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BOOK REVIEW

"CRIMINAL TRIALS - THE SEARCH FOR TRUTH"

Tom Sargant & Peter Hill, Fabian Research Series No 348, Fabian Society, London, 1986

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Fabian Research Series No. 348, Fabian Society, London, 1986 1-33. $3.00.

Reviewed by Justice Michael Kirby

One of the difficulties I have with this pamphlet is signalled in its title. According to my understanding (and orthodox theory), criminal trials are not a search for truth, as such. In our tradition, they are, a search for whether the Crown as prosecutor, can prove an accused person guilty. The distinction is a subtle but important one. It is at the heart of the accusatorial system of criminal justice which we have inherited in Australia from England. Its purpose is to keep the State in its place. It is to restrain unnecessary prosecutions unless the prosecutor is sure that the Crown can prove its case and can do so beyond reasonable doubt.

I realise (as much modern research has shown) that there is often a great disparity between this theory and reality. Confessions are sometimes unfairly extracted. Unrepresented people are sometimes at a gross disadvantage in a police station and in a subsequent trial. Rules of evidence and procedure can sometimes disadvantage the accused. Wrongful convictions do occur. Countless law reform and Royal Commission reports demonstrate these realities. But it is

still worth clinging to the basic theory of the criminal trial. It is a theory which provides the independent courts with a weapon to deal with oppressive or unfair conduct by the agents of the State. If the criminal trial becomes a "search for truth" as such, many of the immunities and inbuilt protections which still exist might be swept away. Why, for example, allow a right to silence? Why require proof beyond reasonable doubt? Why forbid reliable hearsay evidence against the accused? We tinker with the accusatorial trial at great risk. Changes in such fundamentals should only occur after much thought, public consultation and the adoption of an integrated program of reforms.

These criticisms said, there is much in the pamphlet which is useful. The authors are respectively the founding secretary of Justice - the English branch of the International Commission of Jurists - and a journalist who has produced a number of BBC programs exposing unreliable convictions. Many suggestions are made to diminish the risk of miscarriages of justice. They include provision for a prosecutor, independent of the police; limits on the admission of confessions unless taken before magistrates or electronically recorded; strict procedures for the independence of forensic reports; and creation of an office of Public Defender. Some of these suggestions have also been made in Australia. The Australian Law Reform Commission proposed recording of confessions to police as long ago as 1975. The proposal was recently repeated by Sir Harry Gibbs, past Chief Justice of Australia who is now heading an inquiry into Australia's Federal criminal courts.

Suggestion for the security and integrity of forensic evidence have recently been made by Justice T R Morling in his report on the Chamberlain case. The office of Public Defender is well established in a number of Australian jurisdictions.

Some of the other proposals may be more controversial. They include that the court should use its "inherent power" to call witnesses when so requested by either side. Does this mean that if the Crown, wishing to have the advantage of cross examination, requests a judge to call a witness, the judge should normally do so? That idea would strike fundamentally at the accusatorial trial. The proposal for the admission of "relevant and responsible hearsay evidence" also begs a number of questions. The Crown's "responsibility" might be the accused's unfairness.

The best part of the pamphlet is the examination of the special difficulties which the accused and their lawyers face in dealing with expert evidence. In the nature of things, the "experts" are frequently part of the prosecution establishment. Expertise tends to recur on the Crown's side, because it is the repeat performer in criminal trials. How this potential for injustice can be reduced is explored. Necessarily, in a short essay, the exploration is fairly superficial.

The pamphlet ends with a lament that the record of Labour Governments in the United Kingdom in the reform of criminal law and procedure is "not encouraging". It remarks that it has been left to Conservative governments to introduce reform. It says that in Britain, the law officers of Labour Governments

tend to be over awed by the established order and daunted by the prospect of changing it. This is not always so in Australia. But there are sufficient similarities to make the comparison of the problems for reform in both countries useful. But the solutions must be offered with a clear understanding of the fundamentals of the criminal trial. However defective the practice may be in particular cases, the fundamentals go to the heart of the relationship between the individual and authority. They thus stand at the gateway of our freedoms.

M D KIRBY