

Australian Criminal Justice

By Mark Findlay, Stephen Odgers and Stanley Yeo
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AUSTRALIAN CRIMINAL JUSTICE

FOREWORD TO THE FOURTH EDITION

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I wrote forewords to earlier editions of this book when I was busily at work, in the judiciary, deciding several of the cases that are recorded in these pages. Now, retired from judicial office by force of s.72 of the Constitution, I write once again for this updated edition of the work. It remains a marvellous introduction to the great landscape of criminal law, official investigation, trial and punishment in Australian society.

It is not easy to compress within the manageable space of an accessible text, the main contours of the law and practice that need to be understood to grasp the essence of our peculiar system of criminal justice. Yet, once again and in an improved and updated work, the authors have succeeded in doing so. Even for busy and experienced practitioners, it is useful to have such a text both because of the danger of missing the wood for the trees and because of the countless changes that are occurring in the substance of the law and the practice of courts, police, prosecutors and other actors in the administration of criminal justice.

Our legal system is a highly practical one, which is most comfortable in addressing specific cases, commonly by analogy to the treatment of earlier similar instances. In the criminal law, attempts have been made to superimpose legislation so as to reduce the wilderness of instances and to provide general principles that will permit more conceptual thinking about this vital branch of the law. The most heroic effort in this respect in Australia was the Criminal Code drafted by Sir Samuel Griffith, one time Chief Justice and Premier of Queensland and later the first Chief Justice of the

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High Court of Australia. That Code, substantially copied in Western Australia and Tasmania (and influential in the later Code of the Northern Territory) has proved to be one of the most important legal exports Australia has even made. It has greatly influenced the criminal law of the former British Empire in parts of Africa and the Caribbean. However, it did not catch on in the other States of Australia. They persist, to this day, with a mixture of common law and statutory rules. Just to make the situation more confusing, federal and state legislation of varying degrees of particularity has been enacted to introduce new notions and, sometimes, to implement distinctive proposals advanced by law reform bodies.

Against this confusing background of legal rules, supplemented by differing police and prosecution practices in the several sub-national jurisdictions of Australia, and, as well, by conventions and unwritten rules that also play their part, it is a miracle that the authors have been able to stamp the degree of order on the subject that they have. Especially that they have done so without sacrificing accuracy and a proper reflection of the diversity that still exists in Australia because the founders elected to follow the United States model, rather than the Canadian, and to withhold from the Federal Parliament a general power to make laws on the subject matter of crime.

If Sir Samuel Griffith were to return today to a criminal trial or appeal in Australia today, he would quickly feel at home. The scarlet robes of the judges and (in most places) their wigs and those of counsel would all look entirely familiar. The presence of the jury in serious criminal trials would be comforting. So would the basic procedures observed in the conduct of the trial; the observance of the accusatorial form of trial; the addresses and charge to the jury; and the anxious wait for the verdict.

Yet before long, Griffith would begin to notice a number of important changes. Indeed, this book describes the many changes that have come upon the criminal justice scene since I first knew it as a young lawyer fifty years ago. This edition collects still further changes that have occurred since the last, third, edition.

- The advent of sound and video recording of confessions and admissions to police and other public authorities has proved an important weapon for

prosecutors as has the advent of forensic (especially DNA) evidence. Yet many cases¹ and much analysis² have revealed new challenges for the fairness of the trial, arising from the development. They are described in these pages;

- Special institutions, such as the National Crime Authority, that was grafted onto the criminal justice system, have come and gone and been replaced by new bodies, such as the Australian Crime Commission, with its own peculiarities;
- Powerful statutory authorities, such as ASIO and ICAC, now walk across the stage of criminal justice armed with very great powers that enlarge the weaponry of prosecution in particular instances;
- The trial scene has been greatly (and beneficially) affected by the decision of the High Court in *Dietrich v. The Queen*³ upholding the provision of a stay of serious criminal proceedings if an indigent accused is unable to obtain legal representation without default on his or her part. Yet, to this day, that principle does not extend to appeals. There is significant disparity in the treatment of prisoner appeals if the prisoner has been refused legal aid;
- In the field of punishment, every decade since the first edition of this work has seen significant changes in the law and practice of criminal justice. The authors describe the successive waves of truth in sentencing policies; mandatory punishments; provisions for court guidelines; and the involvement of victims in the sentencing process. Many of these reforms, but not all, have been introduced as a result of the unseemly lottery that generally accompanies parliamentary elections in Australia, as politicians vie with each other to present the toughest 'law-and-order' manifesto to the electors. The result has been a steady increase in per capita levels of imprisonment. Together with the privatisation of correctional institutions, these are features that might have shocked Sir Samuel Griffith. Just as we are generally horrified by the ease and frequency with which capital punishment was inflicted in his day;

¹ See e.g. *Carr v. Western Australia* (2007) 82 ALJR 1

² M.D. Kirby, "The Urgent Need for Forensic Excellence" (2008) 32 Criminal LJ 205 at 210.

³ (1992) 177 CLR 292

- When Griffith was Chief Justice, the High Court rarely deigned to intervene in sentencing appeals. However, this text is replete with the many recent decisions where the Court has done so out of recognition of the importance and arguable injustice, often inherent in such decisions. The debates, so earnestly waged in the decisions of the High Court concerning the proper approach to sentencing and whether it is inescapably intuitive or can be subjected to some rules or procedures for consistency's sake, are all laid out for the reader's consideration;
- Appeals against criminal convictions were introduced throughout Australia during Griffith's time as chief justice. To a large extent the common form of criminal appeal statute remains unchanged and still applies throughout Australia. Yet this text describes the new insights offered by the High Court concerning the approach that intermediate appellate courts should take to appeals against conviction⁴. In such courts, the risks of error and oversight must be acknowledged. They were lately clearly demonstrated to the High Court itself in the second visit to that court of *Mallard v. The Queen*⁵. Perhaps by the fifth edition of this text, we may have seen the introduction in Australia of a Criminal Cases Review Commission such as now operates in the United Kingdom; and
- The text closes with classes of particular vulnerability within the criminal justice system including juveniles; Aboriginals; women; the intellectually disabled; and (at a different level) corporations. One could add other groups, including homosexuals – not now so much as criminal accused⁶, but certainly as victims of criminal violence⁷

Scattered throughout this text, by reference to recent decisions of the High Court, are references to cases that present troubling features for the operation of what, in earlier times, would certainly have been viewed as aspects of the criminal justice classification:

⁴ E.g. *Markarian v The Queen* (2005) 79 ALJR 1048

⁵ *Weiss v. The Queen* (2005) 224 CLR 300.

⁶ (2005) 224 CLR 125.

⁷ But cf. *Ryan v. The Queen* (2001) 206 CLR 267

- The prolonged and in some cases indefinite detention of illegal immigrants claiming refugee status has presented challenging questions of statutory and constitutional interpretation⁸;
- The proliferation of laws allowing State courts to extend the detention of prisoners who have completed their sentence by reference to generalised criteria of danger to the community, presents new risk of expedient politics overwhelming basic legal principles⁹;
- The introduction of new police technology, involving elements of falsehood¹⁰ and trickery¹¹ introduce new quandaries for adherence to the traditional rights to silence and the conventional operation of the accusatorial system;
- The identification of new targets of criminal law, subjected to unprecedented deprivations of traditional rights (such as the members of motor cycle clubs)¹² indicate that this area of the law can no longer be treated as entirely stable. The deprivation of the rights of 'bikies', of alleged terrorists and of other unpopular groups conjures up reminders, in some respects, of the 1951 Australian laws against the communists which were struck down by the High Court¹³. Those laws were also rejected by the Australian people at the referendum that quickly followed. But would the outcome be the same today?

These and other developments that are described in this text show the law and practice governing criminal justice which is so central to the Australian legal system. This is a topic that lies at the very core of our liberties. It defines our country as a civilised nation that adheres to basic principles and generally upholds universal human rights.

The foregoing are some of the reasons why this book is important for law students, legal practitioners and citizens generally. About the big issues dealt with in this book

⁸ See e.g. *Green v. The Queen* (1998) 191 CLR 334.

⁹ *Al-Kateb v. Godwin* (2004) 219 CLR 562.

¹⁰ *Baker v. The Queen* (2004) 223 CLR 513; *Fardon v. Attorney-General (Qld)* (2004) 223 CLR 575; cf. *Kable v. Director of Public Prosecutions (NSW)* (1997) 189 CLR 51.

¹¹ *Swaffield v. The Queen* (1998) 192 CLR 159; *Em v. The Queen* (2007) 81 ALJR 1896

¹² *Toffilau v. The Queen* (2008) 81 ALJR 1688

¹³ *Gypsy Jokers Motor Cycle Club Inc. V. Commissioner of Police (WA)* (2008) 234 CLR 532; cf. *K-Generation Pty. Ltd. v. Liquor Licensing Court (SA)* (2009) 83 ALJR 327.

14. *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

there are, and should be, lively controversies. By helping the reader to perceive the conventional taxonomies and to understand the contemporary controversies, the authors have, once again, made an important contribution to a part of legal practice that helps to define the character of the nation as one that protects persons and property by the observance of laws and procedures that are at once principled and fair.

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