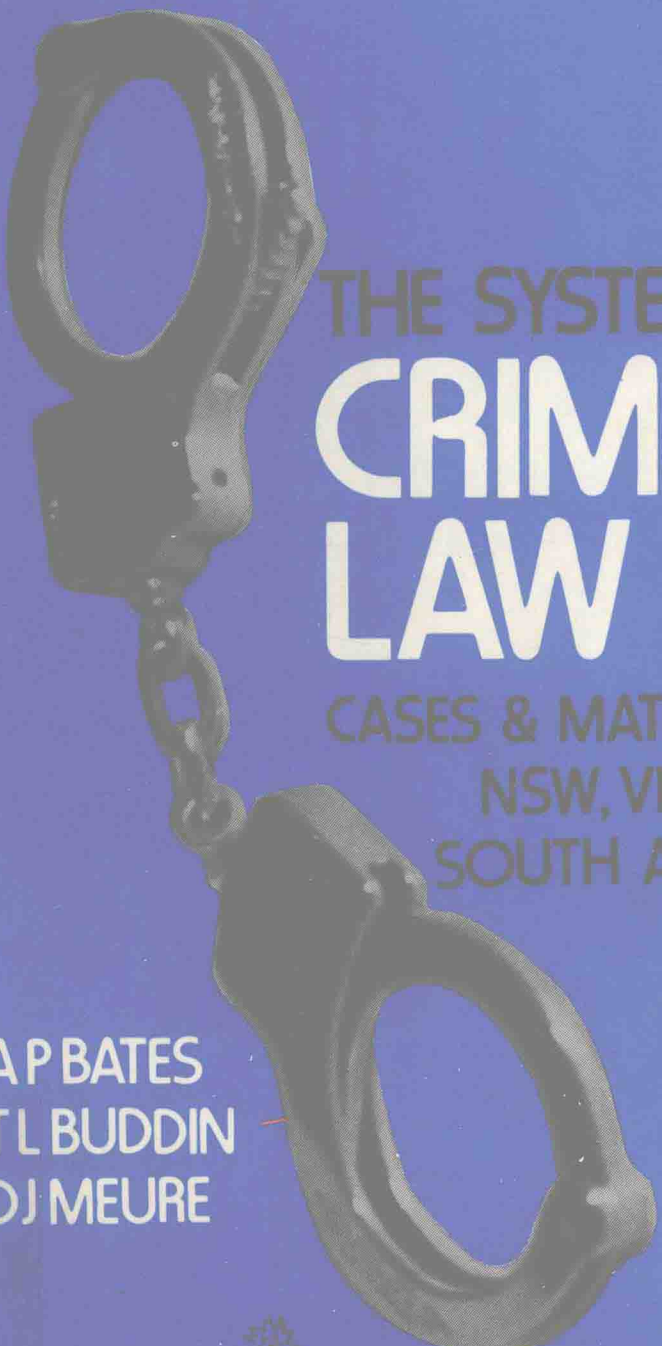

THE SYSTEM OF CRIMINAL LAW

CASES & MATERIALS IN NSW, VICTORIA & SOUTH AUSTRALIA

A P BATES
T L BUDDIN
D J MEURE

Butterworths

The System of Criminal Law

Cases and Materials

New South Wales, Victoria, South Australia

A P BATES

LL B (Wales)

Formerly Lecturer in Law, University of New South Wales

Solicitor of the Supreme Court of England

T L BUDDIN

BA, LL B (Hons) (Syd), BCL (Oxon), LL M (Illinois)

Senior Lecturer in Law, University of New South Wales

Barrister of the Supreme Court of New South Wales

D J MEURE

LL B (Tas), LL M (Sheffield)

Lecturer in Law, University of New South Wales

Barrister and Solicitor of the Supreme Court of Tasmania

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The System of Criminal Law
Cases and Materials

To Marilyn

Preface

Weschler once said of the criminal law, in a frequently cited passage: "This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy." The student of criminal law ought, we believe, to have an informed perspective about the problems which arise from this antinomy between the power of the State and the freedom of the individual. Given their crucial importance to an understanding of the criminal law and its administration, we regard it as one of our primary aims to focus attention upon these problems. Accordingly, our first chapter is designed to introduce the reader to a selection of views concerning the purposes of the criminal law as well as to a consideration of the objectives sought in punishing offenders. We firmly believe that a study of the rules of the criminal law without any attempt to consider a rationale for their existence is a futile, if not dangerous, exercise. Of course, a study of the rules themselves is vital, and the greater part of the book is concerned with a detailed examination of the major substantive offences and the general principles of criminal liability. These matters have been most exhaustively covered, both in this country and overseas, by the established textbook writers and commentators, to whom we acknowledge our indebtedness.

However, we think that to concentrate on these matters exclusively is to provide a focus which is too narrow and perhaps even distorted. No area of substantive law is self-executing, and within the sphere of the criminal law, the rules are but one feature of the criminal justice system. Indeed, to a very large extent, the rules of the criminal law are shaped by, and are dependent upon, the operation of the criminal justice system. Furthermore, these rules only become relevant once the criminal process has been initiated. For these reasons, and because we believe that a contextual and operational approach to the study of the criminal justice system will result in a broader understanding of the place of criminal law in our society, we have devoted Chapter 2 to a treatment of some of the processes of the criminal law.

Chapters 11–13 deal with three highly significant groups of offences which are of overwhelming practical importance: namely, drug, public order and motor traffic offences. Many of the offences within these three categories are strict responsibility offences. This factor raises fundamental questions about the relevance of the so-called general principles to many areas of criminal liability. In addition, as the offences are all creatures of legislation, we anticipate that their examination will enable students to master the skills of statutory interpretation. We regard this ability as, at least, equally important as the capacity to analyse cases.

This book is designed for teachers and students of criminal law, but it is our hope that practitioners may also find it useful. To facilitate the teaching process we have used case and statutory extracts, academic commentary and text. We have employed the textual approach both where important material

was not readily accessible from other sources, and where a brief "overview" of the area of law in question was required. We have relied on questions not only as a tool for guiding the reader through the materials and testing his or her understanding of them, but also as a method of raising crucial policy issues. We have included lists of further references to provide assistance to those with particular research tasks as well as to enable students to pursue selected topics of special interest.

Heeding the words of Roscoe Pound, that "the law must be stable but it cannot stand still", we have attempted to achieve the delicate balance between presenting the law as it "is" and as it "ought to be". That the criminal law is not standing still is fairly apparent. In some areas its reach is contracting as existing offences are abolished or re-defined, whilst in others its scope is expanding as new offences are created. Legislatures in many jurisdictions have indicated an awareness that the law should be kept under constant review. Law reform bodies have, accordingly, been established to examine some of the outstanding problems confronting the criminal law. We have constantly referred to, and where appropriate have reproduced relevant material from, the reports of such bodies. Not only do these reports provide very useful reviews of the area under consideration, but they also provide a basis for critical analysis. One very obvious word of warning ought, however, to be sounded: the first need of the student of the criminal law is to know what the law is—the existing law should never be confused with proposed changes to it.

In the present context, mention should be made of the very considerable reliance which we have placed upon the most admirable reports published by the Criminal Law and Penal Methods Reform Committee of South Australia. The reports published to date are as follows: First Report *Sentencing and Corrections* (1973); Second Report *Criminal Investigation* (1974); Third Report *Court Procedure and Evidence* (1975); Special Report—*Rape and other Sexual Offences* (1976); Fourth Report—*The Substantive Criminal Law* (1977). For citation purposes we have merely referred to the number of the report in question and the relevant page numbers, and in a further endeavour to facilitate the reading of the material which is extracted, we have omitted all footnotes therefrom.

This book is concerned only with the criminal law of the three Australian States which do not have a criminal code. We have used NSW as our model, but have provided extensive interstate references for our Victorian and South Australian readers. Where there have been important legislative reforms in these States, such as the Theft Act in Victoria, and in relation to sexual offences in South Australia, we have relied on them as comparative models. We think that students in all three States using the book will require few additional materials.

We are aware that it is highly unlikely that any two teachers will approach the task of teaching criminal law in an identical fashion. We also think that it is improbable that all the topics and issues raised and discussed in this book can be adequately covered in a single course on criminal law. We have deliberately set out to ensure that, at least to some extent, divergent interests and approaches are accommodated. We believe that there are a number of different paths that may be taken through the book. For example, a course with a conceptual or jurisprudential orientation would presumably focus on Chapter 1 and the chapters which deal with the various forms of criminal liability. For those concerned with the criminal law as a means of

solving social problems there is a vast array of material in the chapters on Non-Fatal Offences against the Person, Property, Drugs, Public Order and Motor Traffic offences. There is also material available, particularly in Chapter 2, to those whose main interest is with the criminal law "in operation". We also anticipate that the co-called "black letter" lawyer will find that he or she has been catered for as well.

Although all three authors accept joint responsibility for the entire contents of the book, Tony Bates and Dirk Meure would like to acknowledge the special role played by Terry Buddin in its preparation. As well as making a very significant and substantial written contribution, he also assumed overall editorial responsibility.

Finally, and most importantly, we would like to record our appreciation to three people who made most important contributions to this book. Ron Webb proved to be a most valuable research assistant and was responsible for compiling the interstate references. Paddy Baldwin and Pat Coleman typed the entire manuscript between them and their boundless enthusiasm was a constant source of inspiration to us.

The law discussed is as at 1 June 1978.

TONY BATES
TERRY BUDDIN
DIRK MEURE

June 1979

Authors' Note

There have been a number of highly significant developments in the criminal law since the writing of this book was completed. Time and space preclude mention of all but the most important legislative changes. First, by dint of further amendment to s 235 of the *Customs Act* **[11.4, 11.21]**, the penalties for drug trafficking offences have been substantially increased. Where a person commits an offence under ss 231(1), 233A or 233B(1) of the *Customs Act* and the amount involved is of a "trafficable quantity", then, if the narcotic substance is (a) cannabis, the penalty is a $4000 fine or imprisonment for 10 years or both, (b) any other narcotic substance, the penalty is a $100,000 fine or 25 years imprisonment or both: s 235(2). Where the amount involved is not of a "trafficable quantity", a fine of $2000 or 2 years imprisonment may be imposed. Secondly, the *Bail Act* 1978 (NSW) effectively consolidates the pre-existing common law situation in NSW **[2.29–2.32]**. Thirdly, the ambit of the NSW Supreme Court's summary jurisdiction **[2.13]** has been significantly enlarged by the inclusion of s 475A in the *Crimes Act* (NSW) in April 1979. That section creates a number of offences in the area of corporate crime which are now punishable by the Supreme Court in the exercise of its summary jurisdiction. Fourthly, the presumption of coercion has been abolished in Victoria. Nevertheless, the defence of coercion remains intact except in relation to serious crimes such as murder and treason: see *Crimes Act* (Vic) s 336. The Victorian and South Australian positions now appear to be the same **[6.39]**. However, by far and away the most important reforms for our purposes relate to "public order offences".

Repeal of Summary Offences Act

In April 1979 the NSW Labor Government honoured one of its 1976 pre-election pledges when it secured the passage of legislation to repeal the *Summary Offences Act: Summary Offences (Repeal) Act* 1979 s 3. Although a few offences have, in the result been abolished, a significant number provided for under the *Summary Offences Act*, have been transferred intact, or in slightly modified form, to other legislation. Some totally new legislation has also been introduced. In all, 16 Acts of Parliament were required to effect the dismantling of the structure created by the *Summary Offences Act*. The various pieces of amending legislation are to come into effect on proclamation.

As these changes markedly alter the material set out in Chapter 12, it is intended to refer to the most important amendments with cross-references to appropriate paragraphs in the text. Of course, bearing in mind the number of offences which are simply reproduced in amending legislation, a great deal of that material remains directly relevant. Even where the scope of offences has been altered, decisions pertaining to the pre-existing offences may well provide useful aids when interpreting the breadth of the new offences.

The likelihood, in the short term at least, is that the new legislation will mean that many persons whose behaviour was previously the subject of criminal sanctions **[12.3]** will no longer be subjected to the formal judicial process.

INTOXICATED PERSONS ACT

The offence of public drunkenness which existed under s 6 of the *Summary Offences Act* **[12.6–12.8, 12.66]** has been abolished. Now, however, under s 5 of the *Intoxicated Persons Act*, a person "who is found intoxicated in a public place—may be detained and taken to a proclaimed place by a member of the police or an authorized person". An "intoxicated person" may be so detained if he is found to be "(i) behaving in a disorderly manner; (ii) behaving in a manner likely to cause injury to himself or another person or damage to property; or (iii) in need of physical protection because of his incapacity due to his being intoxicated.": s 5(1). An "intoxicated person" may be detained at a "proclaimed place" (which presumably initially means a police cell but later will include places like the City Mission) for up to eight hours, although he may be released earlier than that if he "ceases to be intoxicated": s 5(2). If a "responsible person" is willing to undertake the "care of the intoxicated person", the "intoxicated person" may be released into that person's care: s 5(3). "Reasonable restraint" may be used upon an "intoxicated person" in order to detain him: s 5(4). Records must be made in relation to intoxicated persons who are detained, and must be kept for a period of three years: s 7.

OFFENCES IN PUBLIC PLACES ACT

One of the more notable absentees from the new legislation is the age-old offence of vagrancy **[12.9–12.11]**. Any person who is imprisoned, on the commencement date of the Act, by sole reason of "his having committed an offence under s 22 of the *Summary Offences Act* 1970 shall be released forthwith": *Summary Offences (Repeal) Act* s 6.

The definition of the offence of "offensive behaviour", at least in the form in which it existed under s 7 of the *Summary Offences Act* **[12.12–12.14]**, has been altered. Section 7 has been replaced by s 5 of the *Offences in Public Places Act*, which creates a so-called "general offence". The section states that a "person shall not, without reasonable excuse, in, near or within view or hearing from a public place or school behave in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted". The insertion of the objective standard of the "reasonable person" will presumably mean a narrowing of the scope of the offence. Nevertheless, the ambit of the offence will ultimately be determined by the interpretation which the courts place upon the new provision. "Public place" is defined in s 4 of the new Act in identical fashion to the definition employed by the *Summary Offences Act* **[12.7]**. Various other offences are created by the *Offences in Public Places Act*. Under s 6 "[a] person shall not, in or within view from a public place or a school wilfully and obscenely expose his person". The penalty provided is either a $400 fine or six months' imprisonment (the only instance under the Act in which a prison sentence may be imposed). The section effectively reproduces s 12 of the *Summary Offences Act* **[12.44–12.45, 12.66]**. Section 7 of the new legislation provides that "[a] person shall not, without reasonable excuse wilfully prevent, in any manner, the free passage of a person, vehicle or vessel in a public place". It is in virtually the same terms as s 10 of the *Summary Offences Act* **[12.31]**, but for the insertion of the phrase "without reasonable excuse".

The damaging of fountains, shrines, monuments or statues, and the defacing of walls, all remain as offences **[12.57]** and are punishable by a fine of $100: ss 8–10. Section 11 of the new Act, which provides the defendant with a

defence of "lawful authority", corresponds to s 20 of the *Summary Offences Act* **[12.58]**, whilst s 12, which entitles the defendant, upon request, to be furnished with particulars of the offence charged, corresponds to s 21 of the former legislation **[12.12]**.

The offences under the *Summary Offences Act* relating to "unseemly words" **[12.40–12.43]**, indecent exposure **[12.44–12.45, 12.66]**, various begging activities (including busking) **[12.11]** and various nuisance activities **[12.57]**, have not been specifically re-enacted. However, a person who engages in these kinds of behaviour may well find himself liable to prosecution under the "general offence" created by s 5 of the *Offences in Public Places Act*.

INCLOSED LANDS PROTECTION (SUMMARY OFFENCES) AMENDMENT ACT

Sections 49 and 50 of the *Summary Offences Act* **[12.15]** re-appear in slightly modified form as a result of the above-mentioned legislation. The definition of "inclosed lands" under the amended *Inclosed Lands Protection Act* 1901, has been widened to include "any building or structure or any part thereof, and any land occupied or used in connection with a building or structure or any part thereof". Section 4 of the Act extends the offence of unlawfully entering upon inclosed land to include remaining upon such land after a request to leave has been made. Section 4A of the Act is totally new, and is in terms similar to s 5 of the *Offences in Public Places Act*. It provides that "[a]ny person, who remains upon the inclosed lands of another person after being requested by the owner or occupier or the person apparently in charge of those lands to leave those lands and while remaining upon those lands behaves, without reasonable excuse, in such a manner as would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted, shall be liable to a penalty of $200".

PROSTITUTION ACT

The most significant reform in the area of prostitution is the removal from the statute-book of the offence of soliciting **[12.20–12.21, 12.66]**. Of course such an activity may still be an offence if it is construed to be within the terms of s 5 of the *Offences in Public Places Act*. Also abolished is the offence of being on premises "habitually used for the purpose of prostitution" **[12.20, 12.22]**.

The remaining prostitution offences have, however, been re-enacted. The offence of "living off the earnings of prostitution" **[12.20, 12.23–12.24]** re-appears as s 5 of the *Prostitution Act*, but whereas the previous section referred only to a "male person", the new offence applies equally to females. Section 30 of the *Summary Offences Act* **[12.20]** now becomes s 6 of the new Act. Section 7 of the new legislation, which is substantially similar to s 32 of the *Summary Offences Act* **[12.20, 12.25–12.27]**, penalizes a person who allows premises to be used for prostitution. Section 8 creates a new offence, namely, advertising that "premises are used, or are available for use, for the purposes of prostitution", for which a penalty of $400 or 6 months' imprisonment is provided.

A stipendiary magistrate is empowered under s 9 of the *Prostitution Act*, as indeed he was under s 33 of the *Summary Offences Act* **[12.64–12.65]**, to issue a warrant requiring a police officer who "has reason to suspect . . . that section 6 or 7 is being contravened with respect to specified premises" to enter and search those premises and to arrest and search persons found in those premises who are suspected of "contravening either of those sections".

The use of premises for prostitution or soliciting for prostitution is, as a result of an amendment to s 62(5) of the *Landlord and Tenant (Amendment) Act*

1948, regarded as a prescribed ground for giving a notice to quit to the lessee of those premises. This effectively replaces s 34 of the *Summary Offences Act* **[12.25–12.27]**.

PUBLIC ASSEMBLIES ACT

The provisions of the *Public Assemblies Act* replace and, significantly alter the effect of, Division 6 of Part II of the *Summary Offences Act* **[12.28–12.30]**. Essentially they create a notification system for the holding of a public assembly in rather the same way as the South Australian legislation does **[12.32]**. A person who participates in an authorized public assembly may not be found guilty of any offence by reason only of his having participated in that public assembly: s 5. Under s 4 of the Act, a public assembly is an "authorized public assembly" if certain requirements are met. First, there must be notification in the prescribed form, of an intention to hold the assembly, given to the Commissioner of Police. Secondly, the notification must contain details about various matters including the date, time, place and purpose of the assembly (or proposed route if a procession is envisaged), the number of people expected to participate in the assembly, and the address and name of a person who is willing to take responsibility for organizing the assembly. Thirdly, the Commissioner of Police must inform the organizer that he does not oppose the holding of the assembly. However, s 6 of the Act states that where the Commissioner is served with a notification seven days in advance of the date for the proposed public assembly, he may apply to the District Court or Supreme Court for an order prohibiting the holding of the public assembly. The Commissioner may not apply for such an order unless he has invited the organizer of the assembly to discuss the matter further, or to make written representations in relation thereto. Furthermore, where the organizer indicates a willingness to confer, the Commissioner may not apply for a court order unless he has arranged a meeting and has taken into consideration "any matters put by the organizer at that conference" and any representations made by him. The effect is that, if the Commissioner has been given seven days' notice, then the assembly will be an authorized one unless it has been prohibited under s 6(1).

Where, however, the Commissioner has not notified the organizer that he does not oppose the holding of the assembly, and the Commissioner is given less than seven days' notice of the date of the proposed assembly, the organizer may apply directly to the District or Supreme Court "for an order authorizing the holding of the public assembly": s 7. The court is required to decide the application, be it of the Commissioner or the organizer, "with the greatest expedition possible so as to ensure that the application is not frustrated by reason of the decision of the court being delayed until after the date on which the public assembly is proposed to be held". The net effect of the legislation is that it is the court which ultimately decides whether a public assembly may be prohibited, for its decision is final and not subject to appeal: s 8(2). The onus is now upon the Commissioner of Police to indicate why a public assembly should not be authorized. This move will be seen as effecting an important liberalization of the laws relating to public assemblies: see **[12.32–12.34, 12.66]**.

CRIMES (SUMMARY OFFENCES) AMENDMENT ACT

A number of offences have been removed to that part of the *Crimes Act* which deals with offences which are to be tried summarily.

Section 38 of the *Summary Offences Act* **[12.53]** is substantially reproduced as s 527A of the *Crimes Act*, whilst s 527B which deals with the offence of framing a false invoice, reproduces s 41 of the repealed Act. Section 40 of the *Summary Offences Act* **[12.55–12.56]**, which dealt with the offence of "goods in custody", now becomes s 527C of the *Crimes Act*. Fortune-telling **[12.54]** is no longer an offence.

A new consorting offence has been created by s 546A of the *Crimes Act*, but it is substantially narrower in its ambit than s 25 of the repealed Act **[12.47–12.48]**. It states that it is an offence, punishable by a $400 fine or six months' imprisonment, for a person to habitually consort "with persons who have been convicted of indictable offences, if he knows that the persons have been convicted of indictable offences". Sections 23 and 24 of the *Summary Offences Act* **[12.47–12.48, 12.66]** have no equivalent under the new legislation.

Section 546B of the *Crimes Act*, which replaces s 52 of the *Summary Offences Act* is more specific than its predecessor in so far as it requires that the person, to whom the section applies, must have been convicted of an indictable offence. The conduct which formerly constituted an offence under s 51 of the *Summary Offences Act* **[12.52]** is now covered by an amendment to s 114(1)(a) of the *Crimes Act* **[12.52, 10.12]**. The words "commit an indictable offence or to" have been inserted in that section after "intent to", and the words "felony or" have been removed. The offence of resisting police, formerly covered by s 54 of the *Summary Offences Act* **[12.16–12.18]**, is reproduced in s 546C of the *Crimes Act*, whilst the offence of prying, previously s 53 of the *Summary Offences Act* **[12.46]**, now becomes s 547C of the *Crimes Act*.

Various powers previously conferred upon the police under Part III of the *Summary Offences Act* **[12.61]** are now to be found in the *Crimes Act*: ss 56–59 of the *Summary Offences Act* **[12.61–12.62]** have thus become s 357B–E of the latter Act. Under s 358A of the *Crimes Act* provision is made for the disposal of property in police custody.

GAMING AND BETTING (SUMMARY OFFENCES) AMENDMENT ACT

The two sections dealing with betting and gaming offences **[12.59]** have now been transferred to a more appropriate place, namely the *Betting and Gaming Act* 1912 **[12.60]**.

Erratum: Finally, we would like to point out that the chart on p 80 of the text, in so far as it indicates that the Privy Council occupies a more elevated position in the hierarchy of courts than the High Court, is misleading: see **[2.142]**.

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