

New Crimes or New Responses?: Future Directions in Australian Criminal Law

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Australian criminal law has to respond to new technology, social conditions, and threats. The opening decades of the twenty-first century will see an accelerated shift from local, to national and international sovereignty over the criminal law; an expansion of Federal criminal power; a continuing struggle to apply substantive criminal law and appropriate penal sanctions to corporate wrongdoing; greater use of civil sanctions to supplement criminal ones; increased emphasis on regulatory rather than punitive modes of responding to breaches of the law; managerial approaches to court procedure; and a rethinking of the values, doctrines and purposes of the criminal law.

I INTRODUCTION

In 1967 a book entitled *The Year 2000: A Framework for Speculation for the Next Thirty Three Years*¹ was published. It was prepared in the United States by the prestigious Hudson Institute Think Tank as part of a series on *Alternative World Futures*. Its authors, Kahn and Weiner, sought to explore in a disciplined fashion the prospects for the beginning of the new millennium. They accurately predicted the accumulation of scientific and technological knowledge and the rapid increase in industrialisation and modernisation which have rendered production less labour intensive. They were less prescient about shifts in global politics. But they foresaw globalisation, computerisation, the increased surveillance of citizens and the new opportunities for genetic manipulation of human beings. Nevertheless, they allocated no space in their lengthy text to crime as a significant factor likely to call for innovative responses.

Was that a significant omission in their speculation? Or was it a pragmatic recognition that crime and communal responses to crime were permanent and largely unchanging features of the social and legal landscape? Did they think that the deviance expected in the next century would be essentially no different from that of the last, and that the settings of criminal law in the twentieth century would suffice for the twenty-first? Were they unaware of the dramatic changes that had occurred in criminal law and procedure in the eighteenth and nineteenth

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¹ H Kahn and A J Weiner (1967).

centuries as the law was compelled to respond to the industrial revolution? Did they not know how it had been forced to adapt by creating new forms of statutory regulation and by establishing special courts of summary jurisdiction - the ones we now take for granted as Magistrates' Courts? And had they overlooked how, for the sake of expediency, determinations of guilt for the new class of summary offences often relied upon concepts of strict and vicarious liability hitherto unknown at common law in relation to felonies and misdemeanours?

In setting up their framework for speculation for the year 2000, the authors had not learnt the lessons of criminal law history. They were negligent in failing to contemplate any linkage between the economic and technological developments they were predicting would affect world markets and individual lifestyles in the new age and the likelihood that parallel developments in the illicit marketplace would compel new responses from the criminal law.

By way of remedy for their failure, six areas are identified in which movement is likely to occur in Australian criminal law and procedure in the opening decades of the 21st century. These concern the shift from local to national and international sovereignty over the criminal law; the search for more effective sanctions against corporate crime; the greater use of civil remedies; reform of criminal procedure; the possibility of decriminalisation; and the ongoing re-evaluation of the values and doctrines which underpin the criminal law.

II SOVEREIGNTY OVER CRIMINAL LAW WILL CHANGE

An overarching theme will be the manner in which local sovereignty over the criminal law will be weakened as this country comes to appreciate the need to address the growth of organised, sophisticated, and serious transnational crime.² Globalisation has seen the growth and dominance of transnational institutions, including multinational corporations. Much of the accompanying economic change has been the product of free-trade policies which tend to overwhelm local mechanisms for controlling excesses. Globalisation has been facilitated by the exponential growth in world-wide computer networks and telecommunications systems. The Internet has emerged as an expedient and uninhibited form of global communication. Criminals are taking advantage of its global scope and of weaknesses in the extraterritorial reach of state and territorial criminal law. Offences can be committed effortlessly by an offender in one part of the world

² See the Global Organised Crime Project of the Centre for Strategic and International Studies <www.csis.org>; D Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 *British Journal of Criminology* 445.

against victims in another.³ Standard forms of investigation do not work well in cyber-space, nor do conventional powers of search, seizure and arrest. The ready availability of powerful forms of cryptography compounds the problem by facilitating concealment of unlawful activities.

A Adding to the International Catalogue of Crimes

In the drafting of Australian criminal legislation, not only will there be increased attention to the dangers of computer crime,⁴ but also to those crimes with international dimensions irrespective of the means by which they are committed. Only a decade or so ago it was not an offence in this country to launder money within or without Australia, or to commit sexual offences abroad, or to engage in bribery and corruption of foreign officials overseas. The need for legislative action specifically aimed at facilitating the cross-jurisdictional pursuit and prosecution of offenders will remain urgent in the coming decades. Already reciprocal obligations between states have compelled the introduction of measures involving mutual recognition and co-operation between different jurisdictions.⁵ It is a movement that will need to be accelerated as criminals seek to exploit the economic opportunities which arise from the ease with which they can transact business in the world's markets.⁶

The implications of dual criminality and concurrent jurisdiction will loom large. The growth of multi-jurisdictional crimes will require closer attention to the consequences of elements of crime being distributed across two or more jurisdictional areas. The common law sought to identify one jurisdiction as the sole place of trial. But already every Australian state and territory has statutes which contemplate the possibility of trial in more than one jurisdiction. Appropriate cross-border rules, (particularly in relation to international wrongdoing) are needed to respect the legitimate public interest of the jurisdiction trying the case and any other jurisdictions affected by the crime, while at the same time doing justice to the defendant. As David Lanham has argued⁷ there needs to

³ See generally P N Grabosky and R G Smith, *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities*, (1998); Australian Centre for Policing Research, *The Virtual Horizon: Meeting the Law Enforcement Challenges - Developing an Australasian Law Enforcement Strategy for Dealing with Electronic Crime*, Police Commissioners' Conference Electronic Crime Working Party, (Report Series No 134.1), 2000, <www.acpr.gov.au>; P N Grabosky, R G Smith and G Dempsey, *Electronic Theft: Unlawful Acquisition in Cyberspace*, (2001).

⁴ Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Report, Chapter 4: Damage and Computer Offences*, (2001); *Cybercrime Act 2001* (Cth) amending *Criminal Code Act 1995* (Cth), Schedule-The Criminal Code, Ch 10. There have been similar responses at state levels, e.g. the recent revision of Pt 6 of the *Crimes Act 1900* (NSW).

⁵ Eg *Mutual Assistance in Criminal Matters Act 1987* (Cth). Extradition of alleged offenders and the international transfer of prisoners are other aspects of international criminal justice cooperation. See also, S Schneider, M Beare and J Hill, *Alternative Approaches to Combating Transnational Crime*, Ottawa, Ministry of the Solicitor General of Canada, (2001), <<http://www.sgc.gc.ca/epub/pol/etranscrime/etranscrime.htm>>.

⁶ M Findlay, *Globalisation of Crime: Understanding Transitional Relationships in Context*, (1999).

⁷ D Lanham, 'Crime and Conflicting Duties Across Borders' (2001) 25 *Criminal Law Journal* 19.

be developed a defensible order of priorities in relation to applicable law since no jurisdiction can, as a matter of power, force another to abandon its claim to jurisdiction. International agreements will be needed on how such matters can be handled, not only for extreme crimes like genocide, war crimes, and terrorism but also for the more common ones such as fraud.⁸

Transnational crimes of special interest will include ones which involve:

- Attacks from within or without the country upon the technological infrastructure of society, particularly by acts which destroy or vandalise computer networks and telecommunications systems or otherwise undermine their data security and integrity.⁹
- Threats to the stability of the world's financial markets and capital flows through large-scale money laundering, tax evasion and fraud, usually facilitated by accommodating banks in international tax havens.¹⁰
- Threats to government and political development through corruption of public officials. The Organisation for Economic Development (OECD), the World Bank, the International Monetary Fund (IMF) and the International Chamber of Commerce (ICC) have each commented on the growth in general levels of corruption.¹¹ There is now a specific chapter in the Australian federal *Criminal Code* relating to offences concerning the integrity and security of the international community and foreign governments.¹²
- Attacks upon particular populations, or ethnic or minority groups. Genocide and other war crimes will continue to be of concern as conflict continues unabated.¹³

⁸ Lanham, above, argues that the first step should be to recognise the superiority of the territorial basis of jurisdiction over others such as the nationality of the defendant, or of the victim. The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General Report, Chapter 2: *Jurisdiction*, Canberra, 2001 has recommended substantial amendments to the *Criminal Code Act 1995* (Cth), Schedule-The *Criminal Code*, Ch 2, to extend the jurisdictional reach of state laws.

⁹ See generally P N Grabosky and R G Smith, *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities*, (1998).

¹⁰ R G Smith, 'Cross-Border Economic Crime: The Agenda for Reform', *Trends and Issues in Crime and Criminal Justice*, No 202, Australian Institute of Criminology, (2001).

¹¹ J W Williams and M E Beare, 'The Business of Bribery: Globalization, Economic Liberalization and the "Problem" of Corruption' (1999) 32 *Crime, Law and Social Change* 115.

¹² *Criminal Code Act 1995* (Cth), Schedule-The *Criminal Code*, Ch 4-The integrity and security of the international community and foreign governments, Div 70-Bribery of foreign public officials

¹³ The Commonwealth already has in place the *International War Crimes Tribunal Act 1995* (Cth) to enable it to respond to requests for assistance from, or orders issued by, the ad hoc International War Crimes Tribunal. The latter was created by the United Nations in 1994 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The federal statute provides for the arrest and surrender of persons to the Tribunal, the taking of evidence and production of documents or other articles search and seizure, the giving of evidence at hearings in Australia or overseas, the sitting of the Tribunal in Australia and the enforcement of forfeiture orders made by the Tribunal against property in Australia.

- Threats to border security through acts which undermine immigration policy.¹⁴ Prohibitions on the smuggling of people need international cooperation to be effective.¹⁵ Criminalisation of ancillary activities such as sexual servitude and debt-bondage,¹⁶ or the forging of admission documents might deter the exploitation of those who have already entered or remained as illegal immigrants, but the main activity is extraterritorial.
- Threats of a bio-technological nature. These will not only be the recognised dangers of biological weaponry,¹⁷ but also new forms of discrimination against individuals or groups on the basis of their genetic make-up.
- Significant destruction of the environment and resources of the earth, such as results from illegal commercial fishing, large-scale pollution, and the destruction of species and habitat.
- Even in relation to local offences, criminal legislation will have to be reviewed to ensure that existing offences apply to their on-line equivalents and to anticipate cross-border violations by giving extra-territorial effect to the prohibitions.¹⁸

Striking illustrations of the shift from local to international sovereignty can found in the *Pinochet* case in the United Kingdom in 2000¹⁹, and the willingness of United Nations member states to support the establishment of an International Criminal Court, as well as in the indictments issued and prosecutions being undertaken by the existing ad-hoc war crimes tribunals for Rwanda and the former Yugoslavia.

It can be expected that there will be greater reliance on the concept of personal liability under international law for international crimes under the so called 'universal jurisdiction'. The latter applied to piracy even though the traditional

¹⁴ A Schloenhardt, 'Organised Crime and the Business of Migrant Trafficking' (2000) 32 *Crime Law and Social Change* 203.

¹⁵ Schloenhardt quotes figures which have placed the worldwide profits in migrant trafficking as between US\$3 billion and US\$10 billion per annum, making it one of the fastest growing illegal businesses, A Schloenhardt, 'Organised Crime and the Business of Migrant Trafficking' (2000) 32 *Crime Law and Social Change* 203, 227.

¹⁶ The long established international conventions against slavery have recently been supplemented in Australia by domestic laws punishing slavery, sexual servitude and deceptive recruiting of persons for sexual services: *Criminal Code Act 1995* (Cth), Schedule, *The Criminal Code*, Ch 8-Offences against Humanity, Div 270-Slavery, sexual servitude and deceptive recruiting. See also S Shannon, 'Prostitution and the Mafia: The Involvement of Organised Crime in the Global Sex Trade' (1997) 3 *Transnational Organised Crime* 119; P Williams, 'Trafficking in Women and Children: A Market Perspective' (1997) 3 *Transnational Organised Crime* 145; I Taylor and R Jamieson, 'Sex Trafficking and the Mainstream of Market Culture' (2000) 32 *Crime Law and Social Change* 257.

¹⁷ *Eg Crimes (Biological Weapons) Act 1976* (Cth).

¹⁸ Australian Information Industry, *Submission to the Joint Committee on the National Crime Authority Inquiry into New Technology and Law Enforcement*, Version 1.0, 24 October 2000, [4.1.2], <<http://www.aiaa.com.au/submissions/privacy001024.html>>.

¹⁹ *R. v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

subjects of international law have been states rather than individuals. Following the war crime trials after the second world war, the international community came to recognise that there could be personal criminal liability under international law for other grave crimes such as war crimes, genocide, and other crimes against humanity, as well as those against United Nations personnel. Those categories are becoming more numerous and are beginning to separate from any direct linkage with war or hostilities of some sort. Thus murder, torture and the taking of hostages on a large domestic scale were the bases of the extradition application in relation to Pinochet.

The list of human rights violations that justify states in assuming universal jurisdiction to prosecute and punish them wherever they may occur in the world is not closed. The principle of 'universal jurisdiction' will enlarge the reach of the criminal law to the detriment of the principle that criminal law is only enforced in respect of acts done against the law within the local jurisdiction. It may be predicted that the superior courts will be increasingly supportive of the concept of universal jurisdiction. For instance, the traditional jurisdiction over piracy could be readily extended to air piracy particularly when it results in large scale loss of life and destruction of property. Courts will assume jurisdiction to try persons for the gravest crimes irrespective of where the conduct occurs in accordance with the principle that those who commit such offence are the 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'.²⁰

It is preferable that reactions to crimes of this order remain balanced and proportionate and that adjudication and punishment takes place within a judicial framework, but it is understandable that they may also trigger military and political responses. As John McFarlane of the Australian Defence Force Academy recently explained:

Transnational organized crime and terrorism can no longer be written off as 'boutique' regional security issues. These issues have become central to security and international policy concerns in the post-Cold War era, extending far beyond the scope of conventional law enforcement. The response to these transnational threats has resulted in a blurring of the traditional demarcation between diplomatic, military, law enforcement, and intelligence roles of

²⁰ *Demjanjuk v Petrovsky* (1985) 776 F 2d 571. A restraining influence on such a development is the principle of comity. To rely on the concept of universal jurisdiction to permit the arrest and trial of a foreign political figure for crimes allegedly committed outside the court's normal jurisdiction, implies a willingness to accept that foreign courts may do the same. If Pinochet could be arrested in Britain to answer allegations of crimes committed elsewhere, so Margaret Thatcher would be at risk of being arrested in Chile, or some other country, for crimes alleged to have arisen out of her leadership role in the Falklands war.

nations.²¹

B Effect of Human Rights Norms

On the positive side, globalisation can also induce in states a greater willingness to incorporate into the fabric of their legislation and judge-made law principles of international law, especially ones respecting human rights. There will be an increasing insistence that local criminal law should respect internationally recognised human rights norms.²² In time such norms will come to be read as part of the constitutional or foundational law of the jurisdiction. For instance, the *Human Rights Act 1998* (UK) has added to domestic law certain 'convention' rights which are the rights and fundamental freedoms set out in the articles and protocols of the European Convention on Human Rights. Those articles and protocols impose obligations on the national government. It is then unlawful for a public authority, including a court, to act in a way which is incompatible with those convention rights. These obligations are expected to have a significant impact on both substantive criminal law and procedure.²³ Areas already identified by commentators as likely to be affected include:

- (a) *Certainty in substantive criminal law*: The application of international human rights standards to domestic law will add to the demand for clarification and rationalisation of criminal prohibitions. In Australia they are made up of a mix of common law and statutory provisions in the non-code states and Criminal Codes dating from the early part of the last century in the remaining ones. That framework needs refurbishment.
- (b) *Restrictions on retrospectivity*: There is no constitutional prohibition in the Commonwealth Constitution against retrospective criminal legislation²⁴ such as is to be found in the United States Constitution²⁵ and in the European Convention on Human Rights. But international acceptance of such a standard strengthens the general presumption that criminal statutes are only to operate prospectively.
- (c) *Scope of defences*: Convention affirmations of the value of equality before

²¹ J McFarlane, 'Transnational Crime: Response Strategies' (Paper presented at the Australian Institute of Criminology, 4th National Outlook Symposium on Crime in Australia, Canberra, 21-22 June, 2001) 6.

²² M Flynn, 'International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities' (2000) 24 *Criminal Law Journal* 184.

²³ C Ovey, 'The European Convention on Human Rights and the Criminal Lawyer: An Introduction' [1998] *Criminal Law Review* 4; R Buxton, 'The *Human Rights Act* and the Substantive Criminal Law' [2000] *Criminal Law Review* 331; A Ashworth, 'The *Human Rights Act* and the substantive Criminal Law: A Non-Minimalist View' [2000] *Criminal Law Review* 564.

²⁴ *The King v Kidman* (1915) 20 CLR 425; *The King v Snow* (1915) 20 CLR 315; *Millner v Raith* (1942) 66 CLR 1. The power to enact retrospective criminal laws has since been confirmed in *Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501 where the validity of the *War Crimes Amendment Act 1988* (Cth) was upheld.

²⁵ Art I, s 9 (1789)

the law and of life and physical integrity will encourage appellate submissions regarding the gender bias and/or narrowness of defences such as self-defence, provocation, duress and necessity.

- (d) *Requirement of mens rea*: When international human rights conventions declare that 'everyone charged with a criminal offence is to be presumed innocent until proven guilty according to law'²⁶ this is understood to place the burden of proof on the prosecution. But the absence of guidance regarding the quantum of proof, or the legitimacy of offences of strict or absolute liability, invites further debate about what minimal elements of moral culpability must be proven by the state in cases of serious crime. Chapter 2 of the federal *Criminal Code* has done much to address these issues in the course of codifying the general principles of criminal responsibility under the laws of the Commonwealth.
- (e) *Methods of investigation*: The extent to which the application of convention rights of privacy will be regarded as incompatible with current investigatory practices, especially the gathering and use of evidence obtained by means of covert surveillance,²⁷ or invasive forensic procedures,²⁸ can be expected to become a live issue in the years to come.²⁹

On the Australian human rights front, the full ramifications of the High Court of Australia's commitment to the concept of a fair trial as exemplified by cases such as *Jago*³⁰ (effect of delay), *Dietrich*³¹ (representation in serious crimes), *Longman*³² (fair warnings about reliability of evidence), *Veen (No 1)*³³ and *Veen (No 2)*³⁴ (proportionality in punishment), and *Kable*³⁵ (maintenance of the impartial administration of judicial functions) have yet to be determined. It is to be expected that the implications of the underlying concept of 'fairness' will be explained and enlarged in the coming years as the court manifests its greater willingness to address principles of substantive criminal law and procedure³⁶ and

²⁶ Eg *European Convention on Human Rights*, Art 6(2).

²⁷ R G Fox, 'Someone to Watch over Us: Back to the Panopticon?' (2001) 1 *Criminal Justice* 251.

²⁸ The federal government has sought to set certain minimum standards in relation to the conduct of various types of investigation, see *Crimes Act 1914* (Cth), Pt 1AA (controlled operations); Pt 1C (search warrants and powers of arrest); Pt 1D (forensic procedures).

²⁹ S Uglow, 'Covert surveillance and the European Convention on Human Rights' [1999] *Criminal Law Review* 287.

³⁰ *Jago v District Court of New South Wales* (1989) 168 CLR 23.

³¹ *Dietrich v The Queen* (1992) 177 CLR 292.

³² *Longman v The Queen* (1989) 168 CLR 79.

³³ *Veen v The Queen (No 1)* (1979) 143 CLR 458.

³⁴ *Veen v The Queen (No 2)* (1988) 164 CLR 465.

³⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

³⁶ Justice Michael Kirby, in describing the change of attitude to criminal law in the High Court since the 1970s, has stated that criminal cases now constitute one quarter of the applications for special leave to appeal to the High Court, an increase in numbers from 14 in 1977 to 114 in 2000: M Kirby, 'It's a crime, but will it always be?', *The Age*, 23 February 2001, 17.

to test them against internationally accepted human rights norms.³⁷

C Flexing the Federal Muscle

A hundred years ago, when drafting the Australian Constitution, it was not within the contemplation of the founding fathers that the Commonwealth required plenary power over criminal matters.³⁸ The current engagement of the federal government in criminal justice, despite the absence of an express head of power over the criminal law of the nation, would have amazed them.

It is worth remembering that, immediately following federation, the *Customs Act 1901* (Cth) was the main crime fighting and revenue protection instrument of the Commonwealth. It drew on a 400 year old history of criminal and civil procedures and sanctions which included potent forfeiture measures, and wide ranging investigative powers. It was and still is a powerful piece of legislation, one which has continued to have a significant influence in providing models for later additions to the federal criminal justice armoury. Even so, it took almost fourteen years before a federal Crimes Act was passed; a quarter of a century before the creation of a statute-based force of Commonwealth peace officers (instead of relying, as previously, on state police forces); and over half a century before a true federal police force, the Commonwealth Police came into being in 1957.

The great expansion of federal involvement in criminal justice under the available constitutional arrangements took place in the early 1980s, following the spate of inquiries and royal commissions which had revealed criminal activities beyond the capacity of conventional enforcement agencies to suppress. Although, in 1979, federal policing was invigorated by the establishment of the *Australian Federal Police*, it too was no match for the criminal activities which had been identified by royal commissions at state and federal levels, in particular those conducted by Mr Justice Stewart into drug trafficking (1983) and Frank Costigan QC on the activities of the Federated Ship Painters and Dockers Union (1984). These exposed extensive drug trafficking, fraud, murder, extortion and large scale tax evasion.

Suddenly 'organised crime' in Australia had been discovered. It was complex, it transcended jurisdictional boundaries, and it exploited legitimate commercial practices. White collars seemed to predominate. The royal commissions and

³⁷ For earlier discussions of the issues which may arise see: Australia, Human Rights Commission, *Review of Crimes Act 1914 and other Crimes Legislation of the Commonwealth*, (1983); Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law, Discussion Paper No 15: Human Rights in Relation to the Commonwealth Criminal Law*, (1988); P Byrne, 'Australian Criminal Procedure and International Standards of Criminal Justice' (1989) 63 *Australian Law Journal* 426; Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law, Final Report*, (1991), Pt III - Human Rights in Relation to the Commonwealth Criminal Law.

³⁸ Unlike that enjoyed by the federal government in the Dominion of Canada.

other government inquiries concluded that the federal and state police forces were grossly under-resourced, lacked the necessary legal powers to act and were often unwilling to co-operate with each other. Accordingly, there existed a widespread perception that the perpetrators were largely immune from effective investigation and prosecution. Their conduct came to be seen as such a threat to 'the fabric of society' that the federal Government, drawing largely on the experience of the United States, enacted a package of legislation intended to strike at the heart of such crime in this country.³⁹ Whereas existing offences and procedures under state and federal Crimes Acts and the *Customs Act 1901* (Cth) were seen as useful in catching the little fish, something more was required for the sharks.⁴⁰

The establishment of the National Crime Authority as a federal law enforcement agency in 1984 under the authority of both federal and state law was a first step. Next followed a 1987 federal legislative package which included the:

- *Telecommunications (Interception) Amendment Act 1987* (Cth) which extended existing interception powers (which related to narcotic offences) to a greater range of serious offences and which enabled law enforcement agencies other than the Federal Police to seek interception warrants.
- *Mutual Assistance in Criminal Matters Act 1987* (Cth) which provided a legislative basis for Australia to enter into arrangements with other countries under which it now can request and grant assistance relating to criminal investigation, prosecution and recovery of the proceeds of crime on an international front.
- *Proceeds of Crime Act 1987* (Cth) which provided for the freezing and confiscation of property used in or derived from the commission of certain classes of serious indictable offences. The Act also created new offences of money laundering and organised fraud and opened new ways of following the money trail through monitoring orders and the imposition of new obligations on financial institutions.
- *Cash Transactions Reports Act 1988* (Cth), which was renamed in 1992 the *Financial Transactions Reports Act 1988* (Cth). It significantly increased obligations to report certain transactions and provided stricter identification procedures for opening new accounts. Its surveillance functions allow it to provide intelligence on suspect financial transactions to enforcement agencies.

³⁹ The equivalent stimulus to action by the federal government in the United States is said to have been the criminal consequences of that country's experiment with prohibition: K M Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition*, (1994).

⁴⁰ For example, see R G Fox, 'The Expansion of Federal Criminal Law in Combating Money Laundering' in W Weerasooria, N Jensen and J Visser, *Money Laundering In Australia*, (Proceedings of a National Seminar, Melbourne, Banking Law Centre, Monash University, 31 March 1998), (1998), 11-14.

This was to have been followed by the Australia Card, a compulsory system of identification for all Australians, but the legislation failed to pass. Some part of that lost ground has since been made up by greater reliance on tax file numbers as an identifier, increased enforcement powers under taxation legislation and Australian business numbers for the purposes of the goods and services tax.

In March 1994, the Commonwealth Law Enforcement Board was established to improve the management and enforcement of criminal justice at a federal level and to facilitate better co-ordination between agencies in the interest of pursuing national and international law enforcement issues. One of its functions is to provide 'over the horizon' assessments of potential crime problems of national import, particularly those involving sophisticated criminal networks whose influence spans the world.

The expansion of federal involvement in criminal justice is continuing unabated despite the constitutional limitations. The new federal *Criminal Code Act 1995* (Cth) is now in effect. This ambitious project is not only intended to produce a complete and revised criminal law for the Commonwealth, but through the collaborative agreement of the Standing Committee of Attorneys-General was supposed to produce a model Criminal Code to be adopted by each Australian jurisdiction. This outcome is a long way from being realised, but the national adoption of a uniform Criminal Code at some stage during this century is urgently required so that all criminal legislation dealing with serious offences in Australia will be constructed in accordance with the same underlying principles of criminal responsibility.⁴¹ This offers great benefits in terms of simplifying joint federal/state investigations and trials, and adding to the power of investigators and prosecutors to pursue crime throughout the country and beyond, thus reducing, if not overcoming, many of the deficiencies of the federal system from a crime-fighting perspective.

D Sharing a Regional Jurisprudence

Proposals have been put forward for a shared criminal jurisprudence in this part of the world. The notion goes beyond regional cooperation through mutual assistance legislation, or arrangements for the international transfer of prisoners. A recent editorial in the *Criminal Law Journal*⁴² called for lessons to be learnt from other countries in the vicinity regarding legal concepts of accountability and the relevance of differing cultural and ethnic backgrounds in evaluating liability and in applying defences such as self defence, duress and provocation. The idea is to bring Australian law closer to that of our Asian neighbours such as Malaysia, Singapore, Sri-Lanka, India and Pakistan that also possess British-based criminal

⁴¹ E Colvin, 'Unity and Diversity in Australian Criminal Law: A Comment on the Draft Criminal Code' (1991) 15 *Criminal Law Journal* 82.

⁴² Editorial, 'Towards a Shared Criminal Jurisprudence in the Asia-Pacific' (2000) 24 *Criminal Law Journal* 137.

codes akin to those in three of the Australian states.⁴³ An exchange of ideas with regional neighbours on standards of criminal law, criminal justice and punishment should be welcomed given the need for close cooperation with them in responding to cross-border crime. Each jurisdiction would obtain a better understanding of the strengths and weaknesses of their own criminal justice system as well as gaining ideas for improvement in substantive law and practice.

III SEARCHING FOR CORPORATE SANCTIONS

In the era of globalisation, it is no longer possible to assume that any one jurisdiction is in a position to regulate multinational corporate harm, nor indeed, that all those affected will have the motivation to try to do so.⁴⁴ This compounds the recognised weakness of the criminal law in targeting corporate wrongdoers for prosecution even though their actions may constitute a greater threat to society than those of individual offenders.

The Commonwealth has already exhibited leadership in addressing the principles of corporate criminal responsibility in its *Criminal Code*,⁴⁵ but much more is needed by way of action in response to corporate misconduct to 're-establish the hegemony of human beings over their corporate creations'.⁴⁶ Of course it is always possible to criminalise reckless risk taking with the lives of employees, or sharp business practices such as bid-rigging, price-fixing and other forms of collusion and then threaten directors and executive officers with imprisonment for leading the corporation down those paths. But this overlooks the ease with which executives can be turned into scapegoats, leaving the organisational psychology and institutional attitudes intact. As Celia Wells reminds us: 'Corporations, whatever they are, are not individuals and do not act as unitary individuals'.⁴⁷

The federal code has yet to define what criminal sanctions are appropriate to corporations when viewed as offenders in their own right. Corporate fines under the federal *Crimes Act 1914* may be up to five times higher than those open to a court dealing with a natural person convicted of the same offence.⁴⁸ There is a similar general loading under state law.⁴⁹ But such simplistic responses fail to do justice either to the leadership Brent Fisse has been offering this country for

⁴³ Queensland, Tasmania and Western Australia.

⁴⁴ F Haines, 'Towards Understanding Globalisation and Control of Corporate Harm: A Preliminary Criminological Analysis' (2000) 12 (2) *Current Issues in Criminal Justice* 166, 176.

⁴⁵ *Criminal Code Act 1995* (Cth), Schedule-The *Criminal Code*, Chapter 2, Pt 2.5-Corporate criminal responsibility.

⁴⁶ S Russell and M J Gilbert, 'Truman's Revenge: Social Control and Corporate Crime' (1999) 32 *Crime, Law, and Social Change* 59, 78.

⁴⁷ C Wells, *Corporations and Criminal Responsibility*, (1993), 121.

⁴⁸ *Crimes Act 1914* (Cth), s 4B(3).

⁴⁹ Eg *Sentencing Act 1991* (Vic), s 113D.

almost thirty years in designing sanction systems for entity crime,⁵⁰ nor the innovative measures for the punishment of organisations to be found in chapter eight of the United States Sentencing Commission's *Federal Sentencing Guidelines Manual*.⁵¹ These creative ideas suggest new forms of reparation and restitution (including community service and remedial orders); fines (including fines based on turnover, or in the form of divestment of equity); probation and other types of ongoing surveillance; novel forms of disqualification from certain commercial activity; receivership; and ultimately the winding-up of a corporation itself. Policy makers have had their heads in the sand for over a hundred years in relation to corporate crime. If they maintain that posture, their responsiveness to good ideas is likely to remain inhibited for yet another century.⁵²

IV SUPPLEMENTARY CIVIL REMEDIES

Civil remedies offer an attractive alternative to criminal ones because they appear to be potent, relatively inexpensive and easy to implement. They can cover a variety of criminal situations. Tax assessments and penalties can disgorge the profits of crime; planning legislation can be used to close down illegal brothels and gambling venues; and the licensing of service providers can be used to exclude criminal elements and reduce corruption. Civil measures also serve preventive purposes. Examples are by-laws prohibiting the consumption of alcohol in public in high crime areas, orders for the abatement of nuisances, administrative procedures for the enforcement of health and safety standards, and the like.

A Forfeiture of Proceeds of Crime

Over the last twenty years the idea of restraining and confiscating an offender's assets in addition to imprisoning the person has been enthusiastically revived in this country. Though the immediate benefits of these remedies have been

⁵⁰ Eg W B Fisse, 'The Use of Publicity as a Criminal Sanction Against Business Corporations', (1971) 8 *Melbourne University Law Review* 107; W B Fisse, 'Responsibility, Prevention, and Corporate Crime', (1973) 5 *New Zealand Universities Law Review* 250; W B Fisse, 'The Social Policy of Corporate Criminal Responsibility', (1978) 6 *Adelaide Law Review* 361; B Fisse, 'Community Service as a Sanction Against Corporations' [1981] *Wisconsin Law Review* 970; W B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions', (1983) 56 *Southern California Law Review* 1141; B Fisse, 'Sentencing Options Against Corporations' (1990) 12 *Criminal Law Forum* 211; B Fisse and J Braithwaite, *Corporations, Crime and Accountability*, (1994).

⁵¹ 1 November 2000, United States Sentencing Commission, Washington, DC.

⁵² S S Simpson and C S Kopher, 'Deterring Corporate Crime' (1992) 30 *Criminology* 347; J Braithwaite and B Fisse, 'On the Plausibility of Corporate Crime Control' in G Geis, R R Meier and L M Salinger (eds), *White Collar Crime: Classic and Contemporary Views* (3rd ed 1995). For a discussion of the circumstances in which companies can get away with homicide because the law and the courts are not geared with dealing with organisational deviance and corporate violence, see M Punch, 'Suite Violence: Why Managers Murder and Corporation's Kill' (2000) 33 *Crime, Law and Social Change* 243.

overstated,⁵³ the zeal with which they have been embraced will provide the momentum to sustain them well into this century. The lessons of earlier history that saw the demise of common law forfeiture in the nineteenth century have been forgotten.⁵⁴ Excitement for this approach to crime control has recently been further fuelled by the Australian Law Reform Commission's promotion of 'civil' forms of forfeiture for unlawful activity in its 1999 report *Confiscation that Counts*.⁵⁵ Under these, there is no need to charge, try, or convict those who are being stripped of their assets. Non-conviction based forms of confiscation already exist in New South Wales⁵⁶ and Victoria.⁵⁷

Civil remedies of this sort avoid the higher standard of proof required for criminal prosecutions, or the principles of parity or mitigation in sentencing and are usually more expedient.⁵⁸ They are criticised for sidestepping the culpability requirements of substantive criminal law and the niceties of due process and proportionality in adjectival law. Yet one thing is certain: such expediency will become increasingly attractive to legislatures in the new millennium as they sense they are losing the battle against globalised crime.⁵⁹

B Regulatory Enforcement v Criminal Enforcement

This blurring of civil and criminal enforcement paradigms is currently the subject of the Australian Law Reform Commission's attention. It was given a reference on civil and administrative penalties in January 2000 and still due to report in November 2002. It has been called upon to identify those areas in which provision for such penalties is more appropriate and the extent to which, in moving to this mode of enforcement, basic principles of criminal liability, including fault elements, corporate criminal responsibility, vicarious responsibility, and strict responsibility, should be retained. It is to undertake this important evaluation having regard to:

- The importance of maintaining an effective and efficient criminal justice system;
- The need in relation to various economic, financial, business, industrial, environmental, social, law enforcement and other areas of Australian government responsibilities, to achieve effective and efficient regulation

⁵³ A Freiberg and R Fox, 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33 *Australian and New Zealand Journal of Criminology* 239.

⁵⁴ A Freiberg and R Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6 *Australian Journal of Legal History* 1.

⁵⁵ Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, (1999); *Proceeds of Crime Bill 2001* (Cth).

⁵⁶ *Criminal Assets Recovery Act 1990* (NSW).

⁵⁷ *Confiscation Act 1997* (Vic).

⁵⁸ L G Mazerolle and J Roehl, (eds), *Civil Remedies and Crime Prevention*, Monsey, (1998).

⁵⁹ A Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian and New Zealand Journal of Criminology* 44.

and supervision and to counter wrongdoing with a fair, effective and practical system of decision-making and enforcement;

- The advantages and disadvantages of a uniform system for imposing monetary penalties by means of administrative and civil penalties (including a system allowing for the prosecution of an offence by a civil procedure);
- The balance which ideally should be maintained in deterring and punishing wrongdoing in regulatory and supervisory regimes, between the use of the criminal justice system and administrative and civil penalties;
- The need, having regard to considerations of fairness, effectiveness and efficiency, for appropriate relations to be established between administrative, civil and criminal offences, processes and penalties . . .;
- Australia's obligations under international law and Australia's commitment to human rights and civil liberties . . .⁶⁰

The Commission has already conducted a conference to explore regulatory theory and practice⁶¹ including the globalisation of regulation and the role of courts in regulatory arrangements and is expected to release a discussion paper shortly. The recent corporate collapses of HIH Insurance and One-Tel Ltd have highlighted weaknesses in the preventive capacities of the government agencies responsible for superintendence of the corporate sector. Their interventionist roles as regulators weakens their position as prosecutorial authorities. Their function is very different from that of the Director of Public Prosecutions in responding to wrongdoing. This inevitably leads to tension regarding who is to prosecute and for what offences.

When corporate entities are subjected to prosecution it is far more likely to be for a breach of regulations than for 'real' crimes. The former invite a more pro-active negotiated approach to enforcement since many of the 'offences' are concerned with specifying standards of conduct or safety to *avoid* harm or danger, rather than penalise an *outcome*, as with conventional crimes. The more flexible style of regulatory enforcement, is not without its significant problems.⁶² In 1990, in their book, *Stains on a White Collar*, Peter Grabosky and Adam Sutton presciently warned that:

⁶⁰ Attorney-General's reference on the laws of the Commonwealth relating to the imposition of administrative and civil penalties, 21 January 2000.

⁶¹ *Penalties: Policy, Principles & Practice in Government Regulation*, Sydney, 7-9 June 2001.

⁶² P Grabosky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, (1986); R G Smith, *Health Care, Crime and Regulatory Control*, (1998). For an assessment of the advantages and disadvantages of these competing approaches, see R Sarre, 'Alternatives to the Criminal Courts: Some Considerations of Civil and Administrative Options in the Process of Legal Regulation' (2001) 11 *Caribbean Law Review* 25.

[R]egulation is essentially a charade, with businesses allowed to do largely as they please...[C]ase after case suggests that regulatory authorities have failed in their role of protecting the public...In some, the law is unable to address harmful corporate conduct. In others, the penalties available at law may have been inadequate. In others still, the legal apparatus may be sufficient but the enforcement agency may be co-opted by the industry which it oversees. Alternatively, the agency may be crippled by inadequate resources, by administrative incompetence, or by political forces.⁶³

Has anything changed? The ALRC's report on civil and administrative penalties will be important in determining how much more weight will be given to this parallel system of sanctions in the future.

V PROCEDURAL REFORM

Much procedural reform these days is pervaded by managerial and fiscal concerns.⁶⁴ Thus the 1999 recommendations of the *Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure* called for the reallocation of legal aid in the interests of pre-trial dispute resolution; increased obligations of disclosure on prosecutors and investigators,⁶⁵ and incentives for fast-tracking prosecutions by offering tangible and publicly identified discounts for early pleas of guilty.⁶⁶

However, the committee did not address the deeper concerns expressed by the former Chairman of the National Crime Authority, John Broome, about the inability of Australian governments to provide an adequate procedural framework within which the investigation and pursuit of serious crime can take place.⁶⁷ Future procedural reform along these lines would require compatible cross-jurisdictional frameworks for investigations and witness protection schemes; better arrangements for the collection and exchange of intelligence and evidence regarding transnational crimes; improved facilities for providing mutual

⁶³ Sydney, (1990), xv and 240-247.

⁶⁴ A Ashworth, *The Criminal Process: An Evaluative Study* (2nd ed 1998).

⁶⁵ See also M Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121.

⁶⁶ Australia, *Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure Report*, Canberra, September 1999, (Chair, Justice Brian Martin, Supreme Court of South Australia).

⁶⁷ J Broome, *Transnational Crime in the Twenty-First Century* (Paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service, Canberra, 9-10 March 2000), 8 <www.aic.gov.au/conferences/transnational/index.html>. See also, in relation to the United Kingdom scene, J R Spencer, 'The Case for a Code of Criminal Procedure' [2000] *Criminal Law Review* 519.

assistance in real-time or close to real time;⁶⁸ simplified extradition procedures; and the capacity to transfer proceedings from one jurisdiction to another, including transfer to an international criminal court to deal with a wide range of international criminal matters.

These are all long shots, but their objective is a better coordinated procedural framework to support the agencies that are trying to respond to crime which significantly impinges on national and international interests.⁶⁹

Many alternative forms of non-adversary procedure have been advanced under the rubric of 'restorative justice'.⁷⁰ It is not clear how many will take root in the coming decades. So far their main thrust has been towards young offenders and less serious crimes. Other explorations are taking place in relation to the operation of the criminal and civil trial processes.⁷¹ Already judicial officers are being invited to acquire a better understanding of new interdisciplinary concepts, such as therapeutic jurisprudence,⁷² so that they may participate in the ongoing supervision of offenders in new specialist tribunals such as Drug Courts.⁷³ The concept of investigating magistrates, well understood in the European civil law systems, will also become increasingly attractive. However, sooner or later, demands that judicial officers undertake these enlarged administrative and supervisory functions, will be met by reference to the doctrine of separation of powers and to the importance attached by the High Court in the case of *Kable*⁷⁴ to judges not being placed in the position of appearing to be doing the bidding of the executive arm of government.

Whether the jury will long survive into the new millennium is also moot. The civil jury is already on its way out and the place of the criminal jury in the determination of guilt is being rapidly eroded. Factors which undermine its role

⁶⁸ Australian Centre for Policing Research, *The Virtual Horizon: Meeting the Law Enforcement Challenges - Developing an Australasian Law Enforcement Strategy for Dealing with Electronic Crime*, Police Commissioners' Conference Electronic Crime Working Party, (Report Series No 134.1), 2000, <www.acpr.gov.au>

⁶⁹ See also P Francis, P Davies and V Jupp (eds), *Policing Futures: The Police, Law Enforcement and The Twenty-First Century*, (1997).

⁷⁰ D Daly and H Hayes, 'Restorative Justice and Conferencing in Australia', *Trends and Issues in Crime and Criminal Justice*, No 186, Australian Institute of Criminology, Canberra, 2001.

⁷¹ Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia -- Final report*, (1999), [6.2]; Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89, (2000), [1.111].

⁷² D B Wexler and B J Winick 'The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law' in J R P Ogloff (ed), *Law and Psychology: The Broadening of the Discipline*, (1992), 211-240; 'Special Issue: Therapeutic Jurisprudence and Preventive Law Transforming Legal Practice and Education' (1999) 5(4) *Psychology, Public Policy, and Law*; D P Stolle, D B Wexler and B J Winick (eds), *Practicing Therapeutic Jurisprudence*, (2000).

⁷³ Eg *Drug Court Act 1998* (NSW); *Drug Rehabilitation (Court Diversion) Act 1999* (Qld); A Freiberg, 'Australian Drug Courts', (2000) 24 *Criminal Law Journal* 213; J W Raine, 'Modernising Courts or Courting Modernization?' (2001) 1 *Criminal Justice* 105; P Hora, W G Schma and J T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America', (1999) 74 *Notre Dame Law Review* 439.

⁷⁴ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

include the expanded jurisdiction of magistrates to try indictable offences summarily, the statutory and common law incentives to plead guilty early, and the availability in some states of the option to be tried on indictment in a superior court by a judge alone.⁷⁵

Even s 80 of the Commonwealth Constitution, which appears to guarantee trial by jury for indictable offences under federal law can be readily by-passed. If federal legislation creating a crime permits the prosecution to proceed summarily, the accused cannot demand a jury trial on indictment. Already the *Crimes Act 1914* (Cth), s 4J allows any indictable offence punishable under federal law by imprisonment for up to ten years to be heard and determined by a court of summary jurisdiction.⁷⁶ And even when proceedings are brought before a jury on indictment, the High Court has accepted that Parliament may confine the jury's role to determining guilt for the substantive offence, while leaving it to the trial judge alone to decide upon the existence of key aggravating facts (such as the quantity of an illicit drug) which define the applicable penalty levels.⁷⁷ This withdrawal of significant issues of fact from the jury and assigning them to the judge has been held not to violate the s 80 guarantee of a 'trial' by jury.⁷⁸

VI SEX, DRUGS AND DECRIMINALISATION

Will large scale decriminalisation be a feature of Australian criminal law in the 21st century? Except in the areas of prostitution and consensual adult homosexual behaviour, little occurred in the closing decades of the last century to suggest that law makers are now ready to vacate entire areas of social regulation, despite their willingness to move to administrative penalties or to experiment with reparation or mediation schemes and other forms of restorative justice as an alternative to criminalisation.

A Sex

Even the decriminalisation of adult access to pornography in the 1970s on the basis that it was not the function of the state to enforce private morality, did not result in the criminal law wholly abandoning the field.⁷⁹ The law continued to regulate access to sexually explicit material when the manner in which the material was disseminated constituted a form of public nuisance. To do so, it

⁷⁵ As in South Australia, see *Brown v The Queen* (1986) 160 CLR 171.

⁷⁶ The s 80 guarantee has no application to state or territory offences.

⁷⁷ *Kingswell v The Queen* (1985) 159 CLR 264, confirmed in *The Queen v Meaton* (1986) 160 CLR 359.

⁷⁸ A recent attempt in *Cheng v The Queen* (2000) 74 ALJR 1482 to persuade the High Court to overturn *Kingswell* and to strengthen the constitutional 'guarantee' in s 80 failed by a majority of 6 to 1 (Kirby J dissenting).

⁷⁹ R G Fox, 'Censorship Policy and Child Pornography' (1978) 52 *Australian Law Journal* 361.

established and refined an elaborate classificatory scheme to restrict the open display of such material.⁸⁰

If anything, the criminalisation of sexual conduct has expanded as efforts are made to devise an effective means of regulating the more extreme and exploitative forms of sexual expression such as child abuse⁸¹ and sado-masochism, particularly when disseminated through the internet.⁸² Prohibitions on cultural sexual practices of a non-consensual nature which were previously ignored, such a female sexual mutilation, have already been added to the statute books.⁸³ Will male genital mutilation be included in the future?

B Drugs

Decriminalisation is one of the ways of limiting the high demands placed upon criminal justice agencies by re-defining deviance downwards. If government is not prepared to filter the conduct out of the system altogether by wholly decriminalising it, it may be prepared to lower the degree of criminalisation. This tends to happen at the 'shallow' end of the criminal justice system through use of informal or formal cautions, instead of filing charges, or allowing minor drug offences to be dealt with by on-the-spot tickets instead of prosecution.⁸⁴ Diversion from prosecution after charges have been filed may also be coordinated by specialist agencies such as Drug Courts.⁸⁵ Measures such as these will continue to feature in the handling of minor offenders, particularly where a rehabilitative approach is preferred over a punitive one.

At the 'deeper' end of the justice system, decriminalisation can occur when the conduct in question is 'medicalised'. Attempted suicide is a case in point. On the

⁸⁰ Eg *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Cth) and corresponding legislation in each state.

⁸¹ Eg F David, 'Child Sex Tourism', *Trends and Issues in Crime and Criminal Justice* (No 156, Australian Institute of Criminology, 2000).

⁸² P Forde and A Patterson, 'Paedophile Internet Activity', *Trends and Issues in Crime and Criminal Justice* (No 97, Australian Institute of Criminology, 1998); I Ali and P Biskup, 'Pornucopia on the Net: A Contribution to the Recent Censorship Debate in Australia' (1996) 27 *Australian Academic and Research Libraries* 270; J Wallace and M Mangan, *Sex, Laws, and Cyberspace: Freedom and Censorship on the Frontiers of the On-line Revolution*, (1996); M Rimm, 'Marketing Pornography on the Information Superhighway: a Survey of 917,410 Images, descriptions, Short Stories and Animations Downloaded' (1995) 83 *Georgetown Law Journal* 1849. Australia's latest attempt to regulate local access to pornography on the internet by measures contained in the *Broadcasting Services Amendment (On-Line Services) Act 1999* (Cth) is probably doomed to fail for both social and technological reasons.

⁸³ Eg *Crimes Act 1958* (Vic), s 32.

⁸⁴ On-the-spot fines for minor drug possession have been available in South Australia since 1986 and in the Northern Territory since 1996 (*Controlled Substances Act 1984* (SA); *Misuse of Drugs Amendment Act 1996* (NT)).

⁸⁵ K Freeman, R L Karski and P Oak, *New South Wales Drug Court Evaluation: program and participant profiles*, Sydney, NSW Bureau of Crime Statistics and Research, (2000); A Freiberg, 'Australian Drug Courts', (2000) 24 *Criminal Law Journal* 213; K Graham, 'Piloting a Youth Drug Court' (2000) 25 *Alternative Law Journal*, 185; T Makkai, 'Drugs Courts: Issues and Prospects', *Trends and Issues in Crime and Criminal Justice* (No 95, Australian Institute of Criminology, 1998).

drug scene, trials of lawful access to heroin by addicts have been resisted because they have been perceived as a threat to the deterrent aims of the criminal law. Any marked shift from criminalisation to medicalisation of the illicit drug problem under harm-minimisation public-health-based intervention strategies, such as the provision of safe injecting facilities, will be slow in coming. Nor will it lead to a significant amelioration of the law relating to possession and use of illicit drugs. Incapacitative rationales will still prevail. Legislators will reduce the quantities which must be proven to be in possession to attract the higher penalties reserved for trafficking and commercial dealings in illicit drugs. The penalties themselves will also be increased either by direct amendment, or by sweeping a wider group of drug dealers into special classes of 'serious' or 'continuing enterprise' offenders who are subject to extended terms of imprisonment.⁸⁶

VII RETHINKING VALUES, DOCTRINES AND PURPOSES

Just as the United Kingdom Criminal Law Commissioners struggled with the reform of the substantive criminal law in the mid-nineteenth century in response to the changing industrial and social climate,⁸⁷ so it should be expected that the values and doctrinal foundations of the substantive criminal law itself will come under intense scrutiny in the twenty-first century as its supporters are called upon to defend the now doubtful assertion that it is an apolitical and coherent body of doctrine. Already feminist perspectives have influenced criminal law in relation to sexual offences and domestic violence by questioning the extent to which it serves to maintain the prevailing structure of power and gender relations rather than protecting core social values.⁸⁸

New defences and other important distinctions in the substantive law have emerged in the past⁸⁹ and there is no reason to think that this process is at an end. Just as self defence, necessity, infancy and insanity were recognised grounds for leniency and executive clemency prior to becoming substantive grounds for acquittal,⁹⁰ so the same evolutionary process is present in the claims for new or

⁸⁶ Eg *Sentencing Act 1991* (Vic), Pts 2A & 2B. These provisions were originally designed for recidivist sexual or violent offenders.

⁸⁷ Great Britain, *Report of the Criminal Law Commissioners*, (7th Report) 19 Parliamentary Papers 28; L Radzinowicz, *A History of English Criminal Law*, (1948), vol 5: The Emergence of Penal Policy, ch 22.

⁸⁸ D Nicolson and L Bibbings, *Feminist Perspectives on Criminal Law*, (2000).

⁸⁹ This is particularly true of the separation of manslaughter from murder, C A H Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law and Philosophy* 109, 112-3.

⁹⁰ K D Moore, *Pardons: Justice, Mercy and the Public Interest*, (1989), 18.

enlarged homicide defences to apply to killings by abused and battered women,⁹¹ mercy killings⁹² and death intentionally caused in other extenuating circumstances. A powerful example is the emerging defence of 'medical necessity' which the English Court of Appeal recently used to buttress its decision to permit the ending of the life of the weaker of the conjoined twins.⁹³

Since the criminal law coexists with other forms of social control, re-evaluation of its provenance in these coming years will inevitably explore its relationship to other systems for achieving civic compliance. In major areas of significance such as taxation; public and mental health; occupational health and safety; industrial relations; environmental protection; corporate regulation; and in the regulation of particular markets and commercial activities, compliance is primarily achieved through administrative and educative measures, rather than criminal ones. The question of which is the best approach to adopt, has already been resolved against the criminal law in efforts to curb the proliferation of HIV/AIDS. The current debate about use of safe injecting facilities and other non-criminal approaches to illicit drug usage is a further example of the criminal law coming under pressure from alternative forms of social control. So too are the experiments with restorative justice.

On the other hand the framing of prohibitions by reference to an alleged offender's character, malevolence of disposition, and potential for future danger, as in the cases of Gary David in Victoria⁹⁴ and Gregory Kable in New South Wales,⁹⁵ to justify detention beyond the expiry of their sentences, or in laws imposing post-discharge restraints on sex offenders,⁹⁶ is strong evidence of a willingness to make greater use of quasi-criminal preventive measures.

A civilised society requires principled constraints to be placed upon the use of the criminal law on both moral and functional grounds. A criminal prohibition must address a significant and demonstrable threat to a legitimate interest or value that

⁹¹ Eg J H Krause, 'Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill' (1994) 46 *Florida Law Review* 699; C P Ewing, 'Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill' (1990) 14 *Law and Human Behaviour* 579; I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; G Hubble, 'Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence' (1997) 9 *Current Issues in Criminal Justice* 113; I Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in N Naffine and R J Owens, *Sexing the Subject of the Law*, (1997), 149-69.

⁹² M Otlowski, 'Mercy Killing Cases in the Australian Criminal Justice System' (1993) 17 *Criminal Law Journal* 10.

⁹³ *Re A (children)(Conjoined twins: surgical separation)* [2000] 4 All ER 961, particularly the judgment of Brooke LJ 1032-52.

⁹⁴ *Community Protection Act 1990* (Vic) (though repealed following his death in 1993 it was the basis of later legislation creating indefinite sentences of imprisonment); *Attorney-General v David* [1992] VR 46; C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case', (1990) 16 *Monash University Law Review* 161.

⁹⁵ *Community Protection Act 1994* (NSW) (subsequently declared invalid by the High Court in *Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51).

⁹⁶ *Eg Crimes Act 1958* (Vic), s 60B (sex offenders loitering near schools etc).

is capable of specification in clear terms and with the prospect of at least some utilitarian benefit from the proposed criminal intervention. Those who have examined the scope and functioning of the criminal law from socio-legal, economic and critical legal studies perspectives⁹⁷ add intellectual weight to the demands for a reconsideration of its values, doctrines and purposes. The political support for the wholesale use of criminal sanctions, which is said to be buttressed by 'public opinion', may in fact be driven by disguised vengeance, excessive paternalism, or an attempt to enforce a particular morality. This branch of the law simply cannot achieve the diverse and internally inconsistent objectives which are within its brief and the setting of its priorities will remain on the agenda for many years. This is the larger task of the Criminal Code project.

VIII FINALLY

If the nineteenth century was the age of colonialism bringing the benefits of the common law, codifications, and other established legal systems to the 'uncivilised' parts of the world, the twentieth century was the age of individual states demanding recognition of their own identities, values and means of enforcing their local normative standards.⁹⁸ The twenty-first century will see local sovereignty over criminal matters in Australia being undermined by a variety of forces. These include the impact of globalisation and global communications on contemporary life,⁹⁹ changing conceptions of what constitutes serious crime, and a greater awareness of its cross-jurisdictional nature.¹⁰⁰ It is ironic that in celebrating the centenary of Australian federation, the nation is also reaffirming the principal obstacle to a coordinated and efficient criminal justice system to meet these challenges.

Since technological advances in communications have made it easy for those engaged in sophisticated crime to ignore the jurisdictional boundaries of states and nations, the pressure to reduce the legal significance of those boundaries will continue to grow. In this country, one response has been to establish cooperative federal/state arrangements such as now underpin the National Crime Authority, or the Standing Committee of Attorney's-General Criminal Code project. Another has seen the Commonwealth acquiring additional capacity to legislate by relying on its external affairs power to give domestic effect to international crime-control agreements, particularly in relation to illicit drugs.

⁹⁷ Eg H Packer, *The Limits of the Criminal Sanction*, (1968); G P Fletcher, *Rethinking Criminal Law*, (1978); P Alldridge, *Relocating Criminal Law*, (2000).

⁹⁸ A good example is how the application of state law to federal offenders leads to a lack of uniformity in their treatment throughout Australia: *Leeth v The Commonwealth of Australia* (1992) 174 CLR 455.

⁹⁹ S Sassen, *Losing Control: Sovereignty in an Age of Globalisation*, (1996).

¹⁰⁰ D Lanham, *Cross-Border Criminal Law*, (1997).

However, if renewed discussion of the prospect of an Australian republic is also accompanied by consideration of larger questions of constitutional reform, it will be timely to ask whether the Commonwealth should have, as was given to the federal government of Canada, plenary power with respect to the criminal law. It will then be able to prescribe uniform criminal laws and sanctions for the nation and be better able to deliver international co-operation in the investigation and prosecution of cross-border crime.

In the meantime, sovereignty over the emerging international aspects of the criminal law will continue to pass into federal hands because state and territory structures and resources are no longer adequate to the task of responding to this type of complex and serious crime. At the same time the ideology that punishment is principally the domain of the criminal law will continue to be eroded by greater use of civil remedies and other measures for tracing and confiscating the proceeds of crime. And for lesser offences, there will be increased reliance on regulatory systems and administrative penalties that involve minimal engagement with the courts. The pattern is clear - both new crimes and old will require new responses in this new millennium.