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CRIMINAL PROCSS IN QUEENSLAND & WESTERN AUSTRALIA

By Heather Douglas, Kimberly Everton-Moore & Sue Harbidge

Foreword
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The Hon. Michael Kirby AC CMG

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HARBIDGE

FOREWORD

The Hon. Michael Kirby AC CMG*

This book joins a number of recent works dealing with criminal law and practice in Australia. Indeed, we now face an embarrassment of riches, in the excellent texts that address the substantive and procedural law involving our community's response to crime.

What a difference this represents from the situation that obtained when I entered the Sydney University Law School in 1958. At that time, the prescribed texts were two written in England by Rupert Cross and P. Asterley-Jones. One such text dealt with the governing principles of English criminal law titled *Introduction to Criminal Law*. The other was a book of extracts from judicial decisions (notably English) titled *Cases on Criminal Law*. Both concerned themselves with the substantive law and basic principles on criminal liability; exemptions from liability; degrees of responsibility and individual crimes.

For the young Murray Gleeson and me (Mary Gaudron and Bill Gummow were to arrive at the same place a few years later), there was

* Justice of the High Court of Australia (1996-2009); President of the NSW Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-84).

no Australian text to which we could refer, unless it was the annotated practice book on the *Crimes Act 1900* (NSW). There were cyclestiled law school notes which our lecturer, the Honourable Vernon Treatt MLC QC, read and occasionally elaborated. There was virtually no discussion on criminal procedure. And such insignificant subjects as criminal sentencing were treated with silent disdain. Presumably, procedures and the outcome of the criminal trials following conviction, were regarded as too insignificant or lacking in intellectual regour, to trouble the impressionable young minds of the fresh law students receiving their instruction in the first year of their course in one of the central subjects of the discipline to which they had elected to devote their lives.

Naturally, a great deal of Mr. Treatt's instruction was devoted to the exotic features of the law of treason (*Joyce v DPP* had then only recently been decided in England). The case of the cabin boy, slaughtered and eaten to sustain the lives of shipwrecked seafarers (*R v Dudley and Stephens*) was always a favourite in our class. So was the ringing speech of Viscount Sankey LC about the "golden thread" of English criminal law, reminding us that the Crown must prove its case on all issues in contest beyond reasonable doubt (*Willmington v DPP*). Practical and troublesome issues of how criminal proceedings actually unfolded were postponed to the years of practice that lay ahead. Looking back, it was not a very suitable or helpful preparation for the real life encounters with criminal process that were to follow.

Things may have been different, and better, in the code States of Australia. But in New South Wales, we enjoyed a mixture of statutory and common law covering both substantive crimes and matters of

practice. We knew that elsewhere in Australia, notably in Queensland where the *Griffith Code* had been enacted in colonial times (a few years before our *Crimes Act*) and in Western Australia, which followed the Queensland Code quite quickly, a more comprehensive attempt had been made to express the principles and substantive offences of criminal law in a major statute. The code approach was later followed by Tasmania. Later still, it was to influence the *Commonwealth Crimes Act* and the Northern Territory statute. But even then, many matters of practice and procedure were left to be dealt with by other legislation or by common law rules and judicial conventions.

As young law students, we came to appreciate that, unlike the pristine simplicity of English law described by Cross and Jones, the Australian law on crime was somewhat chaotic, containing significant differences from state to state and in the federal territories as well. We did not let these differences worry us over much. In those days, lawyers did not generally think of themselves as 'Australian'. We were admitted to practise law by our local Supreme Court. Our minds were fixed on the intricacies of the local law and practice. We could leave reflections on the similarities and differences of the code and non-code states in Australia to academic treatment, or to the interventions of the High Court of Australia (which were rare) and the Privy Council which then, even more rarely, superintended the criminal law and practice of our nation.

Today, this picture has changed. The Privy Council has decided its last Australian case, coincidentally in 1986 in a decision on civil law from the New South Wales Court of Appeal in which I presided. (The appeal was dismissed). The endeavour of the Law Council of Australia to promote a single Australian criminal code in the 1960s came to nothing. The

several Australian jurisdictions stuck resolutely to their differing traditions as they do to this day. Yet a mass of legislation began to emanate from state, territory and federal legislatures after the 1980s. Sometimes these new laws were stimulated by reports on glaring anomalies presented by the increasingly active law reform commissions of the nation. These commissions included the Australian Law Reform Commission (ALRC) to which I was appointed in 1975.

The ALRC quickly produced influential reports on some of the controversial subjects dealt with in this book (*Complaints Against Police*, ALRC1, 1975; *Criminal Investigation*, ALRC2, 1975; *Sentencing of Federal Offenders*, ALRC15, 1980). Encouraged by such reports, but also by the less enlightened pressures of law and order campaigns that became a hallmark of Australian politics after the 1980s, parliaments, including in the code states, commenced enacting special laws to supplement the stable elements in the criminal law as it stood at the time of my law school classes. These special laws did not adhere to the old disinterest in matters of practice and sentencing. On the contrary, the parliaments realised that it was in the nuts and bolts of criminal trials and in the rules for criminal punishment that really important topics could be dealt with, about which citizens were often seriously concerned. And if they were not seriously concerned to begin with, the tabloid media frequently told them that they should be. They demanded from politicians and law reformers changes in things long established.

The result, as this comprehensive book demonstrates, has been a remarkable elaboration of the codes and statutes that existed in Australian from the enactments of the 19th century, the excision of many such matters from the general provisions of criminal statutes, and a

proliferation of special laws dealing with matters of practice, sentencing and other responses to anti-social acts that were classified as criminal. The outcome has been, at once, a greater complexity in the law governing criminal proceedings; a more candid recognition of the importance of criminal practice, sentencing and other responses to crime; and a number of deliberate changes to features of the process which, in 1958, would have been regarded as fundamental.

The most fundamental feature of criminal process, as it was taught in 1958, as much in code states as in other Australian jurisdictions, was the accusatorial character of our peculiar system of criminal law. Sometimes in the cases, it was described as 'adversarial'; and in one sense the criminal trial was fiercely so. Yet, whereas *civil* process, once it reached a court, was typically adversarial (unless in a Coroner's Court or elsewhere, where special laws allowed for inquisitorial elements), the peculiar feature of *criminal* process was the obligation that it cast on the State (in those days, universally, the Crown) to prove the case against the accused beyond reasonable doubt. With very few exceptions, at least so far as the law was concerned, the accused had to say and do nothing. That was the theory of the system. Its importance was taught to us all. It derived from the checks that accusatorial processes impose on the representatives of the organised community that brought a criminal accusation, to prove the truth of that accusation to a very high level of assurance and to do so by the accuser's evidence, not by requiring the accused to answer or to provide evidence against himself or herself.

A particularly interesting aspect of this book is the way in which it illustrates the modifications and qualifications that have been accepted

in recent years to this fundamental feature of criminal justice proceedings. Amongst the changes have been:

- The reversal of the onus of proving some issues so that the defence bears that obligation if it is to make out the claimed exculpation. See e.g. [1.80];
- The wider power given to authorities to search the accused, so as to extract inculcating evidence from their private parts, body orifices, clothing and possessions. See e.g. [2.90];
- The introduction of covert investigations that involve officials in what would otherwise be very serious crimes. See e.g. [2.120];
- The deliberate concealment by police officers of the true purpose of their investigations during 'controlled activities'. See e.g. [2.150];
- The conduct of police investigations using trickery and deception. See e.g. [2.450];
- The forcible extraction of DNA by mouth swabs and body samples. See e.g. [2.650];
- The opening up of repeated trials, overturning past understandings of the rigorous rule against double jeopardy. See e.g. [7.272], [13.290], [14.90], [14.110];
- The introduction of disclosure requirements on the part of an accused concerning particular defences and the tender of particular evidence. See e.g. [8.130, alibi, expert and some hearsay] – [8.180];
- The introduction of indefinite sentences or other means to extend incarceration beyond the sentence imposed and to do so upon a

judicial assessment of the dangerousness of the prisoner. See e.g. [12.410];

- The introduction of victim rights and statements, and non-accusatorial procedures, such as ‘conferencing’ in the case of particular offences and offenders. See e.g. [15.100], [15.120]; and
- The provision of victim assistance and monetary compensation which changes subtly the role of complainants from witnesses in an official prosecution to more active participants in the process of vindication and redress. See e.g. [15.140].

Occasionally, under pressure of electoral imperatives, political combatants have indulged in bidding wars to introduce still further modifications of the traditional procedures of criminal trials in Australia. The provision for greater jury access to any criminal record of the accused is sometimes proposed, despite the obvious prejudice that this could cause to the fair trial of the particular accusation. So far, this ‘reform’ has not been introduced. But the foregoing list demonstrates the large number of changes, some of them very significant, that have occurred in criminal procedure in Australia during the past twenty years.

It is therefore understandable and timely that the present authors, in the context of the code states of Queensland and Western Australia, have assembled the changes and described the present law in the way that allows students, practitioners, judges and citizens to understand the way the criminal justice system operates in those jurisdictions. The book is right up to date, recording even the reversal by the High Court in 2010 of the decision of the Full Court of the Federal Court of Australia in the extradition case of *Snedden (aka Vasiljkovic) v Croatia* - see [5.230]). They have also noted the report of the Human Rights Committee of the

United Nations criticising in April 2010 the Australian law on indefinite detention, as upheld by the High Court in *Attorney-General (Q) v Fardon* - see [12.400].

Without a constitutional (or in most jurisdictions, even a statutory) charter of rights in Australia to safeguard universal principles of human rights in criminal process, our laws are susceptible to a multitude of patchwork amendments that meet transient political demands but do so at the cost of introducing measures that are sometimes difficult to justify in terms of basic legal principle. Risk-averse politicians, tapping atavistic popular demands, are sometimes willing to tinker with long-established rules in order to curry short-term popularity at the expense of a significant alteration to the balances we have hitherto observed. All of this is well described in these pages.

Quite apart from the position reached in condoning deceptive conduct by officials, the imperfect machinery for curing miscarriages of justice; the special burdens of the criminal and penal systems on Australia's indigenous peoples; the large number of mentally ill people caught up in the criminal process; and the sheer complexity of the system demand radical (and preferably national) simplification and reform. Any such reform needs to be soundly based on empirical findings (see e.g. [12.410]). Yet it should also be grounded in the basic principles of our criminal justice system. Those principles were designed, amongst other things, to keep the power of the state and its officials in check and to subject those officials to ever vigilant scrutiny by the touchstones of lawfulness, reasonableness and rationality.

As the authors point out, whilst recent decades have seen a lot of legislative and administrative changes affecting criminal process, the criminal law and practice has never stood completely still. In a democracy, there are few advocates for the rights of criminal accuseds, prisoners, or other unpopular groups in society. When we were sitting in our class in 1958 the substantive crimes included the so-called 'unnatural offences'. These punished sexual minorities for their consensual, adult, private conduct. The scientific knowledge that was already available and the changes to the law that have been achieved since those days demonstrates the need to adopt a sometimes sceptical and questioning posture when analysing criminal law, police conduct and trial practice.

Whilst accurately describing the substantive and procedural law, and the practices now affecting police, accused and complainants in the criminal field, the authors have injected just the right note of questioning throughout this text. Their questions will encourage readers to ask themselves about the basic purposes of criminal justice and whether the balances we now have in Australia are correct and effective to achieve the legitimate objectives of a civilised legal order. In such an order, it is not necessary to molly-coddle accused persons. Nor to play a game with authorities by which the plainly guilty escape their just deserts on the basis of unmerited tactics or by invoking irrational relics of earlier laws. Just the same, one occasionally hopes for a national statement of fundamental rights (or perhaps the evolution from Ch.III of the Constitution of an Australian law of guaranteed fair trial (see [9.20]) to counter-balance, hasty or ill-conceived innovations that unduly enlarge the already great powers of the state when accusing an individual of criminal wrong-doing.

It is at the moment of such accusations that human rights and notions of fair process are at a premium. That is why the subject matter of this book is so important. It concerns nothing less than the relationship of the state with those who live under its protection. Getting the right balance is always a work-in-progress. That work is difficult in Australia because, almost alone, we have to achieve our balance without daily reminders of the abiding values that other countries enshrine in a Charter or Bill of Rights.

This book is therefore a most valuable work of legal taxonomy, case law and policy analysis. Students, practitioners and judges of today, who have access to this and other recent publications are so much better served than we were fifty years ago. Now, we can no longer blame English law and English judges for the defects of our criminal justice system. A book like this helps us to see its strengths, but also the subjects in urgent need of improvement.

Michael Kirby

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