# PROBLEMS for the CRIMINAL LAW

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## PROBLEMS for the Criminal Law

#### Acknowledgments

The structure of this book and its commitment to problem-solving as a context for teaching and learning is in many respects the product of the team enterprise which has been the teaching of criminal law at the University of Sydney over the past decade. The critical legal theory approach was championed by Julia Tolmie and Miranda Kaye. The foundation in substantive law and process was the work of Brent Fisse, Bron McKillop, and David Fraser. My immeasurable benefit from team teaching was drawn from the enlivening experience with Julia, Miranda, Catherine Dauvergne, Lynne Barnes, Fiona Borthwick, Kristin Savell, and Laurence MacNamara.

Several of the problems, particularly in the areas of domestic violence and sexual assault, as well as the justifications and defences, are the contributions of Julia and Miranda. Both their problems and my own were amended and developed through the constructive criticisms of the team and of our students.

My view about how to construct an understanding of the criminal law has been moulded by the insights in the writing of Alan Norrie, Andrew Ashworth, David Brown, and David Weisbrot. I tested and refined these views through writing and teaching in transitional jurisdictions such as Hong Kong and the South Pacific.

There has been a burgeoning of critical writing on criminal law in Britain and Australia in recent years. My debt to the scholars responsible for this development in taking criminal law seriously is recognised throughout the text.

I have explored my comparative interests in criminal justice institutions, from my early experience of the prison struggle in New South Wales through my years of researching the jury with my friend and colleague Peter Duff. Ugi Zvekic ignited and maintained my commitment to informal mechanisms of crime control. David Garland gave me a passionate respect for theory and theorising. More recently Ralph Henham has shared my new interest in international and comparative criminal procedure.

The hundreds of 'victims' of criminal justice and their supporters in the profession have revealed the real impact of what we teach and the imperative of context.

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My students have explored the course with me over the years and provided a willing experimental environment for testing its commitments. I am very grateful to them all, even those who resisted its intent.

This book is a critique of criminal justice. It is intended as a companion to the work *Australian Criminal Justice* with Stanley Yeo and Stephen Odgers. No doubt we will continue to argue over some of its directions.

In claiming the possibility of justice as the central reason for most of what I do, I recognise the inspiration of Jack Grahame and the late and great George Petersen.

The book is dedicated to my wonderful children James, Nicholas, and Alice, who give meaning to all my effort.

Mark Findlay Sydney November 2000

#### Introduction

Essentially this is a book for the undergraduate study of criminal law. What makes it different is its problem-centred approach. This is especially relevant for the understanding of criminal law and its process within contemporary social settings. As a teaching strategy it reflects the practice in successful law programs throughout Australia.

The structure of the book advances two main themes: law in context; and the contested process of criminal trial. The problem focus enables the teacher and student to analyse issues of context and process within a critical framework. In addition, structuring the primary topics of study around 'life-problems' allows a clear understanding of the practical applications and consequences of the criminal law.

Students are attracted to criminal law because it represents a significant and early expectation of how the law operates in practice. A powerful popular image of the law is the criminal trial. Therefore, to teach criminal law effectively and in a convincing fashion, the trial should form a framework for the presentation of ideas about substance and process that confirm or challenge the student's appreciation of crime and justice.

This project draws from a variety of analytical perspectives and a range of disciplines in order to reveal the operational reality of criminal justice in Australian jurisdictions. It is essentially a critical endeavour and one which recognises that the study of law is neither contained within considerations of consistent rules and principles, nor limited by the examination of procedure.

<sup>1</sup> While examples from various Australian jurisdictions are used when they are relevant, and in certain discussions there is coverage of the law in several jurisdictions, this book does not endeavour to be comprehensive of the criminal law in Australia. In addition, there is a more significant reliance on the law in common law jurisdictions (both across and beyond Australia) in recognition of the form of law and process in the jurisdiction in which this program originated.

The book develops in three parts. First, there is a contextualisation of the criminal law and criminal justice, which is crucial for the appreciation of problem-centred learning and issues of substantive law and process on which it relies. Next is a discussion of problem-centred learning for the criminal law. In particular, problem-solving skills are made available, and applied. Finally, issues of law and process are examined, with a topic focus which develops in a fashion similar to the progress of the criminal trial. This section opens with a critical discussion of legal principles and an analysis of criminal capacity, which is crucial to the determination of criminal liability.

This book is not a substantive reference text on the criminal law in Australia.<sup>3</sup> Nor is it a sourcebook of cases and materials. It is a teaching/learning tool for law students and their instructors. It may be used as a companion to introductory texts such as Findlay, Odgers and Yeo, *Australian Criminal Justice*, <sup>4</sup> thereby expanding its utility. Important theoretical, substantive and teaching texts in criminal law, <sup>5</sup> cited throughout this book, would make useful supportive reading. These are not always cross-referenced on the expectation that students will be made familiar with them within the wider teaching environment.

The jurisdictional coverage is not always comprehensive or complete. The skills developed through the use of problem-centred learning texts

In addition, evidentiary issues which might be viewed as central to the existence, nature, and operation of the criminal trial will only be dealt with here either as they highlight general issues of discretion (see Chapter 2) or when they prepare the context for a discussion of more general substantive concerns such as the rights of the accused.

The treatment of these topics suggests cohesion in the criminal law and criminal justice that centres on the trial. Although the vast majority of criminal justice issues are resolved before or outside the trial, it is the context for many important doctrines and procedures. Both symbolically and practically, the option of a trial drives many criminal law problems to a resolution. It presents a useful learning framework against which all other discretionary criminal justice outcomes can be measured. The trial also clearly identifies the obligation of participants, and the expectations of the community for the process. The trial here should not be simply equated with best-practice models. While time will be spent discussing fair trial and the impediments to it, the trial structure is utililised in a manner where its structural and institutional deficiencies (and challenges to justice) may be a feature of criminal procedure in practice.

<sup>3</sup> As the reader will note, it is deliberately under-referenced in order not to detract from its essentially introductory purpose.

<sup>4</sup> M. Findlay, S. Odgers and S. Yeo, Australian Criminal Justice, Oxford University Press, Melbourne, 1999.

In particular: Findlay, Odgers and Yeo 1999; D. Brown, D. Farrier, S. Egger and L. M<sup>c</sup>Namara, Criminal Laws, Federation Press, Sydney, 2001; B. Fisse, Howard's Criminal Law, Law Book Company, Sydney, 1990; L. Waller and C. R. Williams, Criminal Law: Text and Cases, Butterworths, Sydney, 2001; A. Norrie, Crime, Reason and History, Weidenfeld & Nicolson, London, 1993; P. Rush, Criminal Law, Butterworths, Sydney, 1997; R. Murgason and L. McNamara, Outline of Criminal Law, Butterworths, Sydney, 1997; P. Rush and S. Yeo, Criminal Law Sourcebook, Butterworths, Sydney, 2000; S. Bronitt and B. McSherry, Principles of Criminal Law, Law Book Company, Sydney, 2001.

should be transferable to any context of criminal law. I have chosen substantive and process examples that stimulate the consideration of how criminal law applies in either similar or different jurisdictional settings. The instructor will identify the nature of this similarity or difference as and when it is appropriate. Naturally, as New South Wales is the jurisdiction in which I currently teach, its substantive law predominates, while not representing an exclusive jurisdictional setting for the selected problems.

There is no pre-existing work on which this book is modelled. It is not prepared in a contrived question and answer conversational style such as that adopted by Glanville Williams in *Textbook on Criminal Law.*<sup>6</sup> It draws from the themes and format of Lacey and Wells, <sup>7</sup> and recognises the current developments in legal research and writing as evidenced in Keyzer<sup>8</sup> and Davies. <sup>9</sup> Some problem-based notions similar to those touched on by Clough and Mulhern<sup>10</sup> are here developed.

#### Problems and their content

Part 3 appears as a selection of topics that reveal the problematic development and application of the criminal law. Reference is made to interesting and controversial features of the law in various Australian settings.

Within each topic, problems are identified. Essential to an appreciation of the problem is a brief identification of its context. The problems take the form of either general issues statements, which focus the discussion to follow, or of brief fact scenarios, which are materials and settings for exercises in analysis.

The problems rely on the discussion in the topic preceding them, and the techniques for analysis discussed earlier in the book. Certain further issues and readings follow each problem. Students should be able to extract enough from the general discussion of the topic and the nominated references to discuss the central issues in each problem that they identify. This book does not supply all the answers, even if there 'all the answers' to such problems are ever available. It is an introduction to techniques of research and analysis, and a guide to other helpful primary and secondary sources. More than anything, however, the book is a celebration of the significance of social context when engaging legal problems.

The problem dimension of the book gives it a function beyond a commentary with reference to further teaching materials. It becomes an

<sup>6</sup> G. Williams, Textbook on Criminal Law, Stevens, London, 1983.

<sup>7</sup> N. Lacey and C. Wells, Reconstructing Criminal Law, Butterworths, London, 1998.

<sup>8</sup> P. Keyzer, Legal Problem Solving, Butterworths, Sydney, 1994.

<sup>9</sup> M. Davies, Asking the Law Question, Law Book Company, Sydney, 1994.

<sup>10</sup> J. Clough and C. Mulhern, Criminal Law, Butterworths, Sydney, 1999.

instructional device as well as a framework for legal analysis. The problems will be compatible with a student-centred learning approach to the coverage of the course requirements.

Topics around which the problems and substantive analysis are constructed include:

- Crime and society (euthanasia problem)
- Colonisation and the imposition of the criminal law (custom and introduced law problems)
- The phenomenon of crime (criminal sanction as discriminatory regulator problem)
- · Criminal justice I: Police powers (youth detention problem)
- · Criminal justice II: Court function (pub brawl prosecution problem)
- Criminal justice III: Discretion (drink-driving and sentencing discretion problem)
- Constructing the truth: Bail and verdict (bail application problem)
- Determining criminal responsibility I: Volition and capacity (omission problem)
- Determining criminal responsibility II: Elements of the offence (mistake of fact problem)
- Determining criminal responsibility III: Exceptions to liability, participation and preparation (corporate homicide problem)
- Assault (domestic violence problem)
- Sexual assault and law reform (sexual assault problem)
- Homicide I: Murder (causation problem)
- Homicide II: Non-intentional manslaughter (neglect problem)
- · Homicide III: Intentional manslaughter (provocation problem)
- Factors affecting liability I: Self-defence and duress (battered woman syndrome problem)
- Factors affecting liability II: Insanity and automatism (irresistible impulse problem)
- Factors affecting liability III: Intoxication and diminished responsibility (child abuse problem)
- Factors affecting liability IV: Mistake and consent (sport, sex and consent problems)
- · Property offences: Dishonest acquisition I (larceny problem)
- Property offences: Dishonest acquisition II (fraud problem)
- Sentencing and punishment I: Sentencing principles (parole problem)
- Sentencing and punishment II: Prison and alternatives (sentencing exercise)

These topics have been chosen, ordered, and classroom tested as an undergraduate course of study in criminal law. The course is not proposed as the definitive structure for such teaching. In its original form this course

depended on a small-group teaching environment over a semester.<sup>11</sup> These constraints may not suit other teaching situations. The topics are prepared in such a way that they may be applied or developed in other structural contexts.

While the book does not contain a separate section on ethics and the delivery of the criminal law, ethical concerns are explicit throughout. The approach to considering the criminal law in context is governed by the belief that criminal justice is inextricably bound up with the challenges of ethical professionalism. The problems are designed to expose ethical dilemmas for the intervention of criminal law and process. This approach is rooted in the conviction that ethics is more effectively presented to students in context rather than as abstraction.

<sup>11</sup> I would like to acknowledge the critical comments of colleagues and students who participated in the undergraduate criminal law program delivered at the University of Sydney, Faculty of Law, in 1999 and 2000, in which a draft of this text and the teaching approach were successfully trialled. Earlier versions of the course structure and some of the problems were the work of Julia Tolmie and Miranda Kaye.

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### The Context of Problems for the Criminal Law

This part is designed as a brief overview of the issues one confronts in a consideration of crime and justice. These issues are presented in a form inviting further debate and analysis, particularly when crime and justice are located within the cultures of modern Australia.

Chapter I offers a range of themes about crime, criminal law, and criminal justice that should be addressed before any consideration of substance or process in these areas is approached critically. The themes are presented in a fashion intended to provoke rather than provide answers to concerns about crime, criminal law, and criminal justice. Readers might feel better prepared to engage with these issues after having had the benefit of understanding this text as a whole. While an intelligent response to the issues in this chapter should not rely on preexisting knowledge, the reader can return to this chapter as the course progresses, and develop ideas on any challenge it proposes. This chapter will set the agenda for the contextual consideration of law and justice. It may also represent a résumé of the central themes for the text. In this respect the chapter forms both an introduction and a conclusion.

The second chapter explores the institutions and operations of the criminal justice process. Discretion is used as a central critical theme, helping to explain the contradictions between ideologies of justice and criminal justice practice.



#### Chapter I

#### Locating Crime and Justice

#### Introduction

Criminal law is a framework of rules and procedures designed to control social behaviours through the prevention and punishment of criminal activity. The institutions of the criminal law, and the processes they perform, are expected to ensure criminal justice.

It is essential before any discussion of substantive and procedural criminal law to attempt to appreciate crime and justice as significant features of modern and transitional social environments. The interests behind popular representations of crime and justice also require recognition.

Crime and justice are not static social facts. They are constituted by significant state and community relationships. Further, the connections between crime and justice are themselves crucial keys to understanding the status and operation of the criminal law.

At the outset, certain propositions concerning the social position of crime and justice should be considered.

- 1 Criminal justice may be conceived of as:
  - · a social mechanism for the restitution of order and balance;
  - · a process for exacting retribution against the moral outrage of crime;
  - · an attempt at the protection of the community against harm;
  - · a deterrent against the commission of further crime; or
  - various essential connections between each of the above intentions.

See M. Findlay, The Globalisation of Crime, Cambridge University Press, Cambridge, 1999.