

The problem of lawyer's guilt

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In recent days, CLANT has been deluged by jourmos covering the issue of prison overcrowding in the Northern Territory, a chronic problem which has now become painfully acute, particularly for the prisoners who are being obliged to serve their terms in a police watch house. Building more prisons, training more staff and devising new programs all takes a lot of time and a lot of money. There are, however, three simple things government could do to reduce the pressure on our prisons at no cost and in next to no time:

- amend s48(1) of the *Sentencing Act* to permit minor violent offenders to be punished by way of community custody orders;
- repeal reg 3(b) of the *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Regulations*, to make the same offenders eligible for referral to the SMART Court; and
- amend the *Bail Act* to ameliorate some of its more

draconian presumptions, which effectively prevent many defendants charged with minor violent offences from obtaining bail.

Prisoners serving less than six months are generally ineligible to participate in rehabilitation programs, so why not let them serve their sentence in the community, where they can be put to work, and sent to rehab?

We've been busy beavers at CLANT lately, putting on two exceptionally well-attended events, an intensive weekend CPD on the *Uniform Evidence Act*, and, the following week, the Second Tony Fitzgerald Memorial Address, delivered by Professor Patrick Dodson. If you missed the first event, don't dismay: CLANT is planning to present a further CPD on the UEA later in the year. If you missed the second, you can listen to or download Pat Dodson's Address from the website of ABC Radio National's Big Ideas program, which broadcast the Address on 4 April 2012.

A reminder that the CLANT 25th Jubilee Dinner has been rescheduled for 29 September 2012. We are also pleased to announce that the next CLANT Bali conference will commence on 22 June 2013.

What follows is abridged and adapted from a paper I recently delivered to a conference organised by the Institute of Australasian Psychiatrists.¹

“Warning: disturbing/offensive material enclosed”:

Inside the criminal (lawyer's) mind

A while ago, I was defending a client I'll call John who had been charged with repeatedly and viciously raping a child relative, who I'll call Jane. The jury had just finished watching the lengthy pre-recorded video of Jane's testimony, including my cross-examination of her, and the judge adjourned the court for lunch. During the lunchbreak, my accused client went home and hanged himself.

If my client had been guilty (something I will never know), as the lawyer who had put Jane through the ordeal of cross-examination, I could not but feel implicated in his crime, as an accessory after the fact. If on the other hand, he had been innocent, I could not but feel implicated in

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his death, as an accessory before the fact, that I hadn't done enough to protect him from the brutality of the criminal justice system. I believe I did nothing unethical, unprofessional or unlawful. And yet.

This was by no means the first time I'd found myself reflecting on the problem of lawyer's guilt. Another client, like John, had insisted on his innocence. Eventually, after a couple of years on remand, he, unlike John, was vindicated, but that prospect seemed remote when I wrote this:

By the way, the question every defence lawyer gets asked at dinner parties, namely 'do you feel guilty when you get your guilty client off?' is drawn from the world of Boston Legal. In the world of Alice Springs Legal, clients who you know are guilty, almost invariably plead guilty. Those very few who don't are invariably found guilty anyway. I can't recall a single case of a client of mine I *know* was guilty, getting off. So, that's one thing I don't feel guilty about.

Okay, perhaps that's a little glib, a little disingenuous: yes, I can't

remember a client who I *know* was guilty getting away with it. But maybe my memory's conveniently faulty. Maybe next week a client I know is guilty *will* be acquitted. And besides, I have certainly had clients I strongly *believed* were guilty who were found not guilty. So do I feel guilty about that? Umm, yes, a bit. But not much.

We are trained to commit to a value system in which the rule of law is paramount. If we permit the rules to be bent or broken in order to nail a bloke we are sure is a crook, how do we stop them being bent or broken in order to nail the rest of us? Rules, in the world of a lawyer, are made *not* to be broken. This issue arose squarely in *Carr v Western Australia*². Police suspected Mr Carr of robbing a bank. They interviewed him on videotape in a designated interview room. He exercised his statutory right of silence. Then they took him to another less formal room where, with a videotape secretly rolling, they goaded him into boasting that he'd committed the crime. A majority of the High Court ruled that this confession was lawfully obtained, and correctly admitted as evidence before the jury which had, unsurprisingly, pronounced Mr Carr guilty. But Kirby J dissented. He said this:

"It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made with enthusiasm. I can understand the tendency of human minds to resist such an outcome. ... [Mr Carr] was a smart-alec for whom it is hard to feel much sympathy. But the

Raft

Bereft	Hard as you can now
Adrift	With this straw
His moorings slipped	I thee take
Left	Right across this alien
Afloat	sea
Foundering in an alien	Over these jagged reefs
sea	Those foaming shoals
On me	That swarming white water
It seems	To that further shore
Now falls the task	And there I'll set you
Of being his raft	High
Chin up	Dry
Old chap	And free
I'm meant to say	(Unless the tide's agin
(Let's put to one side for	us, or the winds aren't
a moment shall we the	fair, or we strike some
inedible the indelible	dark, sharp evidentiary
the impenetrable facts	mass and sink like
of the matter)	a stone, but let's not
Just grasp this nice piece of	speak of that, not now,
straw	not yet)
That's it, there's a good	I don't mind the guilty ones
client	It's the innocent I can't bear
Now clutch at it if you'd be	
so kind	

police were public officials bound to comply with the law. We should uphold the [accused's] rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed."³

Although it is considered unseemly in some circles for retired judges to publicly reflect on their own decisions, especially when they were in the minority, Michael Kirby has gone on to give a number of lectures which dig right down into the legal and ethical issues raised by this particular case. Some might even suggest that he has been wrestling with his conscience about it, although I should say that in his defence that he expressly states that he is "not venturing into 'pop psychology'."⁴ Whatever his motivations, his recently published paper on the Carr case serves as a profound and powerful response to that stock dinner party question.

These days, one of the things I enjoy most about my work is my contact with freshly minted young lawyers, who from time to time I get to supervise when they come for a stint in our office. But even then, things can get awkward.

Endnotes

1. The paper as originally presented dealt primarily with the topic of lawyers and vicarious trauma, an issue well covered by Balance Edition 5/2011, which focused on health and wellbeing within the profession.
2. (2007) 232 CLR 138
3. Carr (2007) 232 CLR 138, 187–8 [168], [170].
4. Michael Kirby, "Statutory Interpretation: The Meaning Of Meaning" (2011) 35 Melbourne University Law Review 113, 119.

Work Experience

Well	being a criminal lawyer
I said	I remember
what did you learn?	the boy
I learnt	the jury found had cut that throat
she said	He was
that when you are reading a murder file and you see a book of photographs you should expect to see photographs of a murder	as it happens
	my very first client
	on my very first day
	being a criminal lawyer
Oh	Black boy
I said	shivering
and to myself	in white cell
oops	The photographs
Oh	were particularly
I said	vivid
come to think of it that particular murder had a particularly large amount of blood. Didn't he have his throat cut?	livid
	The crimson
	splashes on
	his shoes undid him
Yes	We got
she said	a hot shot QC
munching intently through her BLT	up from down south to defend him
And so we made light	To no avail
of this dark spreading stain	after all
on the farewell lunch I'd bought her	the camera never lies
This is	Are you sure
what she's set on	I think
	you really want to get into all this?

The CDU Law School would like to hear from local practitioners who are interested in teaching on a casual basis in the LLB program. Casual teaching opportunities may arise for Semester two, starting in July 2012 across some core and elective law units. Duties can encompass lecturing, tutoring, marking and associated administrative tasks.

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