

CRIMINAL LAW JOURNAL

TURBULENT YEARS OF CHANGE IN AUSTRALIA'S CRIMINAL LAWS*

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The study of criminal law in Australia is at last coming into its own. Mind you, the upper echelons of the legal profession still tend to look down their noses at crime. This may be because of the old adage "crime doesn't pay". Ordinary citizens, politicians and media barons obviously think otherwise. To them, crime is the most fascinating part of the law. It far outranks interest the lucrative corners of commercial disputes, bills of sale and mortgage law. Ordinary citizens are right. The top lawyers are wrong. The criminal law helps to define the type of society we are. The procedures of the criminal trial represent not only a public drama - a kind of metaphor for bringing the accused wrongdoer to justice and resolving contested claims about guilt. Criminal law also symbolises the extent to which we place checks on the power of the state in order to prevent wrongful convictions.

* Adapted from remarks made at the launch in Melbourne on 22 February 2001 of S Bronitt and B McSherry *Principles of Criminal Law*, LBC, 2001

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Forty years ago, when I was at university, the teaching of criminal law in Australia had to get by with English textbooks. The standard work was by Cross and Jones. Every law student salivated (if that is the right word) over the grizzly quandary of the becalmed shipmates in the *Queen v Dudley and Stephens*.¹ It will be remembered how they were tried for murdering a cabin boy to eat his flesh in order to survive. Did their desperate necessity afford them a defence in law? (Answer, no. They were sentenced to death, although this was later commuted to six months imprisonment). The criminal case books were full of weird and gory stories. Like all law students, I pounced upon them.

What a difference four decades makes. Relatively few cases involving criminal law then were heard by the High Court of Australia. The judges tended to share the general professional disdain for criminal law. The big shift towards hearing more criminal appeals in the High Court came with Chief Justice Barwick in the 1970s and Chief Justice Gibbs in the 1980s. Both of them were judges who were keenly interested in the criminal law, although from the differing perspectives of non code and code experiences. In this attitude, they were eventually joined by their colleagues. Even sentencing appeals came to engage some of the High Court's time. Nowadays, according to the annual reports, criminal cases constitute about a quarter of the applications for special leave to appeal in the High Court. That proportion has

¹ (1884) 14 QBD 273

grown in recent years. So have the numbers. In 1977 there were 14 applications in criminal cases. Last year there were 125.²

In the forty years of my professional life, the subject matters of the criminal law in Australia have radically changed. This is confirmed by the new book *Principles of Criminal Law* by Simon Bronitt and Bernadette McSherry, just published.³ The staple diet of murder, offences against the person and against property is still there. But now the punishable offences are greatly expanded by new crimes or by aspects of old offences that once did not trouble the courts. The latter include female genital mutilation; sado masochistic assaults; stalking; offences by people living with HIV knowingly infecting others; various drug offences; computer crime; unlawful invasion of privacy by electronic means; money-laundering; sexual trafficking; underage sexual assaults overseas; corruption of overseas officials; child pornography on the Internet and so on. New defences also fill the pages of contemporary case books, such as battered woman syndrome⁴ and the so-called gay panic defence.⁵

Some old offences have been repealed. These include the infamous "crimes against nature" that oppressed male

² High Court of Australia, *Annual Report 1999-2000*, 64

³ LBC, 2000

⁴ See eg *Osland v The Queen* (1988) 192 CLR 69

⁵ See eg *Green v The Queen* (1998) 195 CLR 334

homosexuals in the Australia of my youth. It took the intervention of international law; but eventually those offences were banished from the statute books.⁶ Yet even today, there are significant differences in the age of consent for private sexual conduct. In New South Wales it is 16 years in the case of females but 18 in the case of males.⁷ Other laws that have changed include the law on suicide, pornography and prostitution. Some changes have been brought about by the courts - such as the abolition by the High Court of the rule that a husband could not be guilty at common law of raping his wife.⁸ But many offences have been altered, or repealed, by parliaments, reflecting the changing values of society.

The lesson of so much change, in such a relatively short time, is this: What are the "crimes" we accept today that will not find a place in an edition of a book on criminal law forty years from now? Will all the drug offences still be there? Or will we, as I suspect, by then be treating most of the instances of drug abuse and dependence as problems of public health rather than of law and order?

⁶ *Human Rights (Sexual Conduct) Act 1994 (Cth): Croome v Tasmania* (1997) 191 CLR 119.

⁷ Crimes Act 1900 (NSW), ss78K, 78Q. In Western Australia the *Criminal Code* (WA) s322A provides an age of consent of 21 years.

⁸ *The Queen v L* (1991) 177 CLR 379

The Pinochet case in England last year⁹ was an early indication of the growing influence of international criminal law on legal practice. In that case, the House of Lords ordered that the former Chilean president be extradited to Spain to face charges for crimes allegedly committed not in Spain but in his own country, Chile. More recently, the former Serbian President Slobodan Milosovic was handed over to the International Criminal Tribunal for the Former Yugoslavia in the Hague. In forty years time will the criminal process of every country be adapted to ensure that dictators and others guilty of genocide, torture and war crimes have no corner of the world in which to hide? Will we have accepted the principle of "universal jurisdiction" for war crimes, genocide and like offences in the courts of every country? Will the International Criminal Court be a success? Will crime increasingly be an international phenomenon, globally addressed rather than one basically reflecting the concerns and values of local communities?

Through the criminal law runs what lawyers are pleased to call a golden thread. The accused who faces the great power of the state has certain basic rights. The right to be presumed innocent. The right to have the accusation proved beyond reasonable doubt to the satisfaction of the judge or jury. The right to be free of forced self-incrimination. The right to confront

⁹ *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte* [No 3] [2000] 1 AC 61

accusers and to test their evidence. During the past forty years the High Court has added a further right, crucial to the proper operation of a legal system such as ours. It is the right, in effect, when facing a serious criminal charge, if otherwise unable to afford a lawyer, to have one provided by the state if that is necessary for a fair trial.¹⁰ Perhaps in forty years time Australians will have a charter of fundamental rights included in their Constitution, like most other civilised countries. This is not a matter of being soft on crime. It is a question of defining the type of society we are and want to be.

Criminal law is the great centrepiece of any legal system. It must change and adapt with changing attitudes. It must pay regard to new problems, new technologies and new social attitudes. In my professional lifetime, Australian criminal law has come from being a post-colonial backwater of the English legal system, using English text and case books, to a highly developed system of our own. Politicians and many citizens have contributed to this process. And the High Court has also played, as it continues to do, a crucial role in the process of change. Criminal law should attract the best lawyers in the country. No other branch of the law is so important. It is where our commitment to fair trial and the rule of law are tested every day, in courtrooms throughout the nation. It is where fear of

¹⁰ *Dietrich v The Queen* (1992) 177 CLR 292 overruling *McInnis v The Queen* (1979) 143 CLR 575.

wrongdoers intersects with respect for basic rights. Against the clatter of constant elections, where law and order have become a regular whipping boy, we must continue to get the balance right.