

## Interesting times in criminal law

By Keith Chapple SC

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This edition of the magazine is known around the Bar News Editorial Committee table as 'The Criminal Law Issue'. Our editor, Andrew Bell SC is a man blessed with a spirit of adventure and a sense of humour and was immediately enthusiastic about the idea of exploring the topic of criminal law at the New South Wales Bar in some detail. Flattery gets you everywhere in *Bar News* circles.

Chris O'Donnell and I are the resident criminal law people on the committee and it fell to us to put a plan together. Chris has been doing things for BN for even more years than I have and between us we realised we knew a lot of the people in the field. The brief was simple: put together an issue largely devoted to criminal law. To help do that we asked for input from a cross-section of criminal barristers to try and show the state of the law, some of its general recent history and the way it is practised in this state.

Everybody we approached loved the idea and agreed immediately to contribute. The results are all around for you to read and we think they are really worth your time. To the many contributors, thank you for coming

on board. We are very grateful for your help.

As I was talking with my colleagues about the topics we were suggesting to them, some serious, some lighter and more anecdotal, I started thinking about my 30 years or so at the bar and before that working as a solicitor. Although the basic framework of the law is still the same as in the 1970s, there were some major differences to the system that we now work in. A few of them are worth touching on.

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The most obvious changes are in the numbers. The bar was much smaller than it is today as were the pieces of legislation we were dealing with. Crime figures were lower. There were fewer courts and the prison population was nothing like it is currently.

The prison system has expanded dramatically over three to four decades to cope with the rising inmate numbers and to try and

improve conditions. The old facilities at Long Bay, Parramatta and the large country gaols all seemed to have been built from the same public works plan and their facades were familiar to anyone who watched black and white English movies. Conditions and discipline inside them were pretty black and white, too. Some of the actions by prison officers were horrific including 'running the gauntlet' on admission to some institutions and systematic beating up of inmates generally.

Early in my career as a solicitor I was employed by the Aboriginal Legal Service which had been started a few years earlier by the late Peter Tobin and others to try and make a difference in dealing with Aboriginal offenders. Every time I hear Cuba mentioned I think of Peter, a truly inspirational criminal lawyer who achieved so much in such a short career. The way Aboriginals were dealt with in some country courts by magistrates could be a real eye opener. Some of the atmosphere comes across in

*Dixon v McCarthy*: (1975) 1 NSWLR 617. Around the time I joined the ALS the Nagle Royal Commission into Prisons was established after some of the prisoners drew attention to conditions at Bathurst Gaol by burning part of it down. The royal commission exposed the brutality endemic in the prison system up to that time.

I spent some months before I moved up to the Cowra office travelling

with ALS field officers to every institution in the state to document Aboriginal complaints that covered many years and many problems. These were included in submissions to the royal commission. There were prisons scattered all over the place, including in the middle of country towns, afforestation camps deep in the woods and custody wards like the enclosed ward at Morisset Psychiatric Hospital, out along a dirt track with big walls around it and heavily medicated people inside. Tragically, it was real life, not a Hollywood set.

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Even in Sydney there have been big changes to prisons. The Silverwater Complex including Mulawa Women's Prison used to be just a relatively small group of buildings, not the

extensive complex it is now; and Parklea I think was an even more recent addition.

Legal visits to gaols were and can still be difficult. The Nagle Royal Commission improved legal contacts a lot but these days I find that it's not so much getting in, but being able to work there. Many trials have hours of electronic evidence and you often need days to get instructions on telephone intercepts and so on, which is all disrupted by the rigid gaol timetables. This has led to trials grinding to a halt while you take

part of your instructions at court; a terrible arrangement for everybody.

The dramatic rise in the number of prisoners on remand and the increase in the complexity of many cases

from about 1980 onwards caused major delays in the court system in New South Wales. As a result a huge operation was directed by the chief judge of the District Court, which successfully reduced the backlog in that jurisdiction by the late 1990s (See: 'Changing Times in the District Court' - *Bar News* Winter 2004).

The start of the 1980s was marked by the appearance of major Commonwealth and state drug cases that changed the meaning of the expression 'a long trial'. The introduction of life imprisonment maximum sentences, complex evidentiary questions, multiple accused and large numbers of witnesses meant that these trials were invariably measured in months, not weeks or days as had been common before. Police investigations could take years so it is not surprising that the evidence filled trolley after trolley. Human ingenuity conceived more novel ways to import. Shipping

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containers, machinery, motor vehicles, boats, suitcases, dinner plates and human beings are only some of the methods that have been used to conceal drugs. It was a very steep learning curve for judges and lawyers alike. Now no-one is particularly surprised when we hear that South American drug cartels are using their own submarines.

Trials involving allegations of fraud, identity theft, terrorism, cyber crime and offences involving children are also filling the court diaries these days, and some bring with them the need for increased security, larger juries and more court resources.

Juries themselves seem to have changed over the years. I cannot recall having a hung jury in any trial when I was instructing or appearing before 1990. Since then, even with the introduction of majority verdicts, there have been many. Recently I acted for a client charged with murder and we had three hung juries. We have been told that this has never happened before. In that case there was what is generally described on bail applications as a 'very strong Crown case', but plenty of other evidence that threw doubt on the prosecution case theory and this obviously troubled all three juries. They deliberated for a long time and seemed to approach their task very carefully and seriously. All of this is expensive and takes time and in a real sense is another form of delay but as some wise soul once said: 'Justice can't be rushed.' It can take weeks for jurors to discuss and debate what are obviously serious matters for the accused and the community. I have no idea if the police are still investigating the evidence we drew their attention to

during those trials.

One problem seems to be this idea of the prosecution and police case theory and the practice of trying to jam evidence into it and ignore the rest. Sometimes, unless you are involved in a giant leap of faith there is no real evidence that a crime has actually been committed. In another recent case where there was no body, my client was acquitted of murdering his partner and it appears the jury was clearly troubled by the police ignoring suggested sightings of the missing man after he was supposed to have been killed. They were finally getting statements from some of these witnesses while that trial was underway. Deliberations once again took an incredible amount of time as the jury obviously struggled with the unsatisfactory state of the evidence. The trial went for a long time, our client was on remand for ages and his life was ruined.

Over recent years there have been many important changes that have transformed the whole procedure followed in criminal trials and hearings. These include the introduction of electronically recorded records of interview, the reversal of the order of addresses in criminal trials so that the defence goes last, the passing of the Evidence Act and the reliance on DNA evidence and grasping its shortcomings.

But it would not be right to mention some important features of criminal law in New South Wales over the last few decades without touching on the Wood Royal Commission into the NSW Police Service. When I looked at the final report today I was surprised to see that the Letters Patent setting up the commission were originally

issued to Justice Wood on 13 May 1994. It seems like it was only yesterday. It is hard to exaggerate the dramatic effect the commission hearings all those years ago had on the police, lawyers and the public all over Australia as they exposed decades of 'entrenched and systemic corruption' in the New South Wales Police Force. Evidence was given by a seemingly endless number of police officers who had 'rolled over' and given commission investigators information about corrupt activities, some of which even criminal lawyers hadn't suspected. The terrible details covered many years, involved the city and the country and went up and down the ranks. I acted for a lot of people at the commission and its successor, the Police Integrity Commission. One of them, a detective in his forties, was typical of many who said he had joined the police as a teenage cadet, had begun his corrupt activity in his second week of employment and continued it throughout his whole career.

Apart from some well publicised exceptions, one hopes it has resulted in a better police force. If it has then the whole criminal justice system in the state is better for it.

As for the barristers, I can tell you that we are as varied as any other group in the law. I have had the pleasure of being led by and opposed to some real polymaths whose skill and hard work is only matched by their professional integrity and courtesy. There have been only one or two cases where the opposite applied. We are not infallible but all in all it has been an unforgettable journey.

We live in truly momentous times.