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THE QUEST FOR JUSTICE

By the Hon. Dr. Ken Crispin QC

FOREWORD
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Ken Crispin has held many important posts in the law in Australia. He served as a barrister, appearing (as this book describes) in some of the most notorious criminal trials of his time. One of them, involving Lindy Chamberlain, resulted in what he feels (and was later held to be) a serious miscarriage of justice. Any lawyer who takes part in a trial resulting in injustice naturally searches his or her mind for what “justice” means; how an injustice could occur in contemporary Australia; and whether any failing on his or her part contributed to such an outcome.

Following his years at the Bar, Ken Crispin was appointed a judge of the Supreme Court of the Australian Capital Territory. Later, he rose to be President of the Court of Appeal of that court. Whilst serving as a judge, he also performed duties as chair of the Law Reform Commission of the Australian Capital Territory. And he took part in the synod Board for Social Responsibility within his church.

The roots of the concerns that have led Ken Crispin to write this book may be traced through all of his public offices. Yet, almost certainly, they chiefly date back to his time at the Bar, his appointment as Queen’s Counsel and his assumption of the responsibilities of Director of Public Prosecutions for the Territory. Such a position is one of great importance. It takes the office-holder into daily consideration of allegations of serious misconduct on the part of accused persons. It

requires the weighing of evidence and the making of difficult decisions as to whether the power of the state will be brought to bear on the life of the accused. Fortunate has been the Australian community that such a thoughtful and introspective human being has carried public responsibility of such worrying difficulty over such a long time. Fortunate are we, the readers of this book, to now have the distilled reflections that Ken Crispin has written down on his life and his personal 'quest for justice'.

The book follows a partly chronological journey through Ken Crispin's encounter with the law and its institutions. It begins with his examination of values in the law. When I was young, I was taught that law was applied by judges immune from any pressure of values. Judges, I was assured were operating on a kind of 'automatic pilot'. Their duty was one to 'complete and absolute legalism'.

A lifetime's service in the law has taught Ken Crispin and me that things are not as simple as that. That law exhibits values. That the search for justice under law is itself a quest for the attainment of values. That the values of individual judges inevitably affect the outcomes of their decisions and the orders that they make. It is therefore fitting to try to explain, and to be conscious of, values. Also to be aware of the possible need to supplement the sources of values in the professional experience of lawyers, particularly when they become judges.

This leads Ken Crispin to a reflection on the controversy, current in Australia at the present time, of whether we need a national *Charter of Rights* to help stimulate judicial and legislative decisions. As Dr. Crispin points out, such a charter has been adopted by the legislatures in the

Australian Capital Territory and Victoria. Contrary to the bogeyman prediction of some notable opponents of that idea, neither the Capital Territory *Charter*, nor its equivalent in the State of Victoria, has so far undermined civilisation as we know it.

The second chapter examines the legal system. It explores the adversarial system and the tradition of jury trials by which serious criminal cases are usually decided in Australia. In this chapter, one finds informed reflections by this experienced trial lawyer on the problems and advantages of trial by jury; the difficulties of discovering the truth from witness impressions; the risks of prejudice that arise in any trial system; and the problems faced by advocates and judges in making sure that adversarial litigation produces just outcomes.

The third chapter is a reflection, doubtless born of many troubled days, when Ken Crispin was obliged, as a judge, to impose a sentence on a person convicted of a crime. As he recognises, this is a topic on which everyone in society seems to hold strong opinions. Especially the shock-jocks in the media. He examines the problems of mandatory sentences; sentencing the mentally ill; and that old perennial: whether Australia should restore the death penalty for 'callous and brutal' killers. Unsurprisingly, because he is aware of the many studies into this subject, Ken Crispin is opposed to restoration. He points out that, when the death penalty was abolished in Canada, there was no increase in homicide, but there was a rise in convictions. DNA evidence now available indicates the surprisingly frequent instances of wrongful convictions in what would be capital crimes. He mentions a case of a neighbour in Canberra who served a very long sentence only to be

released, many years later, when another person reliably confessed to the crime.

The last two substantive chapters are heartfelt examinations of topics that have obviously worried this informed and senior player in the Australian legal scene. In the fourth chapter on the so-called “War on Drugs”, Ken Crispin takes us into the concern he has for the approach that we have adopted in Australia, as in other lands, in an attempt to suppress the use of addictive drugs. The greatest killer amongst these, by far, as he points out, is tobacco. Yet its purveyors become mega-rich on the backs of addicts, increasingly in Third World countries, who will later pay the price.

Yet does this fact excuse a softer touch for other drug crimes? Ken Crispin looks at the evidence that supports an approach of ‘harm minimisation’ rather than ‘law and order’. This is a most compelling chapter, the more so because it is offered by one who, like me, as a judge, was obliged to impose, or confirm, very heavy punishment on those convicted of drug-related offences. By calling attention to law reforms adopted in the Netherlands, Portugal, and elsewhere, Ken Crispin suggests that we, in Australia, have to reconsider our present approach to this issue. His opinion is gathering increasing support from previously unexpected quarters. The Secretary-General of the United Nations (Ban Ki-Moon) in emphatic words expressed in 2008 said bluntly: “No-one should be stigmatised or discriminated against because of their dependence on drugs”. Ken Crispin is not the first to bring this message to lawyers and others in Australia. But he certainly does so with the respectable and experienced background that he can bring to bear in supporting his opinions.

The fifth chapter on another war, the so-called 'war on terror', takes Ken Crispin into an even more perplexing and troublesome area of the law's operation. It is the one with which this book opens, with the attack on the World Trade Center in New York on 11 September 2001. How can society defend itself against such horrors without destroying the liberal democratic principles of the rule of law and respect for human rights?

In this chapter, Ken Crispin describes how the erosion of basic principles that has accompanied the 'war on terror' has spilled over into other areas in Australia that trouble him: preventive detention and prohibitory orders of designated groups, such as so-called 'bikie gangs'.

Legal rules that purport to forbid access to information alleged to justify the detention of suspected terrorists have gathered some support from courts in the United States. So far, the courts of Britain have been much more sceptical and insistent on the rule of law. Just as the High Court of Australia was in 1951 in its decision in the *Communist Party Case*. One hopes that Australian courts will retain their common sense and historical perspective in this field. That is what I take Ken Crispin to be urging in his review of developments such as those in Guantanamo Bay, the Abu Ghraib Prison in Iraq and the model offered by the Orwellian-titled PATRIOT Act of the United States.

Anyone reading this book will have points of agreement and points of disagreement with its author. Yet, it is a very good thing that he has shared his reflections with us. He could, after all, have spent his time since retiring from the Bench, pottering in the garden; reading the *London Times*; or playing endless rounds of golf. Instead, he has

presented his reflections on a legal life troubled by some of the developments he has seen, a few of which he has been part of. In his preface, he acknowledges the stimulus for some of his thoughts of the opinions of friends and of his son. In all things, he has saluted the interrogation to which he was daily subjected by his wife, Pamela. In the loneliness of the judicial life, everyone needs a trusted confidant who can ask the hard questions and insist on convincing answers.

Now it is for readers to consider the answers. This is a contribution to transparency on hard topics that demonstrates, once again, the good fortune of Australia in the service of its judges, like Ken Crispin. Unlike the stereotypes with gavels or the television images of Judge Judy, our judges emerge as serious-minded, anxious about the justice of their performance and puzzled over the big questions that confront us all as citizens and human beings.

MICHAEL KIRBY

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