Commentary: Principles, Proposals and Penalties

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1. *Introduction*

There are three things that I want to address in this paper — the principles and policies that should underlie work on reforming complex criminal trial procedures, some proposals that the Australian Law Reform Commission (ALRC) has developed for complex customs and excise fraud prosecutions and a note — at this stage a personal note — on the question of civil penalties.

But first I should explain why the ALRC is interested in these issues. The ALRC is a federal Government agency established by Commonwealth law to advise the Commonwealth Attorney–General and Parliament on reform of the law. In the years since 1975 when we were first established our work has covered a wide range, from the extent to which Aboriginal customary law should be recognised, to the law of insolvency, to a comprehensive review of the whole of the law of evidence, to customs and excise legislation and, most recently, to the prudential regulation of superannuation schemes, unit trusts and similar collective investments. In many of these projects trial processes, in particular criminal trials, have been an underlying concern.

Most recently this concern has surfaced in the Commission's project on remedies for contravention of the *Trade Practices Act*. In that project a Discussion Paper gives attention to costs of, and the policies behind, complex trade practices litigation.[1]

2. *Some Principles*

It is important to pay attention to the fundamental policy concerns raised by the criminal trial. These concerns, grounded as they are in human rights and equity considerations, apply to both complex and non-complex trials.

Many of the commentators on the problems of the complex criminal trials, including some published in this issue of *Current Issues in Criminal Justice* and prominent judicial and ex judicial figures, have pointed out that the rules of the criminal trial were devised in another age, in other circumstances and to meet other problems than those which face us today. That may be so. This can tend to lead to the suggestion that some of the policies on which the criminal trial is founded ought to be modified.

1 ALRC Discussion Paper 56 *Compliance with the Trade Practices Act 1974* (1993).

The ALRC paid close and explicit attention to the policy framework in developing its evidence proposals, which have in large part seen the light of day in the Evidence Bill 1991 (Cth) and the Evidence Bill 1991 (NSW).[2] These policy guidelines were developed over the seven years in which the ALRC worked on the project. In its extensive consultations it found widespread acceptance of the guidelines formulated in its interim report.[3] The New South Wales Law Reform Commission accepted them. They are based on two propositions:

- the primary purpose or role of the rules of evidence is to facilitate and assist the fact finding task of the court — this means that the laws of evidence should ensure that, *prima facie,* the best available evidence is put before the court;
- the fact finding objective may have to give way on occasions to considerations of fairness as well as of cost and time.

It is in the criminal trial that the need to qualify the fact-finding objective is most marked. The purpose of the civil trials is to resolve disputes between subjects. An equal balance should be struck between the parties. The criminal trial is different. In striking the balance there, between the prosecution and the accused, the ALRC accepted the traditional view of the criminal trial.

- *Minimising the risk of convicting the innocent.* The risk of convicting the innocent should be minimised, even if this means that some "guilty" people go unconvicted and unpunished.
- *The presumption of innocence.* The criminal trial is accusatorial. The accused person is presumed innocent until proven guilty. The accused is under no obligation to help the prosecution in the court.[4]
- *Burden of proof on the Crown.* The central question in a criminal trial is whether the Crown has proved the guilt of the accused person beyond reasonable doubt.
- *The accused's rights and protections.* Accused persons are entitled to the benefit of several rights and protections
    - in recognition of their personal dignity and integrity;
    - as a measure of the overall fairness of the society to the individuals within it;
    - to give credibility to the idea of the adversary system as a genuine contest.

The criminal trial is, and in my view properly, biased in favour of the accused. To assess whether that bias is justified we need to consider the context of the criminal trial. The outcome of a successful prosecution is a penalty imposed by the State on the defendant. Ultimately it is the exercise of force by the State against the defendant. If the defendant is an individual it is the exercise of State sanctioned force against the individual. That is the reality that lies behind all criminal trials.

The law has wisely acted to restrain the State by making it more difficult for the State to exercise that force against the individual. This is not for any lack of concern for the victims of offences, nor for any love of those who commit crimes. It is a recognition that the kind of society we live in so hates the punishment of the innocent that it will tolerate the

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2 See now *Evidence Act 1994* (NSW).

3 See ALRC 38 Summary para 30–5, 46; NSWLRC 56 para 1.12 ff.

4 Just as he or she is under no obligation (apart from that specifically imposed by the Statute) to help in the investigation of a possible offence.

freedom of the guilty rather than punish the innocent. Ours is a society that actively pursues the internationally accepted human rights standards that everyone is to be presumed innocent of the offences of which they are charged and that no one is to be compelled to condemn himself or herself.

3. *Some Proposals*

A. Evidence Bill 1991[5]

The Evidence Bill 1991 (Cth) and its New South Wales counterpart make a number of significant reforms to the law of evidence and should go a considerable way to reducing the difficulty courts face in managing complex criminal trials. Professor Aronson's report for the AIJA[6] picks up and builds on these reforms.

I will not go into any detail of the reforms here. They should be familiar to you all. Significant proposals include the following:

- *Hearsay reforms.* There is a significant recasting of the rule against hearsay, including
    - a broad exception to the hearsay rule for "business records", an expression which is itself very broadly defined: records that are "part of a business and contains representations recorded for the purposes of a business".[7] There is a special rule to allow a nil return in a systematically kept record to be treated as evidence of the fact that the event did not take place.[8]
- *Expert evidence.* The Bill makes a significant relaxation and reform of the expert evidence rules. Under the Bill, a person will be able to give evidence as an expert if he or she has "specialised knowledge based on the person's training, study or experience" about the matter in question.[9]
- *Proof of contents and authenticity of documents.* There are major reforms to the rules about documentary evidence. The main reform is to complete the abolition of the "best evidence" rule, and all its restrictions.[10] Instead, the Bill provides for a much simpler and more commercially realistic way of proving the contents of documents (including electronic documents): by copies, transcripts, printouts and so on. There are easier rules for documents overseas, but notice must be given to the other side.[11]

  Special reforms are proposed for machine produced evidence.[12] The kind of evidence that will be needed to authenticate documents and processes is also significantly improved: affidavit evidence will be acceptable from the current record custodian.

  The Bill provides the ability, under court control, for the other side to test the evidence and the way it was produced. They can test the document or, if necessary, the system

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5 ALRC 38.
6 Aronson, M I, *Managing Complex Criminal Trials: Reform of the Rules Of Evidence and Procedure* (1992).
7 Clause 77.
8 Clause 77(4).
9 Clause 85.
10 Clause 135.
11 Clause 137.
12 Clause 138.

that produced the evidence or the document sought to be adduced. This could even include running tests on the computer.

- *Admissions with authority.* The Bill makes major reforms to the rules about authority to make admissions on behalf of a party. An admission made by a person who is not a party to the proceeding will be attributed to the party if it is reasonably open to find that:
    - the person who made the admission had authority to make statement on behalf of the party about the relevant matter;
    - the person was an employee or otherwise had authority and the matter was about a matter within the scope of his or her authority;
    - the admission was made in furtherance of a common purpose with the party.[13]

B. Complex customs prosecutions[14]

This report, published in 1991, amounts to a comprehensive re-writing of the *Customs Act 1901* (Cth), the *Excise Act 1901* (Cth) and related federal legislation. In response to a special request in the terms of reference, the report pays particular attention to procedures for prosecuting offences against customs and excise law.

These prosecutions are at present conducted in State and Territory courts. Under the recommendations, that position will continue although it is recommended that the Federal Court have concurrent jurisdiction (except in the case of indictable offences).

Attributing criminal responsibility to corporations. The report recommends significant reforms to the law determining when criminal liability is to be attributed to a body corporate. These recommendations were formulated in the light of the Gibbs Committee's work[15] and the work that has led to the Criminal Law Officers Committee report.[16]

Clear rules are recommended for attributing the act or omission of an employee or agent of the corporation to the corporation and attributing the state of mind of a relevant employee or agent of the corporation to the corporation. In brief:

- *Attributing the actus reus.* If a director, officer, employee and agent does an act within their actual or apparent authority from the body corporate, the body corporate is to be taken also to have done the act. However, if the person acted only for his or her own benefit, this rule does not apply.
- *Attributing mens rea.* Two rules are provided.
    - First, the state of mind of a director, officer, employee and agent who does an act with actual or apparent authority on the body corporate is attributed to the body corporate.
    - Secondly, if a director, officer, employee and agent acting with actual or apparent authority from the body corporate, authorises another director etc to

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13 Clause 93.

14 ALRC 60.

15 Committee on the Review of Commonwealth Criminal Law, Interim Report, *Principles of Criminal Responsibility and Other Matters* (1990).

16 Standing Committee of Attorney's General, Criminal Law Officer's Committee "General Principles of Criminal Responsibility", ch 2 in *Model Criminal Code, Final Report* (1993).

do a particular act, the state of mind of the first director, officer, employee and agent in relation to the act is attributed to the body corporate.

- *Defence of due diligence.* There is a defence that the body corporate took reasonable precautions and exercised due diligence to prevent its directors, officers, employees and agents from doing the act in question. There is, however, a rider to this proposition. The defendant corporation will not be able to rely to the defence if it is established that there was no effective system which could be brought into play when the matter was properly reported to prevent the contravention or that the person who would have reported the matter believed he or she would be prejudiced because of the report.

Summary trial. The first major proposal is that the trial of all prosecutions, except for an indictable offence, be summary. This includes trial in superior courts.[17] So far as State and Territory superior courts do not have rules of procedure and practice for summary prosecutions of offences, the report proposes that Federal Court rules made for that purpose apply subject to a number of special rules made in the draft Bill.

Directions hearings. The ALRC's report recommends that a directions hearing be held in all cases of summary trial other than trials in courts of summary jurisdiction. The power of the court on the directions hearing is to make orders for the just disposition of the proceeding, including orders for the directions for the conduct of the proceeding.[18]

The report specifically provides for directions that particulars of the offence be given to the accused, for the exchange of experts' names and their reports and to dispose of preliminary issues as to admissibility or on points of law.

In prosecutions for fraud related offences — which extends to prosecutions against the *Crimes Act* 1914 provisions that relate to such offences and to conspiracy which relates to such offences[19] — there are more detailed provisions for directions.[20] These are clearly intended for cases where the facts or documents are complex. In these cases, the Bill provides for directions

- to the prosecution — to give the defendant
    - a statement of the principal facts it intends to prove, and the inferences it will seek to have drawn;
    - a list of its witnesses;
    - a list of documents which it says ought to be admitted "without objection";
- for exchange of witness statements.

The defendant may then be ordered to identify which facts and documents it contests. The sanction for failure to comply with these orders is an adjournment, with costs, or exclusion of the relevant evidence.[21]

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17 Under the draft Bill, the only indictable offences concern importing and exporting goods contrary to a barrier law.

18 Clause 489(2).

19 Clause 14.

20 Clause 490.

21 Clause 493.

There are some difficulties with the way these provisions are drafted in the draft bill attached to the report. For example, there are protections for the accused in cl490[22] but these do not apply to orders made under cl 489 and orders under cl490 can, it would appear, be made under cl489.

Averments. Under the present customs and excise prosecution procedure, the prosecution may aver any matter except as to the intent of the defendant or as to law. The Gibbs Committee was critical of the use of averments as was the Senate Standing Committee on Constitutional and Legal Affairs. In 1986 the Attorney General, in response to the Senate Standing Committee, said

> Evidentiary aid provisions should only cast an evidentiary burden on the defendant and should only be relied on for proof of matters which are essentially formal in nature.

Nevertheless the report recommends that the existing law continue. It notes that the provision in the *Customs Act*, which is repeated *verbatim* in the ALRC's proposed legislation, has been held to have some limitations imposed on it and these limitations are reflected in notes attached to the draft provision.

More significantly, the Bill provides for the court, on a directions hearing, to disallow an averment having regard to

- whether the averment is of a matter that is merely formal;
- the ability of the prosecutor to adduce evidence on the matter;
- the ability of the defendant to obtain information or evidence about the matter;
- any admissions that have been made.

4. *An Heretical View — Civil Penalties*

For my own part, I do not agree that it should be possible to impose on an individual a pecuniary penalty otherwise than after conviction for an offence. To do so would be contrary to the requirement of the International Covenant on Civil and Political Rights (ICCPR) Article 26 to accord equal protection of the law to all persons.

The imposition of a pecuniary penalty or civil penalty is in substance no different from the imposition of a fine in criminal proceedings. The penalty is imposed to punish those who contravene the law. The procedure for deciding whether there has been a contravention, and therefore whether punishment should be imposed, is, however, different from the procedure which must be followed before a court may find that a contravention of some other kind has occurred for which a similar punishment can be imposed.

In the criminal proceeding, the court must be satisfied beyond reasonable doubt that the contravention occurred. Under most civil or pecuniary penalty provisions, however,[23] the court need only be satisfied on the balance of probabilities. It is true that, under the *Corporations Law* s1317EA(5), the court may only impose a pecuniary penalty if satisfied that the offence is a "serious" one. Under the *Briginshaw* test, the court will generally have regard to that fact in deciding whether it is so satisfied.[24]

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22 For example, that an order directed the accused to indicate which facts or documents he or she admits is not to be made unless a lawyer is representing the accused: see cl 497(7).

23 For example *Corporations Law* Pt 9.4B Div 3; *Trade Practices Act* (1974) (Cth) s77.

24 See *Briginshaw v Briginshaw* (1938) 60 CLR 336.

This does not alter the fact that the standard to which it must be satisfied before imposing a punishment of a similar type and severity to punishments for offences is the civil standard.

I have a very simple view — it is contrary to Article 26 to provide for the imposition of punishments — particularly similar punishments — on different standards of proof.