

“Principles of Criminal Responsibility and Other Matters”

The following is an abridged extract from an address by the Hon-ourable Adrian Roden QC, Deputy Commissioner, Independent Commission Against Corruption (NSW), delivered at a seminar staged by The Society for the Reform of the Criminal Law in Brisbane from 2-5 April 1991.

The purpose of the seminar was to consider the Interim Report of the (Gibbs) Review of Commonwealth Criminal Law (July 1990) titled “Principles of Criminal Responsibility and Other Matters”.

“...Within this new and rapidly changing nation, the changes in the law have differed from state to state and from territory to territory. If that is not surprising, it is in many respects unfortunate, and in some respects indefensible.

The existence of the High Court as the final Court of Appeal for all States and Territories, provides no answer, even if we attribute to it greater constancy than its history may warrant. For the state and territory legislatures, by the stubborn exercise of sovereign power over the years, have seen to it that we have eight separate and at times conflicting systems of law, sometimes contending with one another for supremacy, frequently causing confusion and working injustices, and always at least threatening to impede our national development.

A perfect opportunity for uniformity of approach in the criminal field presented itself with the need for legislative measures to meet the modern phenomenon known as computer crime. The area was new. ...Yet the result is as diverse a mish-mash of legislative provision in the various states and territories as one could imagine. This is, in my view, a totally unacceptable state of affairs. Computer crime neither recognises nor respects state or national boundaries.

The acceptability of general principles of criminal liability should be in no way related to state boundaries or state histories. In the common pursuit of such principles, we should be able to begin the task of breaking away from the legacy of interstate rivalry and assertive state sovereignty.

Any move towards codification, or indeed towards a less complete legislative statement of the law, raises a question of the extent to which the goal is simply a clarification and reaffirmation of the existing law, and the extent to which advantage will be taken of the opportunity to achieve reform.

We ought not to be content to fiddle with specific rules or principles.

The law today, and perhaps the criminal law in particular, is not universally held in high esteem. Technicalities and word games are seen as having too great a bearing on the outcome of too many legal proceedings. In many quarters the gap between the law and justice is seen as widening.

There are more basic reasons for that, I believe, than the state of the law relating to such matters as complicity, conspiracy, attempts to do the impossible, corporate liability, the distinction between voluntariness and intention, or any of the other specific matters. ...Lawyers no doubt are very conscientious in tackling the mind-bending problems to which such concepts can give rise. But there are broader questions with which we should concern ourselves.

The law belongs to the people, not to lawyers. It should operate for the people, not for lawyers. Through the jury system, the criminal law is in a very significant sense applied and administered by the people.

Its continued acceptance is dependent upon the respect in which it is held within the community. That in turn depends upon its being understood, and being seen as concerned more with concepts of justice, and less with the games that lawyers play, as they shuffle the words, change the rules, and from time to time let the words and rules dominate the basic principles they were designed to serve.

More and more, juries are being denied their role in the system, as judges display an increasing unwillingness to trust them with their task. By an increasing array of judicial legislation, it is decreed that juries cannot be relied upon to make their own assessment of a variety of witnesses and classes of evidence.

It is assumed that without judicial assistance they may not appreciate

the inherent risk in the evidence of accomplices. The same may apply to the evidence of complainants in cases of sexual assault - depending on the jurisdiction in which you practise, and the date of the alleged offence. More recently in Australia it has been decreed that police officers are to be added to the list of inherently suspect witnesses. Judges, whose concern is with the law, apparently have an understanding of these matters. Juries, whose expertise is said to be in the field of human behaviour, and whose responsibility it is to assess witnesses and their evidence, are not to be trusted - even with the aid of counsel's addresses - to appreciate the dangers.

The irony of the situation is more clearly seen when regard is had also to the increasing extent to which we require of juries that they adopt an unnatural and legalistic approach as they go about their task. The lawyers - and I suppose I really mean the judges - are abrogating to themselves much of the role of the jury, and at the same time expecting juries to behave like lawyers.

Juries are still bombarded with a baffling array of mind-boggling directions which in many instances can have no effect upon their decisions, beyond making them potentially less reliable and less valuable because of the confusion the directions must cause. Such directions have an obvious propensity to divert the minds of jurors from their proper roles as tribunal of fact and ultimate judges on the question of guilt.

It is sometimes said that the effect of the more complex directions with which trial judges are obliged to bemuse juries, is to convert the summing-up into an examination paper, and the appeal court into a board of examiners. Sometimes there is more interest in whether the trial judge has passed the test, than in the justice of the decision or in the ultimate fate of the appellant.

The criminal law ought not to be the plaything of lawyers. There is an ultimate goal it should be striving to achieve. Notions of abstract justice are not irrelevant to that goal. In determining what justice demands in any given situation it is

not only lawyers whose views are relevant. Where Parliament has not spoken, lawyers - and judges in particular - have a role to play. But they should see that role, I suggest, as that of representative leaders in the community. As leaders, they ought to do more than seek to reflect what they perceive as the dominant community attitude. As representative leaders, they ought not to ignore community attitudes and impose their own.

I believe there are ...lessons to be learned from this. ...It is that it is inappropriate to impose complex, legalistic, wordy rules on juries. They may be satisfying to the lawyers who create them, and to the lawyers and philosophers who enjoy analysing them and arguing about what they mean. It is questionable if they have a place in the statement of laws to be applied by juries.

First-hand view (cont. from p7)

overflow or evade tax."

Illegal brothel owners are taking restrictions on legal brothels to their own advantage, Ms Dodds said, and advertising for staff under false pretences.

Some escort agency owners had fined their workers for not wearing stockings, charged unreasonable booking fees, and driven staff to work to exhaustion with the threat of fining them for being unreliable. Workers often then resorted to using amphetamines or stimulants.

Ms Dodds said when she bought her agency, she began with a 10 year plan. She planned to pay escorts on a weekly commission salary, deducting tax on the National Tax Schedule general exemption column, and try to encourage some regularity and budgeting amongst workers, making it compulsory to supply a tax file number.

She said her plans were difficult to implement. The girls had many other employment choices without tax. She allowed the Vice Squad to inspect the business and establish that she was not a habitual drug user. She insisted upon the provision of safe sex services.

Ms Dodds said she knew of at least eight people carrying the HIV virus who were notorious for not using safe sex practices. Some of them would provide services for more than eight people a night.

It is equally important that we realise the extent to which we have allowed lawyers to determine and control the substance of the criminal law. I ask with the greatest of respect, by what right do seven unelected judges determine whether a particular form of conduct is to be treated, and punished, as murder or manslaughter?

The reason for much of the artificiality which has tended to widen the gap between the criminal law and justice, is the law's obsession with certainty, and its distrust of discretion, particularly when that discretion is to be exercised by people who are not lawyers. I believe that we must strive ... to overcome those attitudes.

The notion that more rigid rules make for greater certainty, is not borne out by experience. The extent to which judges differ about many of them leaves one wondering how

"I am currently holding talks with the Victorian AIDS Council to supply regular workshops through my company to my workers on safe practices.

"The Prostitutes Collective of Victoria supplies an inadequate shop service, visiting spasmodically, with representatives arriving with green hair and expecting to be taken seriously. Sex workers have visited the premises currently leased by the PCV, finding most volunteers have not much better to talk about than how 'out of it' they were the night before.

"Generally, the sex workers object to the needle exchange being associated with prostitutes. No more than 30 per cent of the industry as a whole has illegal drug tendencies; there is however abuse on an equal scale of prescribed drugs and alcohol."

Ms Dodds said that with adequate legislation, the sex industry could return benefits to society.

She said prostitutes should be required to register, supply a photo and blood sample, and nominate the field in which they want to work. They should be assured of confidentiality and that their file would be returned upon request. A worker should be given a visa, renewable monthly after passing health checks.

The registration system would help to alleviate the abuse of Social Security benefits. Restrictive trade practices could be eased and an

juries treat them, if they really consider them at all. Judgement by one's peers may be more likely to be achieved, and achieved with an acceptable form of justice, if those peers pass judgement on the conduct they are considering, rather than on a conglomeration of words they cannot reasonably be expected to understand.

For all that, it is of course necessary to have basic principles of criminal liability, and it is necessary to use words to express them. My proposal is that in selecting the words we use, we seek to do no more than explain those principles. Explanation rather than definition should be the goal. It ought not to be seen as necessary to direct every thought process that will take juries, or indeed other tribunals of fact and ultimate judges on the question of guilt, from those principles to their conclusions in every case."

employment service could be established to liaise between workers and prospective employers.

There was a need for a Red Light District with a whole block of health care services, including counselling facilities, drug rehabilitation, medical services and most importantly, Ms Dodds said, a restricted area where workers could take their clients to hygienic surroundings. Booths and car parks were needed for "other services offered quite quickly".

If a prostitute with a current visa wanted to rent premises, and use them in a similar way to the 'windows' in Holland, they could do so without encroachment on neighbours or "moral society".

Escort agencies did not necessarily service clients with sex, Ms Dodds said, but supplied companionship and escorts for functions. Large agencies relied on complicated telephone networks with diversions from various areas being channelled to a main office centre. Permits similar to those suggested for brothels could be issued, but with protection for workers who did not want to engage in sexual activities. Brothels could be given the option of including escorts with their business.

Ms Dodds said that she hoped the various groups involved in the industry could work together to benefit society and all those choosing prostitution as a career.