CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

In association with

THE CRIMINAL LAW SECTION OF THE LAW INSTITUTE OF VICTORIA

The Future of Criminal Law - Some Big Issues

Justice Michael Kirby

Seventh Biennial Conference
Hard Rock Hotel
Jalan Pantai, Kuta, Bali

27 June to 2 July 1999

CRIMINAL LAWYERS' ASSOCIATION

NORTHERN TERRITORY

BALI CONFERENCE 28 JUNE 1999

THE FUTURE OF CRIMINAL LAW - SOME BIG ISSUES

The Hon Justice Michael Kirby AC CMG*

INTRODUCTION

Looking to the future is perilous. Judges who have been around for a very long time run the risk of overlooking the perils - assuming that things will go on as they have done in the past. I have held judicial office for almost 25 years. Throwing caution to the winds and encouraged by the congenial company and the venue, I propose to embark upon the folly of a few predictions about the future of criminal law in Australia. I will not get down to the engine room in which intrepid officials are struggling to develop and reform Australia-wide principles of criminal law. The High Court of Australia is now quite often referred to their labours[1]. Not infrequently, I have

---

* Justice of the High Court of Australia. Commissioner of the International Commission of Jurists.

1 For example, the report of the Commonwealth Model Criminal Code Officers' Committee of the Standing Committee of

Footnote continues

found them helpful to my reasoning[2]. Rather than review that work, I propose to draw upon recent experience to comment on a few large themes.

My themes are those that seem likely to me to influence some of the future directions of criminal law, procedure and punishment in Australia. Of course, the number of such themes is virtually limitless. The law journals are full of articles upon them. Necessarily, my treatment must be selective. But I hope that my selection will stimulate further thinking. In the daily practice of the law it is essential to focus the mind with precision upon the detail of the case in hand. But it is also important for Australian judges and lawyers occasionally to look at the entire landscape. And to see some of the dilemmas which are presented by our discipline, and specifically by trends affecting criminal law, procedure and punishment.

In days gone by, these were matters which were often looked upon with scarcely disguised contempt by leading judges and members of the legal profession. In part, this was because other

---

Attorneys-General, *Model Criminal Code,* Chapter 3: *Theft, Fraud, Bribery and Related Offences, Final Report,* (1995) was considered in *Peters v The Queen* (1998) 72 ALJR 517 at 522, 533, 539.

2 See eg *Charlie v The Queen* [1999] HCA 23 at par [16.

areas of professional activity commanded, as they still do higher incomes for their specialists. Such areas of practice tended to command the loyalty of the most talented lawyers available. In recent decades, however, attitudes of this kind have begun to change. Citizens have always regarded the criminal law as the most important branch of the law. Citizens were not wrong. Since the time of Chief Justices Barwick and Gibbs especially, a larger part of the work of the High Court of Australia has involved criminal appeals. A more recent contributing factor to this trend may have been the decision of the Court in *Dietrich v The Queen*[3]. This effectively ensured that those accused of serious criminal offences who cannot afford legal counsel will usually be entitled at trial to the provision of legal representation, if necessary at public cost. This development, which involved the reversal of earlier authority of the Court[4] helps to ensure Australia's compliance with Article 14.3 of the *International Covenant on Civil and Political Rights.* That provision includes amongst the rights of every person charged with a criminal offence the rights:

> "(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; and

---

3 *Dietrich v The Queen* (1992) 177 CLR 292. cf E Greenspan, "The Future Role of Defence Counsel" (1983) 51 *Saskatchewan L Rev* 199.

4 *McInnis v The Queen* (1979) 143 CLR 575.

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it".

These remarks provide a suitable introduction to the first large theme which I wish to mention. It is the growing impact of international law and global approaches to crime.

INTERNATIONALISATION AND CRIME

A singularly vivid indication of the growing role of international law in response to criminal conduct can be seen in the election of Justice David Hunt, soon after his retirement as Chief Judge at Common Law of the Supreme Court of New South Wales, to the office of a judge of the International Criminal Tribunal for the Former Yugoslavia. Now His Excellency Judge David Hunt resides and works in the Hague in the Netherlands. He brings to his international office a breadth of experience in the conduct of criminal trials in Australia and intensive work in the Court of Criminal Appeal of New South Wales. He succeeds Sir Ninian Stephen as a judge of the Tribunal. Some of the defence and prosecution counsel of the Tribunal and registry officials are also Australians. The chief prosecutor, Louise Arbour, is a judge of the Ontario Court of Appeal in Canada. Her predecessor was Richard Goldstone, now a judge of the Constitutional Court of South Africa.

In July 1988, at a conference in Rome, member countries of the United Nations agreed upon a statute for the International Criminal Court[5]. This Court may be expected in due course to replace the International Tribunal for the Former Yugoslavia and the other International Tribunal, for Rwanda. The development of international institutions of this kind parallels the creation of the Royal Courts in England 700 years ago. During the course of this century various international conventions and treaties have been adopted such as the Geneva Conventions I to IV and the United Nations Treaties on Genocide, Crimes Against Humanity, War Crimes and the Crime of Apartheid. These are bound to develop into offences which will enliven the jurisdiction of international courts and tribunals. Moreover, as has been demonstrated by the *Pinochet* litigation in England[6], some crimes are now treated as crimes of universal jurisdiction. They demand responses from national courts

---

5 P Kirsch and J T Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" 93 *American J Int L* 2 (1999); M H Aranjani, "The Rome Statute of the International Criminal Court" 93 *American J Int L* 22 (1999); S D Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" 93 *American J Int L* 57 (1999); cf M D Kirby, Book Review of C Gane and M Mackarel, "Human Rights and the Administration of Justice: International Instruments" (1998) 72 *ALJ* 970.

6 *R v Bow Street Metropolitan Stipendiary magistrate; Ex parte Pinochet Ugarte (Amnesty International Intervening [No 3]* [1999] 2 All ER 97 (HL).

although the crime concerned was not committed within the jurisdiction of the nation whose courts are involved.

Another development of an international character which is potentially important to the criminal law is the growing recognition of the role which the international law of human rights will play upon municipal lawmaking and municipal court decisions. In Australia, we saw a vivid illustration of the former aspect of this phenomenon in the outcome of the first complaint made against Australia under the First Optional Protocol to the *International Covenant on Civil and Political Rights.* Mr Nicholas Toonen complained that Australia was in breach of the Covenant by reason of the provisions of the Criminal Code of Tasmania[7]. He alleged that these exposed him and his partner to the risk of criminal prosecution in Tasmania for adult private consensual homosexual conduct. The United Nations Human Rights Committee upheld his complaint[8].

Because, at first, the Tasmanian Parliament was resistant to amendment of the provisions of the *Criminal Code*, the Federal Parliament enacted the *Human Rights (Sexual Conduct) Act* 1994[9].

---

7 *Criminal Code* (Tas), ss 122(a) and (c), 123.

8 *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97. See H J Steiner and P Alston, *International Human Rights in Context* (1996) 545.

9 s 4(1).

This provided that "sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the *International Covenant on Civil and Political Rights*". Mr Toonen and his partner, Mr Rodney Croome, commenced proceedings in the High Court of Australia against the State of Tasmania for declarations that, by reason of the federal statute, the provisions of the Tasmanian *Criminal Code* were inconsistent and to that extent invalid by force of s 109 of the Constitution. The State's attempt to strike out the writ and to challenge the standing of Mr Croome and Mr Toonen to bring their proceedings failed[10]. The Tasmanian Parliament promptly enacted a measure repealing the old laws. It substituted a non-discriminatory provision of the Criminal Code treating in identical ways unlawful sexual conduct, including with minors, whether heterosexual or homosexual. The *Toonen* case is a singularly vivid illustration of the practical way in which, today, international law can be brought to bear upon domestic law, including in the field of criminal law.

Another way in which this influence can be felt was explained by Brennan J in *Mabo v Queensland [No 2]*[11]. Writing there about

---

10 *Croome v Tasmania* (1997) 191 CLR 119.

11 (1992) 175 CLR 1 at 42.

the land rights of Aboriginal Australians, Brennan J made a point of general application:

> "Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".

In conformity with this principle, it is increasingly accepted that judges in common law countries, faced with an ambiguity in legislation or with an apparent gap or silence in the applicable common law, may, consistently with their judicial duty, construe the ambiguity and fill the gap by reference to any relevant principle of international human rights law. Of course, it often happens that there is no ambiguity in the relevant criminal statute. The common law may be abundantly plain on the issue concerned. In that event, the duty of a judge in Australia is clear. He or she must apply the law as it is, not as it might be wished that it was. However, sometimes there are ambiguities and choices.

An illustration of how the international law of human rights (specifically the *International Covenant on Civil and Political Rights)* may affect local decision-making in a criminal context can be found in *Young v Registrar, Court of Appeal and Anor [No 3]*[12], a decision of the New South Wales Court of Appeal. That was a case where a contemnor was committed to prison as the law then provided, by the Court of Appeal. His trial for contempt was required to take place before a bench of three judges. Because of these judicial arrangements, he had no right of appeal; simply an entitlement to seek special leave to appeal to the High Court. When special leave was rejected, Mr Young invoked in the Court of Appeal Article 14.5 of the *International Covenant on Civil and Political Rights.* This provides that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

Powell JA, faithful to the dualist school, regarded the international principle invoked by the prisoner as irrelevant. Handley JA and I treated it as available for use in the construction of a provision of domestic law. We both agreed that a person imprisoned for contempt, whether civil or criminal was, "convicted of a crime" within the meaning of Art 14.5 ICCPR . However, Handley

---

[12] (1993) 32 NSWLR 264 (CA).

JA found that the right to apply to the High Court for special leave to appeal sufficiently satisfied the requirement of the Article. Accordingly, there was no possible clash with local law. I held that there was a clash but that local law was clear and therefore had to be obeyed. The case is an interesting illustration of differing contemporary judicial approaches to the influence of international law, where it is invoked by a party in a criminal proceeding. It seems likely to me that we will see many more cases of this kind.

Since *Young,* in the High Court of Australia, I have suggested that Australia's Constitution, as an instrument which speaks not only to the people of Australia who made it but to the international community of which Australia is a part, may likewise be construed in the case of ambiguity so that it will conform to international human rights norms[13]. It remains to be seen whether this proposition will be accepted by the Court. But the simple idea seems irresistible in the long run. The next century will see the detailed working out of the relationship between the growing body of international law and the domestic law of each jurisdiction. Particularly since Australia signed the First Optional Protocol to the *International Covenant on Civil and Political Rights* and thereby rendered the compliance of its courts

---

[13] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 765-766.

and officials with fundamental rights answerable to the United Nations Human Rights Committee, it seems safe to predict that courts will treat with increasing seriousness arguments which suggest that a particular construction of the law would bring Australia into conflict with its international obligations. If another construction is available, courts of the future will ordinarily favour that other construction[14].

TRANSBORDER CRIMES

One of the obvious factors which stimulates the influence of international treaties is the growing integration of the world. Jumbo jets take us within a day virtually to anywhere on the planet. Connections by telephone, facsimile, email and the Internet are virtually instantaneous. This integration stimulates the growth of international law and of international institutions. It encourages a shared concern about the provision of adequate responses to conduct happening anywhere in the world, shown in global media, which is regarded as so contrary to basic human dignity and rights and social concessions as to be criminal.

---

[14] cf *Re East; Ex parte Nguyen* (1999) 73 ALJR 140 at 151-152 (a case involving the suggested right to free assistance of an interpreter in a criminal trial although none was sought and the accused's counsel expressly denied the need: ICCPR Art 14.3(f)).

Considerations such as these help to explain the establishment of the first such international tribunals, including the International Military Tribunals at Nuremburg and Tokyo after the Second World War. They also help to explain, for example, the recommendations made by the group of experts for Cambodia chaired by Sir Ninian Stephen in their report to the General Assembly of the United Nations of February 1999[15]. This report recommended that the Security Council of the United Nations established an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed between 1975 and 1979. That proposal is still under consideration. The Royal Government of Cambodia appears to have rejected it, opting instead for a national court with international assistance. But, like the indictment of President Milosovic of Yugoslavia by the International Tribunal and the extradition order against ex-President Pinochet of Chile, it shows that even heads of government and their collaborators are no longer entirely free from the reach of international criminal law.

---

[15] Report pursuant to General Assembly Resolutions 52/135 (Sir Ninian Stephen, Chairman, Rajsoomah Lallah and S R Ratner, 18 February 1999), unreported.

Outside developments of this kind, changes in travel and technology increase and alter the opportunities for seriously damaging wrong-doing to the person and property of people in other national jurisdictions which call out for effective systems of criminal law and effective law enforcement across national boundaries.

In particular fields such as those affecting drug law enforcement, overseas corruption of officials and child sex tourism, the legislatures of various countries, including Australia, have begun to respond[16]. We will certainly see more legislation of this kind. But it remains local jurisdiction invoked in a traditional way against persons within the reach of the jurisdiction concerned.

Yet this is an area where the traditional requirement of locality in criminal law presents particular difficulties. An example often cited concerns the way in which interactive technology impinges upon traditional notions of domestic sovereignty. A Norwegian social researcher published findings about NATO defence arrangements. These were contained in documents, publication of which was restricted under Norwegian law. The researcher was convicted of espionage in Norway. However, the documents had been retrieved, on line, pursuant to the *Freedom of Information Act* of the United

---

[16] See eg *Crimes Act* 1914 (Cth), Pt IIIA ("Child Sex Tourism").

States of America. The *Spycatcher* litigation similarly illustrated the way in which, information, once published somewhere and available in one jurisdiction, is next to impossible to re-contain it by laws and court orders[17]. I do not doubt that similar difficulties may arise in Australian attempts to police erotic material on the Internet. Indeed the Federal Minister, Senator Alston, has conceded as much[18].

Computer crime and fraud present special difficulties for harmonising established criminal law with the very nature of information technology. Whereas crime is typically local, being defined with strict precision in relation to a particular jurisdiction (including, commonly, a subnational jurisdiction in a federal country such as Australia) the manipulation of information technology may not so readily be squeezed into this approach. For example the definition of "theft" in domestic law normally involves asportation - the taking away of goods. However, for the purpose of acquiring valuable information, no goods may be taken. There may be no carrying away of property at all. In a number of States of the United States of America, laws have been passed by which "property" is

---

17 *Attorney General (UK) v Heineman Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248.

18 "We can't clean up net: Alston" in *Australian Financial Review,* 28 May 1999, 8 commenting on the Broadcasting Services Amendment (Online Services) Bill 1999 (Cth).

defined to include "information including electronically processed or produced data and computer software and programs in either machine or human readable form"[19].

Case law in Canada has grappled with this subject. In *The Queen v Stewart*[20], an individual sought to obtain names, addresses and telephone numbers of the employees of a hotel. These were protected by the hotel's security system. He approached a security worker and offered to pay for the confidential data. This approach was reported. The accused was charged, inter alia, with counselling theft of information, the property of the hotel and its employees. At his trial he was acquitted. It was held that information was not, as such "property" as defined by the law of theft in Canada. A Bill to extend the Criminal Code definition of "property" expressly to include computer data and software was reported by a Parliamentary Sub-Committee in the negative. The Committee said[21]:

---

19 Organisation for Economic Cooperation and Development, *Computer-Related Criminality: Analysis of Legal Policy in the OECD Area*, OECD, Paris, 1985.

20 (1981) 38 OR (2d) 84. Note that an appeal was, by majority, allowed in the Court of Appeal of Ontario holding that confidential information would be the subject of fraud: (1983) 42 OR (2d) 225 at 236-237. The accused was later given an absolute discharge: *Regina v Stewart [No 2]* (1983) 8 DLR (4th) 274.

21 See OECD report, above n 19.

> "In our view it would be ill advised to grant a proprietary interest in information per se, something which does not exist even in the civil law. For reasons of public policy, the exclusive ownership of information which, of necessity, would flow from the concept of 'property' is not favoured in our socio-legal system. Information is regarded as too valuable a public commodity to have its ownership vest exclusively in any particular individual".

The nature of modern information technology presents acute problems for private international law. Whose legal regime is to apply to the diffuse international components of information technology transactions? Where an electronic message is generated in country A, switched in countries B and C, transits countries E, F, G and H, is processed in countries I and J, stored in country K and involves damage in yet other countries, it is clear that present rules for the choice of law and for the resolution of conflicts of law, including in respect of anti-social harm, are inadequate[22]. The problems in this regard which already existed a few years ago have become much more acute with the rapid expansion and universal reach of the Internet.

The moves which a nation can realistically take to protect itself in a world of interacting informatics are limited. For example, Dresser (France) was a subsidiary of Dresser Industries of the

---

[22] Testimony of W L Fishman to the United States Banking Committee, Subcommittee on International Finance and Monetary Policy, 9 November 1981, mimeo, 10-11.

United States. Overnight, it was denied access to a computer which stored the specifications for manufacturing components of pipeline equipment. In the result, the French subsidiary was unable to manufacture the equipment for the trans-Siberian pipeline to which the United States Government then objected. The French subsidiary lost an order worth millions of dollars[23]. There are many such stories, some of them involving deliberate harm.

Illustrations exist which are pertinent to criminal law. A Miami Branch of the Bank of Nova Scotia was served with a subpoena by a United States grand jury demanding production of the bank's information held in its branches in the Cayman Islands and in the Bahamas. The bank was unable to comply because the information requested in documents and systems in the Caymans and Bahamas was protected there by the laws of those Caribbean countries. An application to the Cayman Islands courts, seeking permission to release the information, resulted instead in the issue of an injunction to prevent such release. In spite of this, the United States courts supported an application by the United States Department of Justice and imposed a fine on the bank of $25,000 a day until the information was produced. The Canadian Government, both in diplomatic exchanges and in *amicus curiae* briefs in the United

---

[23] See for example, "Waging a Trade War over Data", *New York Times,* 13 March 1983.

States court, asked, in effect, what would be the United States attitude if the government (or even a court) of a Middle Eastern State in which the bank maintained an office issued an order, supported by sanctions, requiring the bank to disclose information concerning the alleged business relation between a customer of its Miami office and Israel[24].

The extra-territorial operation of laws, particularly laws of the United States of America, has caused legislative responses in several countries. The issue is partly a political one[25]. But the point is that integrated information technology has presented the need for new laws, and indeed new approaches, including in the field of criminal law. The technology has also presented the urgent necessity of improved cooperation between police services in different jurisdictions. Faced by the difficulty of investigating, prosecuting and securing convictions against persons involved in transborder crimes, it may be a natural response of police to concentrate on the familiar local criminality where the transborder

---

24 *United States v Bank of Nova Scotia* 691F 2d 1384 (11th Circ) (1982); J Fried, "Conflicting Assertions of National Jurisdiction Over Information Matters" cited J T Burnett, *International Banking Law and Extra Territoriality,* 9 *Transnational Data and Communications Report* 17 (1986).

25 P Robinson "Legal Issues Raised by Transborder Data Flow", mimeo, paper presented at a conference on Canada-United States Economic Ties, Cleveland, Ohio, April 1986 at 15 ff.

complications do not arise. Yet it may be that transborder crime works greater harm upon society and affects more victims and greater losses to those afflicted. Thinking globally is not an injunction restricted to business entrepreneurs. It applies equally to well organised, large scale criminals. There is an urgent need to reform criminal law and police cooperation to respond adequately to this new dimension of crime. This is particularly so where what is involved goes beyond old fashioned couriers physically crossing borders with illegal goods[26] and where instantaneous technology is utilised in the service of anti-social objectives.

HUMAN GENOME AND CULPABILITY

Information technology has provided the means of sequencing the human genome. The Human Genome Project, involving cooperative scientific research on geneticists in all parts of the world, is the greatest scientific project in history. Its purpose is to understand the function of approximately 100,000 human genes. These dictate physical characteristics and the presence and likely development of inherited illnesses and disorders. But it also seems likely that, at least to some extent, genes will be discovered which will help to explain patterns of behaviour relevant both to crime and

---

[26] Such as are discussed in *Nicholas v The Queen* (1998) 193 CLR 173.

punishment. A recognition that inborn "defects", genetic "errors" if you like, can dispose certain people to act in a way unacceptable to society (and hence to its criminal laws) seems clear enough. But how the law should deal with this problem remains as uncertain today as it was in Lombroso's day[27].

For a long time, criminal law has recognised the relevance of genetic disorders which affect the mental processes of the accused. Similarly, the predisposition of males to commit more violent acts than are conventionally performed by females, is something recognised by every criminal system. But whereas a genetic disorder affecting the capacity of the subject to reason and to perceive the wrongness of his or her conduct may be taken as relevant to criminal culpability, no court would entertain as an excuse the simple plea that the accused was a male victim of his genes[28]:

> "There is a very powerful genetic predictor of the propensity to violent behaviour, namely the presence of a Y chromosome. Simply, males are more prone to violence than females. We don't have a great deal of difficulty handling that biological fact in our justice system. Anyone who pleaded not guilty by reason of possession of a Y chromosome would not be granted clemency for that fact. Nevertheless, we know that men and women, possessors of Y chromosomes and

---

27 cf S Jones, *In the Blood,* London, 1996 at 218.

28 T H Murray, "Genetic Legacy and Culpability" in *The Human Genome Project: Human Aspects* Vol II, Fundacion BBV, Madrid (1994).

> those that don't have them, behave differently under certain circumstances. ... Our salvation in the short term for behavioural genetics is simply this: that there is generally an inverse correlation between the clear inheritability of a human characteristic and its significance for our moral judgments of individual persons and groups. ... Contrast, if you will, the relative clarity of the genetics of eye colour with the complete irrelevance so far as genetics to such important moral virtues as integrity, loyalty, truthfulness and courage. Nonetheless, we can expect increased scientific activity and public interest in the genetics of behaviour".

Scholars in the field of criminal law are now beginning to consider the possible impact on the basic hypothesis upon which criminal law and punishment are built of the discovery of genes which influence behaviour[29]:

> "It is about genetics and some types of behaviour which happen to be criminal (for example, intentional violence or sexual abuse) rather than about a category called criminal offences. To look for a genetic predisposition or explanation for bigamy or for parking on double yellow lines or owning a dangerous dog, would make little sense - although to look for a predisposition for lying or for risk-taking might be different. Even if we were to take intentional violence as our starting point, there is still a social constructional element in determining the acceptability and tolerability of different types of violence. This is not fixed. Violence to wives and partners is less tolerated than previously, bullying at school is less tolerated. Even taking an apparently clear category - such as homicide - we will find variations in its perception depending on who does it, where it is done, and who the victim is".

---

29 C Wells, "I lame the Parents: Fitting old genes in new criminal laws" (1998) 61 *Mod L Rev* 724.

Different people may respond differently to specific situations, a matter brought to light by cases involving the so-called homosexual advance "defence" of provocation[30] and battered women syndrome[31]. But what would the relevance to our criminal process be if evidence were offered (or for that matter were possible) that particular conduct in the case of a particular accused was nothing, or little, more than the acting out by the accused of a predisposition to antisocial behaviour sourced ultimately in an extremely strong genetic propensity.

Obviously, the advances in DNA technology have begun to have important consequences for evidence in criminal trials and in particular in the proof that an accused was physically present at the scene of the offence[32]. But the point I raise is an earlier and more fundamental one. It concerns the link between biological factors and criminal conduct. This was an hypothesis first raised by Lombroso in 1876[33]. Lombroso set out to verify his hypothesis that criminality was reflected in orthological signs. He believed that there was a statistical correlation between somatic bodily constitution and crime.

---

30 cf *Green v The Queen* (1998) 72 ALJR 19.

31 cf *Osland v The Queen* (1999) 73 ALJR 173.

32 D Robertson and T Vignaux, "DNA on Appeal" [1997] NZLJ 247.

33 C Lombrozo, *L'uomo Delinquente*, 1876

Because he was not favoured with knowledge about DNA and the results of sequencing of the human genome, he dabbled in theories concerned with facial structure. Of course these are now totally discredited[34]. But the fundamental notion that congenital or hereditary factors may at least sometimes determine criminal conduct is likely to have much more attention in the years ahead. One expert has commented[35]:

> "The debate between determinism and free will has been going on for a long time indeed in criminology. The better understanding of the role played by our genes gained through the new genetics - especially through the Human Genome Project - has renewed and sharpened the interest in the question of biological or genetic determinism. ... [But] a human being cannot be reduced to his genome. Behaviour has been shown to be widely influenced by the environment in which an individual is brought up and lives. For the time being, the possible influence of genes in shaping human behaviour remains so vague and uncertain that it should not be used in building a policy. Passing a statute that would instruct the courts to take into account the genetic legacy of a criminal defendant when assessing culpability would send a wrong signal to people. As a matter of fact, it would certainly diminish any notion of personal responsibility and enhance a fatalistic attitude, a development which is counter-productive in terms of deterrence".

---

34 A T Lopez, "Biological Individuality and Culpability" in Fundacion BBV, above n 28 at 111.

35 O Guillod, "Genetic Legacy and Culpability" in Fundacion BBV, above n 28 at 103 at 104.

As more knowledge is obtained from the study of genetics it may become more difficult to hold to this line. Already there is a certain illogicality in permitting evidence to be received that is relevant to insanity but rejecting such evidence where it is said to be relevant to lesser behavioural explanations. At the least, it seems likely that genetic evidence will be increasingly received as relevant to punishment. It is important that lawyers generally, and criminal lawyers in particular, should keep themselves informed about the rapid developments of genetic science.

DRUG OFFENCES

The approximate coincidence of this paper and the Drug Summit in Sydney in May 1999 make it appropriate to reflect upon the future response of Australia's criminal laws to the problems of drug addiction and recreational drug use. It does appear that Australia's politicians and police may be ready to consider fresh approaches to drug policy. Thus Police Commissioners Peter Ryan (New South Wales) and Neil Comrie (Victoria) have suggested that current strategies need reconsideration. Politicians, including Mr Jeff Kennett, Ms Kate Carnell and Dr Brendon Nelson< have called for a new approach which places greater emphasis on considerations of liberty and effective restraints than on the implementation of order by use of draconian deterrence. The so-called zero tolerance policing followed in some parts of the United States of America as a response to widespread and growing drug use has been reported negatively by Australian experts who have

studied it[36]. Certainly, one indication of the social problems into which our present legal strategies have taken us is the report that Australia has a higher rate of burglary even than the United States. Car theft and other property crimes in Australia are unacceptably high. They are above those of most European countries and even most parts of the United States[37]. According to the Director of the Australian Institute of Criminology, the rate of armed robbery in New South Wales has increased by 105% over the past five years. These are all indicators of sharp increases in crimes connected with money procurement. Every lawyer knows that a large proportion of these crimes is connected with drug use.

In New South Wales, Australia's first Drug Court opened in February 1999. Modelled on a United States precedent, it offers heroin addicted criminals an option to undergo rehabilitation instead of prison. But the Director of Public Prosecutions for New South Wales (Mr N Cowdery QC) has suggested publicly that a more

---

[36] Report of Mr C Cunnen, see "Zero Tolerance Not the Answer Says Academic Who Studied It", *Sydney Morning Herald,* 1 March 1999, 4. See also G Zdenkowski, "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) 22 UNSWLJ, 30; G Edgerton, "Mandatory Sentencing Legislation: Judicial Discretion and Just Deserts" (1999) 22 UNSWLJ 256; and N Morgan, "The Aims and Effects of Mandatories" (1999) 22 UNSWLJ 267.

[37] Report by Dr A Graycar, *Sydney Morning Herald,* 22 March 1999, 5.

radical solution is needed in the form of regulation of drug supply as an alternative to prohibition which underpins much of our criminal law in this area[38]. A recent report issued under the authority of the World Health Organisation notes that crime committed by heroin users fell by more than half during a trial in which subjects certified as heroin addicted were supplied with the drug. The report was commissioned by WHO in 1996, apparently after concerns were voiced about Swiss studies of the heroin trial which had begun in Switzerland in 1992. The report found that 8% of the 1,146 patients involved in the programme gave up illicit drugs altogether. About 3% died. The number of homeless participants fell from 12% to 1% after 18 months. The number of participants who had regular employment rose from 14 to 32%. One of the Australian authors of the WHO report, Dr Robert Ali, is reported as stating that the panel found the heroin trial was expensive when compared with methadone programmes. It cost $18,500 a year to treat a patient on the heroin programme compared with $3,000 a year for methadone. However, Australian commentators have pointed out that persons addicted to heroin cost the community at least $70,000 a year in law enforcement, health and other expenses.

---

[38] N Cowdery, "Voters should beware the political hard cell", *Sydney Morning Herald,* 24 February 1999 at 13.

If to these costs of current strategies against illegal drugs are added the financial, emotional and other burdens of drug related crime, it seems clear that our present legal approach is economically extremely expensive[39]. Following earlier remarks by his counterpart Mr Cowdery, the Director of Public Prosecutions for South Australia, Mr Paul Rofe, reportedly told an Australasian conference on drugs strategy in Adelaide in April 1999 that the present attempts to combat the supply of drugs by way of criminal law enforcement were not working and that "new means of regulating the supply and distribution of drugs were needed"[40]. This opinion drew a reported rebuke from the Prime Minister (Mr John Howard). However, it seems likely that Australia is now entering a new phase in the consideration of its response to illegal drug use.

Any change in the present criminalisation of selected drug manufacture, importation, supply and use would have to occur within the context of a national strategy and, applicable international obligations. The matter is one of great importance and urgency for the thousands of Australians criminalised by the present approach of the law and for their families who often watch with despair and anguish the intermittent fall of the criminal law on a person they love,

---

39 See "Heroin trial sees crime cut by half", *Sydney Morning Herald,* 30 April 1999, 6.

40 Reported *Sydney Morning Herald,* 30 April 1999, 6.

see in danger and regard as sick, not evil. No doubt, the current approach of our criminal laws has achieved an unmeasurable success in terms of its deterrent impact on the conduct of some persons who might otherwise have been tempted to import, obtain and use illegal drugs. But it seems likely that the many failings of the current laws, their consequences for the human rights and dignity of many fellow citizens, the erosion of civil rights of many citizens by the investigative necessities of the current laws and the burden on those who are suffering from high levels of consequential crime, will ultimately continue to manifest themselves in legal change. Criminal lawyers, who see the human face of those caught up in illegal drug use, and their families, have an obligation to bring what they see to the notice of their fellow citizens who may have more confidence than is warranted in the capacity of criminal law and punishment to deliver results.

CONCLUSIONS

There are many other questions which require attention in a consideration of the major issues confronting the Australian criminal justice system today. They include:

- The ways in which speedier trials can be achieved, not only for the accused (who may be in no hurry) but for society[41];

- The effective use of legal aid funds both at trial and on appeal, given the special disadvantages which the unrepresented litigant faces in legal proceedings conducted according to the common law tradition[42];

- The many pressures to modify or abolish the right of the accused to silence[43] and the often little understood advantages of adhering to the accusatorial system of criminal justice which puts the onus on the state and its agencies to prove the guilt of the accused, imposing ordinarily no obligation on the accused to demonstrate innocence[44];

---

41 L Dessau, "Speedy trials and a Speedier Criminal Justice System: Recent Observations on Overseas Jurisdictions" (1995) 5 *Journal of Judicial Admin* 43.

42 cf *Frugtniet v Victoria* (1997) 71 ALJR 1598; *Sinanovic v The Queen* (1998) 72 ALJR 1050 at 1054. The Federal Attorney-General has obtained a working group to consider problems said to have arisen for legal aid agencies from the decision in *Dietrich*. See *Australian Financial Review*, 22 May 1999, 9.

43 For example, L T Olsson, "To How Much Silence Ought an Accused be Entitled?" (1999) 8 *J Judicial Admin* 131.

44 New South Wales Law Reform Commission, *The Right to Silence*, (DP 41), May 1998.

- The introduction of majority verdicts in trials for State offences[45];

- The potential for injustice in cases of seriously delayed criminal accusations and in particular in circumstances of "recovered memory", statutory limits on the entitlement of the accused to test the evidence and inducements to false accusation said to be made by victim compensation payments and sensational or chequebook journalism[46]; and

- The way the basic principles of the criminal justice system in Australia can be reconciled with effective policing, including by the use of undercover agents and deception[47].

It is enough to mention these problems to indicate the range and variety of challenges which must be faced by criminal lawyers today and the persons they represent in police stations, trial courts and on appeal.

---

45 Such laws exist in the Northern Territory. A Bill to allow a verdict to be taken from the decision of 11 jurors is before the Victorian Parliament. See *Daily Telegraph* (Syd) 28 May 1999, 32.

46 P Lewis and A Mullis, "Delayed Criminal Prosecutions for Childhood Sexual Abuse: Ensuring a Fair Trial" (1999) 115 LQR 265.

47 cf *The Queen v Swaffield and Pavic* (1998) 72 ALJR 339.

This is a time of great change in criminal law, procedure and punishment. It is important that the changes should come about as a result of serious community debate informed by expert professional and academic opinion drawing upon effective and up to date statistical and other criminal data. All too often, these essential ingredients for the debate are missing. Instead, solutions to community concerns about crime are offered in an unseemly political auction at election time in which candidates compete for a "virile image", sometimes encouraged by identifiable sections of the media[48]. We have seen many unseemly illustrations of these phenomena in Australia in recent years. Part of the blame must be accepted by the judiciary and the legal profession for failing to explain the present system with its strengths and weaknesses and to debate openly and candidly the options for effective reform. This association has a membership and objectives which make it an appropriate communicator of reality. I hope that it will accept that responsibility. In comparison to most other systems of criminal justice in the world, ours still has many strengths. But in times of great national and international change, technological challenges and political and popular pressures, this is not a time for reticence. It

---

[48] R Hogg and D Brown, *Rethinking Law and Order* 1998; R Hogg, "Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order" (1999) 22 UNSWLJ 262.

is a time for plain speaking about large and small issues of the present and the future, some of which I have considered in this paper.