Foreward,

Stanley Yeo et al,

Australian Criminal Justice

Oxford University Press, 1994.

AUSTRALIAN CRIMINAL JUSTICE

Mark Findlay, Stephen Odgers and Stanley Yeo

Melbourne
OXFORD UNIVERSITY PRESS
Oxford Auckland New York

foreword *by The Hon Justice Michael Kirby* AC CMG

This book seeks to put together, in manageable form, the pieces of the mosaic which is Australia's criminal justice system. Whereas other well-known texts take the substantive law; or deal with criminal procedure; or annotate criminal codes or statutes; or describe the vital part played by the law of evidence — the authors of this text have adopted a bold design. It is, as it were, to offer a perspective of the whole criminal justice system.

It is a readable account, written in a comparatively simple style. I completed my reading of it on a journey back to Sydney from a conference in Auckland. As the jet took a mighty sweep over the harbour, I could look down and see the entire terrain below. There were the familiar sights; and some which I puzzled to identify. There were splendid reminders; and some rather ugly areas much in need of redevelopment. Necessarily, from such a distance I lost the detail of all the little streets with their human dramas played out every waking day. But the perspective which I enjoyed helped me to see the object of my attention in a new light and to take in, with comfort and speed, most of its broad features. So it is in this book.

There will be the sections which the specialist reader, or the trial judge or lawyer, might have expanded with fascinating detail. But the great value of this book is that it stands back from the subject. It gives a conceptual framework to its component parts. But it does not threaten the reader, who comes to the subject without intense knowledge, with intimidating detail or unfamiliar language.

I realise that many of those who will use the book will not, as I did, read it from cover to cover, basically in one sitting. The chapters divide the story of criminal justice into a generally chronological sequence which is familiar and logical. After an opening chapter on the theory and the practical sub-divisions of the criminal law, the book traces a criminal case through the stages of investigation, pre-trial decision-making, the trial itself and the production of evidence, the sentencing and punishment which follow conviction, and the appellate process. The authors

are at pains to make the point that the great public trials which capture community attention through the media represent only a tiny proportion of the criminal justice work of the Australian courts. More than 70% of persons charged plead guilty from the start. The percentage grows in the primary first instance courts. It increases as the trial date approaches. Then the accused faces the organised power of the state upon which the law has placed the numerous controls described in this book, to protect liberty and to avoid unjust convictions. The authors do not agree with the suggestion [of Doreen McBarnet] that the drama of the higher courts is for 'public consumption' — the place where the ideology of justice 'is put on display' — the lower courts being concerned with the real business of direct control of the masses. Nor do I. Yet it is easy to derive false impressions about Australia's criminal justice system from the media coverage of it.

Anyone wanting to know how it *really* operates should spend a day or two in a Local Court, or its equivalent. The courts are open in virtually every criminal case. Dispelling myths and examining what actually happens in fact is the new emphasis which knowledge of the social sciences has brought in recent years to the study of law. The ideology of the accusatorial system, the right to silence, the privilege against self-incrimination, the right to warnings and the obligation of the prosecution to prove the case beyond reasonable doubt seem splendid guardians of our liberties. They attract much boastful writing on the part of judges and other lawyers. But the empirical research concerning what actually happens in the police charge room, in pre-trial discussions and in the evidence adduced at the trial may sometimes be quite different. The authors are right to make the point that there are many steps in the sequence of a criminal prosecution, from charge to conviction, sentence and appeal, where injustice and error can occur. The struggle of the system must constantly be to move relentlessly towards unattainable perfection.

The merit of this book is that, in each chapter, reference has been made to the relevant law reform and other reports, in Australia and overseas, which have addressed the risks of injustice and the manner of reducing those risks. Reading the chapter on Criminal Investigation (chapter 2) I was reminded of the early work of the Australian Law Reform Commission on that subject. Reading the chapter on Evidence (chapter 6) I revisited some of the controversies which we considered in that Commission's project on the reform of Federal evidence law. Reading the chapters on Punishment and Sentencing (chapters 7, 8) I recalled the Commission's project on the reform of sentencing which provided the first national study of sentencing law and practice in Australia. It also provided many proposals for assisting judges in that most 'painful and unrewarding' of judicial tasks. Alas, a large number of the reforms recommended by the Australian Law Reform Commission remain to be implemented. Some have passed into law in various forms. Perhaps this book, with its valuable overview of the topic, will help to provide a new stimulus to the process of law reform in this country.

In default of effective reform on the part of the legislatures, it has fallen to the judges of Australia, in defence of the fairness of the trial process where the accused's liberty is at risk, to introduce rules to reduce the chances of a wrongful conviction of a criminal offence. The number and variety of the judge-made reforms may seem surprising to the purist. The definition of substantive crimes has been tightened up in some cases, as it was in the description of the elements of the offence of manslaughter by an unlawful and dangerous act (see *Wilson* v *The Queen* (1992) 174 CLR 313). The problem of so-called police 'verbals' and the need for electronic recording of confessions to police ultimately produced a rule of practice, mandated by the judges, obliging a warning to juries of the dangers of convicting an accused person upon unrecorded and uncorroborated admissions to police (see *McKinney* v *The Queen* (1991) 171 CLR 468). Recognition of the need for safeguards against the risks of wrongful conviction upon mistaken identification evidence, called to attention in earlier cases, was strongly reinforced in *Domican* v *The Queen* (1992) 173 CLR 555. In the trial process, the risk of an unfair trial in the case of an accused person who is not legally represented produced the emphatic decision in *Dietrich* v *The Queen* (1992) 177 CLR 292. The authors point out that the ramifications of this last decision upon the criminal trial remain to be explored. But they seem likely to be great. The authors also collect numerous recent decisions upon evidence law and the principles designed to secure the lawful and just sentencing of those who are convicted of criminal offences at their trial.

The appellate review of the safety of criminal convictions and the lawfulness and justice of sentences imposed, has also been sharpened up in recent years by the increased attention to criminal appeals paid by the High Court of Australia. It is probably fair to say that there has been a diminished inclination in recent cases to sustain a conviction, even in an otherwise very strong prosecution case, where an error has been shown in the conduct of the trial which results in a conclusion that the accused may not have had a trial according to law (cf. *Wilde* v *The Queen* (1988) 164 CLR 365, 372).

If the purist were to suggest that the forgoing (and many other) judicial reforms should have been left to the legislature, the answer must be given that all too often legislators have neglected the reform of criminal law. The lobby groups are strong. Passions can be raised. The result is that nothing may be done. In the end, it often falls to the judges to defend the standards of the community and the integrity of the process.

In July 1993 the report of the English Royal Commission on Criminal Justice was published. It recommended a large number of reforms of the system from which the Australian process described in this book is derived. Whilst many imperfections remain (some of them called to notice in this book), I believe that it is fair to say that we have avoided some of the worst problems which occasioned the English Royal Commission. We did so precisely because judges — stimulated by advocacy, law reform reports and academic writings — have produced necessary safeguards at various stages of criminal procedure in Australia. This is by no means a cause for complacency. The final chapter of this book lists the special disadvantages which some groups in the Australian community suffer in relation to the operation of the criminal justice system. They include most notably juveniles, Aborigines, women, and citizens with intellectual disabilities. Yet that list by no means exhausts the catalogue of the disadvantaged and discriminated against. Despite *Dietrich*, one would still add 'the poor, sick and friendless' (see for example *Ex parte Corbishley; Re Locke* [1967] 2 NSWLR 547 (CA) 549), some victims of violence who suffer because of their sexual orientation; and some who get caught up in the criminal justice system because of physiological or psychological dependence upon drugs.

No doubt the reader of this book will find sections to disagree with, as I did. For example, I am by no means sure that a nationwide approach to substantive criminal law should have a high priority. Like the Australian Model Penal Code, it has so far eluded us. Without naively embracing the notion of a Federation as a 'hothouse of experimentation', it is probably true to say that important reforms of criminal law, as of procedure and sentencing, have been more easily attained in Australia because they can be ventured in one Australian jurisdiction. They are seen to work and cause none of the dangers usually predicted. Their adoption elsewhere then becomes feasible. This is the way the decriminalisation of homosexual offences occurred (although Tasmania still holds out). It is how rationality may yet intrude into legal strategies to control the use of drugs of addiction. It is the way laws for the confiscation of profits of crime have been introduced and other sentencing reforms adopted.

Much of the detail of this book presents an updated description of the criminal justice system in Australia as it existed some 30 years ago when I first entered the law. In some basic things, there has been little change. The book describes several changes, most of which are, I believe, for the better.

- The energetic attention to the criminal law by academics and law reform bodies.
- Increased attention to this body of law by the highest courts of Australia.
- The establishment of the *Australian Criminal Reports* to provide a coherent and national collection of relevant authority.
- The publication of the *Criminal Law Journal*, now in its 17th year, to provide searching commentary and scrutiny on statute and case law.
- The new mood of empiricism, which is also woven through the pages of this text: disclosing an impatience with clichés and a determination to find out how the system actually works on the ground. The whole of chapter 3 of this book is devoted to new investigatory institutions. Their establishment is itself something of a commentary on the capacity of the established laws and criminal justice institutions to address conduct found to be anti-social and in need of a more effective response.

Yet perhaps the most promising beacon for the future is the attention given in every chapter to the principles of human rights law as found in the international instruments to which Australia is a party. The High Court of Australia is increasingly taking this international body of legal principle into account. It did so in *Dietrich*. And in *Mabo* v *Queensland* [No. 2] (1992) 175 CLR 1 at 42, Justice Brennan pointed out:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

It is for this reason that I particularly applaud the attention which the authors have given to the international jurisprudence of human rights. The judgments of the European Court of Human Rights and the decisions of the United Nations Human Rights Committee (as well as the opinions of other international courts and tribunals) will increasingly be studied in Australia as we measure our country's criminal justice system against standards which have been adopted internationally for the attainment of fundamental human rights.

Years ago, in a passage quoted in chapter 2, I called for the collection, rationalisation simplification and clarification of the rules governing criminal investigation. I could have added those rules governing the criminal trial, sentencing and appeals. This book provides a useful perspective and some new insights. If those who have the responsibility for the development and reform of the system can see it as a whole, operating as a unity, it is more likely that they will get individual decisions right. If those decisions are, in turn, illuminated by the growing body of human

rights law, it is more likely that the rules applied will be just and will endure. It is in this sense that this book draws upon the past, describes the present and offers some clues to the directions for the future.

Michael Kirby
Court of Appeal, Sydney
9 March 1994