# Book Reviews

## Book Review – Rape Law in Context: Contesting the Scales of Injustice

**Simon Bronitt & Patricia Easteal**

**The Federation Press, 2018, pp 192, ISBN: 9781760021894**

*Rape Law in Context: Contesting the Scales of Injustice* is an appraisal of the 'legal *process'* surrounding rape in Australia.[1] This may seem like an ambitious task to undertake in less than 200 pages, and indeed, the book is not a comprehensive dissection of the material. Such breadth of subject matter in a relatively short book necessarily comes with the sacrifice of deep analysis. Nonetheless, the work is a profoundly useful project. The authors have conducted a wide-ranging survey of the field that identifies a multitude of areas that are open to contestation, questioning, or re-imagining.

The authors are the first to acknowledge that the book 'joins a crowded field'.[2] Indeed, many of the book's starting assertions are not novel. The way that social biases colour the interpretation and application of the law has been pointed to before.[3] That feminist law reforms have failed to banish persistent misogynistic myths and stereotypes from the criminal justice system is also a well-recognised complaint.[4] However, this should be viewed as continuity rather than repetition. The book is an 'intellectual successor' to *Balancing the Scales: Rape Law Reform and Australian Culture*,[5] Easteal's 1998 critique of the rape law reforms undertaken since the 1970s.[6] *Rape Law in Context* is therefore a 'check-up' on how those law reforms are operating now, as well as a guide to where reform efforts could be focused next.

Some of the most compelling parts of the book are those that explore potentially radical areas of reform. For example, the authors recommend the creation of a new offence criminalising institutional failures to prevent sexual abuse'.[7] This has topical relevance given the Royal Commission into Institutional Responses to Child Sexual Abuse which 'revealed the

---

[1] Simon Bronitt and Paticia Easteal, *Rape Law in Context: Contesting the Scales of Injustice* (Federation Press, 2018) 9.
[2] Ibid 2.
[3] Ibid 3–5, citing Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* Butterworths, 2001) 120; Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge, 2014) 10.
[4] Bronitt and Easteal (n 1) 17, citing Julia A Quilter, 'Reframing the Rape Trial: Insight from Critical Theory about the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23.
[5] Patricia Easteal (ed), *Balancing the Scales: Rape Law Reform and Australian Culture* (Federation Press, 1998).
[6] Bronitt and Easteal (n 1) 14.
[7] Ibid 159.

repeated and culpable failures of senior office and office-holders within the institutions to investigate complaints, protect victims in their care, and to report their suspicions to police'.[8] However, the authors acknowledge that the criminal justice system has 'been slow to embrace corporate criminal responsibility'.[9] Notably, provisions in the *Criminal Code Act 1995* (Cth) that allow criminal liability to be attributed to a body corporate on the basis of corporate culture have never been used.[10] Given that much of this book points to the difficulty of using law reforms to change attitudes and cultures, it is worth wondering what effect a further offence would have.

Another potentially radical reform discussed is the notion of broadening the fault timeline of rape to include both prior fault and reactive fault. Currently, the law 'demands approximate contemporaneity between the occurrence of the physical and fault elements.'[11] In a reactive fault model, a defendant will be under a duty to take restorative action if they become 'aware of harms caused' after the physical event.[12] Criminal liability would be 'a matter of last resort' for defendants who do not undertake adequate steps.[13] This is an interesting contrast to reforms that attempt to widen the net of criminality by 'tinkering' with the wording of the legislation.[14] The authors acknowledge that reforms of the latter type often don't have the desired effect, as juries are unlikely to appreciate the technical differences between nuanced legal standards.[15] It is for this reason that the argument for the introduction of prior fault is less promising, as the doctrine appears dauntingly complex and unlikely to translate well to a jury.

A unique and enlightening aspect of the book is the use of hypothetical scenarios to demonstrate problems in the criminal justice system. For example, the authors argue that current evidence laws allow the marital immunity for rape to persist.[16] Using a hypothetical cross-examination of a victim of intimate partner sexual violence, the authors show that questions about her relationship and previous consensual sex with her partner can easily be framed to invoke the 'permanent consent' fiction that

---

[8] Ibid 153.
[9] Ibid 157.
[10] Ibid 156; (ss 12.3(2)(c), (d)). These provisions allow a fault element to be attributed to a body corporate if the corporate culture 'directed, encouraged, tolerated or led to' the offence, or if the 'body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision'.
[11] Ibid 66, citing *Ryan v The Queen* (1967) 121 CLR 205.
[12] Ibid 70, citing John Braithwaite, 'Intention versus Reactive Fault' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2001) 345, 351.
[13] Ibid 71.
[14] Ibid 72.
[15] Ibid 72, citing Wendy Larcombe et al, '"I think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25 *Social and Legal Studies* 611, 614.
[16] Ibid 35.

was meant to have been eradicated.[17] This technique has great educational value. The authors are not merely contesting or questioning the state of the law, but are rather showing readers the problems that need to be addressed. This is especially so in 'Chapter 9 Contesting "The Other"', where a fictional narrative of an Indigenous victim demonstrates intersectional discrimination in a manner that is both personal and confronting.

Given the multitude of topics covered by this book, it is difficult to provide a review that adequately responds to the variety of matters raised by the authors. While the diverse topics do not feel disjointed or unrelated, it is challenging to point to an overarching thesis. Instead, the *act* of contestation is the driving force and connective tissue of the project. Rape law is worthy of constant attention, and the authors have succeeded in creating a work that is sure to 'stimulate further contestation of existing laws and cultures of rape.'[18]

*Taylor Bachand*[*]

[17] Ibid 42–3.
[18] Ibid 179.
[*] LLB (Honours) graduate at the University of Tasmania and Editor of the *University of Tasmania Law Review* for 2019.