiciary should wield the power that they do over the 'outer limits' of the criminal law (Ashworth 1991:436). Professor Leader-Elliott is of the same view, arguing that *Criminal Code* (Cth) enables the legislature to reclaim from courts the authority to define the grounds of criminal liability (Leader-Elliott 2006:396).

Matthew Goode was the South Australian representative on the MCCOC and is acknowledged as a driving force behind the draft of the commentary accompanying the Final Report on Chapter 2 (Criminal Law Officers Committee 1992:iii). He has written about the work of the MCCOC and, more generally, on the rationales for codification (Goode 2004). Goode identifies two further advantages of codification. First, the statement of the law in plain English means that it is not only accessible to the interested citizen but he or she can understand it without the need of a commentary. Secondly, to use his expression, a Code is 'cheap to buy': by distilling and systematising the principles, Goode argues, the courts are spared the costly work of trawling back through the law reports over centuries in order to decide cases. The cost and length of trials and appeals, he suggests, will be reduced significantly in the medium to longer term (Goode 2004:232).

For my part, the arguments based on accessibility and ease of understanding are oversold. It may be that in the late 18th and early 19th centuries, when Bentham was writing, the general part of the criminal law was a mystery to those outside its profession. At the time the body of criminal law principles that we take as given, including features as fundamental as the presumption of innocence and the standard of proof, had not made their appearance. There was lacking a coherent concept of the mental element of criminal responsibility. It is fair to say that overarching conceptions of criminal liability did not emerge before the publication of Sir James Fitzjames Stephen's *General View of the Criminal Law* in 1863 (Smith 1998:19). The refinement of these conceptions has been a continuing project. The distinction between intention and recklessness was being worked out through much of the last century.

The general part of the criminal law may have been recherché in the coffee houses frequented by interested citizens in Bentham's day. It was not by the late 20th century. It was well explained in the leading texts in terms that were not beyond the grasp of the hypothesised interested citizen. The notion that the same interested citizen might acquire a meaningful understanding of the reach of the criminal law by reading Ch 2 of *Criminal Code* (Cth) has an air of unreality to it.

Proponents of codification acknowledge the shortcomings of the Griffith Code. I am conscious that practitioners in Griffith Code jurisdictions will bridle at the suggestion of any deficiency in their Code. Nonetheless, it has needed judicial surgery, of the kind that Professor Ashworth would characterise as an abuse of power, to bring it into line with contemporary standards with respect to criminal responsibility.

Sir Samuel Griffith sought to distil common law principles as they were understood in 1897, reflecting in large measure Sir James Fitzjames Stephen's draft criminal code. Stephen was a member of the Court for Crown Cases Reserved that decided *Tolson*, holding that the criminal law recognised a defence of honest and reasonable mistake of fact (*R v Tolson*). The *Criminal Code* (Qld), reflecting best practice at the date of its enactment, provides that a person is not criminally responsible for an act done under an honest and reasonable, but mistaken, belief in the facts (*Criminal Code* (Qld) s 24). What the *Criminal Code* (Qld) did not provide, because its time had not yet come, was that the duty of the prosecution to prove the accused's guilt extends to negativing matters of excuse or defence.

It is easy to overlook how recent are some of the assumptions that we take as fundamental in the general part of the criminal law. To our ears, Swift J's charge to the jury at the trial of Reginald Woolmington is startling (*Woolmington v Director of Public Prosecutions* ('*Woolmington*') at 472–3). Woolmington, a 21-year-old man of unblemished character, claimed that the shot that fatally wounded his young wife had been fired accidentally. Justice Swift instructed the jury that the killing of a human being is homicide and that all homicide is presumed to be malicious and murder. Once the fact of the killing was proved, all the circumstances, accident, necessity or infirmity fell to be satisfactorily proved by the prisoner because the law presumed malice unless the contrary appeared (*Woolmington* at 465).

Justice Swift's statement of the law was taken from Sir Michael Foster's *Crown Law*, which was first published in 1762. In the 150 years that followed no learned text writer had doubted it. In that most famous of statements in the criminal law, Viscount Sankey, with allowable hyperbole, described the golden thread as always having been visible (*Woolmington* at 481). This after a careful exposition of authority dating back to the time of King Canute, which demonstrated that no one had ever perceived it to be thus. The reality is that by 1935 it no longer accorded with the values of English society that Reginald Woolmington should be hanged following a trial at which the prosecution had not been required to prove that Violet Woolmington's death was not accidental. The decision profoundly altered the landscape of the criminal trial in England and here. Like all common law development, it can be criticised as piecemeal. Democrats can say any change in proof of criminal responsibility was a matter for Westminster. Reginald Woolmington was no doubt grateful that the law had the capacity to be moulded to do justice in the circumstances of his case.

Two years after *Woolmington* was handed down, a man named Henry Mullen fatally shot a man named Ernest Brown in Queensland (*R v Mullen* ('*Mullen*')). Mullen was indicted for wilful murder. Like Reginald Woolmington, it was Mullen's case that the discharge of the gun was accidental. Section 291 of the *Criminal Code* (Qld) provides that 'it is unlawful to kill any person unless such killing is authorised or justified or excused by law'. At Mullen's trial the jury were directed in conformity with *Criminal Code* (Cth) that the burden of proving authority, justification or excuse rested on Mullen. The Court of Criminal Appeal of Queensland allowed Mullen's appeal against his conviction on the strength of *Woolmington*. The prosecution sought special leave to appeal to the High Court contending, perhaps understandably, that *Woolmington* did not apply in the face of *Criminal Code* (Cth).

Advocates of codification have not forgiven Sir Owen Dixon for his analysis in *Vallance*. Logically they should also deplore his analysis in *Mullen*. His Honour acknowledged

that '[i]t is true that in [*Criminal Code*'s] text there may be traced a belief on the part of the framers that the rule of law was otherwise', a belief which his Honour observed had been very generally held. Nonetheless, he concluded that *Criminal Code* (Cth) did not necessarily imply a principle that the burden was on the prisoner to prove accident or provocation (*Mullen* at 136) The creativity of the judiciary, or as Jeremy Bentham would have it, their licentious interpretation of criminal statutes (Bentham 1970:240), permitted values that had come to be fundamental over the course of the last century to be read into the Griffith Code.

The principles of the Model Criminal Code are drawn from Brennan J's analysis in *He Kaw Teh v The Queen* (at 564–82). It is a masterly exposition of principles that have been understood for half a century and which remain pertinent today. Nonetheless, given Sir Gerard Brennan's belief that the genius of the common law is its capacity to adapt to unforeseen change, there is some irony in his analysis in *He Kaw Teh v The Queen* serving as a template for codification of the entire body of the law governing criminal responsibility.

The risk that codification freezes the development of the law is well understood (Fisse 1990:5) and was appreciated by the MCCOC. Goode proposes that the risk can be addressed by the parliaments in jurisdictions which adopt the Model Criminal Code establishing a Standing Committee to ensure that it is reviewed and kept up to date (Goode 2004:233). Of course, history does not suggest that the orderly revision of the criminal law, in response to the considered reports of law reform commissions and the like, is likely to be high on the political agenda.

History does show that parliaments can respond swiftly to enact legislation to deal with matters of perceived public concern. In 1998, the New South Wales Parliament enacted the *Home Invasion (Occupants Protection) Act 1998* (NSW) ('*Home Invasion Act* (NSW)'), at a time when the expression 'home invasion' had acquired currency. It followed highly publicised incidents in which occupiers had used deadly force to repel an intruder. The Act declared as the public policy of New South Wales that its citizens have a right to enjoy absolute safety from attack by intruders within the citizen's dwelling house (*Home Invasion Act* (NSW) s 5). It conferred immunity from criminal liability in stated circumstances (s 9). The *Home Invasion Act* (NSW) was not a model of good law-making and it was gracefully repealed in 2001 by the device of codifying the law of self-defence in div 7 of pt 11 of the *Crimes Act 1900* (NSW).

When Brennan J spoke of keeping the common law in serviceable condition, his Honour was at pains to distinguish the contemporary values of society with which the court is concerned from transient notions that emerge in reaction to a particular event or are inspired by a publicity campaign generated by an interest group. His Honour had in mind the 'relatively permanent values of the Australian community'. He acknowledged that the perception of those values may be coloured by the opinion of individual judges. He pointed out that the application of principle and the collegiate nature of appellate work tends against courts misapprehending these relatively permanent values (*Dietrich* at 319). Judges do not approach the development of the criminal law as an open canvas. They are working within a system that favours cautious, incremental change in response to new circumstances.

Whether one subscribes to Professor Ashworth's Hogarthian view of the judge or not, it remains that codification does not avoid the need for judicial interpretation. And, as the MCCOC recognised, there has to be a 'stopping point' in the process of definition (Criminal Law Officers Committee 1992:13 [202]). For good reason, the MCCOC chose not to deal with the issue which Dixon CJ dismissed as simple in *Vallance* (at 58). Chapter 2 provides that a physical element of an offence may be conduct (*Criminal Code* (Cth) s 4.1(1)(a)). 'Conduct' is defined in s 4.1(2), relevantly, to mean an act or an omission to perform an act.

The *Criminal Code* (Cth) does not define what constitutes an act. As the MCCOC's Final Report observes, the philosophy of action is a very complex topic (Criminal Law Officers Committee 1992:13 [202]). The differing analyses in *Vallance* underline the force of that observation.

The position was clarified in *R v Falconer* ('*Falconer*') by the adoption of Kitto J's concept of 'act' in *Vallance*: it was neither restricted to the mere contraction of the trigger finger nor did it extend to the fatal wounding of Mr Falconer (*Falconer* at 39). The concept is not readily reduced to statutory definition. The analysis in *Falconer*, a decision concerned with the Griffith Code, sits comfortably with the common law principles stated in *Ryan v The Queen* ('*Ryan*') (at 218–9). In this and in other respects the application of the general principles of the common law and the Griffith Code have been developed along parallel lines.

Goode insists that the Model Criminal Code is not 'the child of academics designed to serve the need of academics' nor is it 'about neatness and symmetry alone' (Goode:19). So much may be accepted. The clear articulation of default fault elements applying to all Commonwealth offences is a welcome development. It remains, perhaps, to question the ambition of the entire scheme of Ch 2. Neatness and symmetry are apt to give rise to difficulty in the messiness of real life cases.

Part 2.2 provides that an offence consists of physical elements and fault elements. It has a pleasing sense of rationality to it (*Criminal Code* (Cth) s 3.1). When that statement is combined with the succeeding provision, which explains how guilt may be established, the rigidity of the scheme opens the door to essentially arid arguments; as with the characterisation of the elements of the offence of conspiracy discussed in *R v LK*.

In terms, s 3.2 provides that, in order to be found guilty of an offence, the following must be proved: (a) the existence of such physical elements as are relevant to establishing guilt; and (b) in respect of each physical element for which a fault element is required, one of the fault elements for the physical element. No doubt the question of whether Ch 2 accommodates offences that have more than one fault element for a physical element will be agitated sooner or later. This may give rise to the question of whether, for the purposes of an offence such as obtaining property by deception under s 134.1(1), one characterises 'dishonesty' as a fault element (*Ansari v The Queen* at 1234–1311). The answer to that question, in turn, requires consideration of the choice to define dishonesty (*Criminal Code* (Cth) s 130.3), for Ch 7 offences, by a return to the test stated by the English Court of Appeal in *R v Ghosh* ('*Ghosh*').

Few decisions have been as roundly criticised as *Ghosh* (see, for example, *R v Theroux*; *Peters v The Queen*; Williams 1983; Campbell 1984; Griew 1985; Lusty 2012). The test formulated in that case requires the jury to determine, first, whether what was done was dishonest by the standards of ordinary people and, if the answer to that question is 'yes', then to ask whether the accused knew it was dishonest according to those standards. The High Court disavowed the *Ghosh* test in *Peters v The Queen* ('*Peters*'). In their joint reasons, Toohey and Gaudron JJ pointed to an incongruity in the test, which they illustrated in this way: the ordinary person considers that it is dishonest to assert as true something that is known to be false. The ordinary person labels that conduct dishonest because the person making the statement knows it is false, not because the person is to be taken to have realised that making a deliberately false statement is dishonest by the standards of ordinary, honest persons (*Peters* at 503–4). The former Chief Justice of Australia, the Hon Murray Gleeson AC QC made the point extracurially with accustomed incisiveness: 'It is not necessary that the accused should have realised that his or her behaviour was dishonest according to [the standards of ordinary, decent people]. Being morally obtuse is not an advantage' (Gleeson 2008:249).

The reason for the choice to return to *Ghosh* given in the Explanatory Memorandum to the Act that inserted Ch 7 into the *Criminal Code* (Cth) was the principled desire to ensure that the concept of dishonesty reflected the characteristic of moral wrongdoing (Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth):28 [58]. As one commentator persuasively argues, the analysis may proceed from a mistaken understanding of *Peters* (Lusty 2012). It suffices for my purposes to make an obvious point in response to those who contend that codification necessarily simplifies the law, making it more readily understandable, which is that it depends upon the content of the Code.

It is still early in the life of the *Criminal Code* (Cth). Any new legislative scheme will have teething problems and that is particularly so with a scheme of this breadth. However, it is not evident that the codification of the principles of criminal responsibility has made the law clearer or easier to apply. To date the experience has been rather to the contrary (see, for example, *R v LK*; *Director of Public Prosecutions (Cth) v Poniatowska*; *Handlen v The Queen*; *Agius v The Queen*). Whether over time the *Criminal Code* (Cth) proves superior in its statement of those principles may be too early to assess. On the experience to date, I would caution against the notion that it will serve to reduce the length of trials and appeals.

The alternative model of the partnership between the court and the parliament has the continued, if undemocratic, charm of developing the criminal law incrementally in the face of real factual controversies. Contrary to the more extreme views as to the rapaciousness of the judiciary, there are areas of the general part of the criminal law in which the High Court has stayed its hand. Many commentators consider that the principles of extended joint criminal enterprise liability stated by the High Court in *McAuliffe v The Queen* (‘*McAuliffe*’) impose liability too widely. The Court has declined to reconsider *McAuliffe* (*Clayton v The Queen*). Kirby J would have given leave to do so and would have confined the liability of the secondary participant. His Honour set out cogent reasons in favour of that view. The majority were not persuaded that *McAuliffe* is wrong in point of principle. Moreover, as their Honours observed, to change the law in this respect would require consideration of the law of homicide more generally, a task better suited to the parliament and a law reform body (*Clayton v The Queen* at 443 [17] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ citing *McAuliffe v The Queen* at 118).

The New South Wales Law Reform Commission (2010) has since addressed this question in its reference on complicity. It proposes, in the case of liability for murder, that the foresight of the secondary participant should be of the *probability* that death would result from the act of a confederate done with the intent to kill or to do grievous bodily harm (New South Wales Law Reform Commission 2010:135 [4.265].

It is almost five years since the Commission’s Report was published and no action has been taken on this or the other recommendations in it. Some would say this argues for the Court to be less timorous and that it should have agreed to revisit *McAuliffe* given legislative lethargy when it comes to the orderly reform of the criminal law. Presumably democrats would say that the legislature’s silence connotes acceptance of the law as the Court has stated it.

To the extent that I am inclined to see value in the common law method in keeping the criminal law in serviceable condition it may reflect what Professor Ashworth identifies as the source of the problem: judges are concerned with how the law is applied in actual cases (Ashworth 1991:438).

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