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CRIMINAL PROCESS IN QUEENSLAND

Heather Douglas ● Malcolm Barrett ● Emma Higgins

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For Zachary, Felix and Isabella,
Motomi and Shou, and Brent

FOREWORD

Margaret McMurdo AC*

I am delighted to write this foreword for three reasons.

The first is because this edition of *Criminal Process in Queensland* by Heather Douglas, a Professor in the T.C. Beirne School of Law at the University of Queensland, Malcolm Barrett, a Senior Lecturer in the College of Business, Law and Governance at James Cook University, and Emma Higgins, a solicitor at the Brisbane criminal law specialist firm, Robertson O'Gorman, is an excellent text.

Its publication is timely because of the many changes to Queensland criminal procedural law in recent years. Whilst primarily written for undergraduate law students, it would be a valuable addition to the library of legal practitioners and judicial officers at all levels. I regret that such a useful and accessible publication on the criminal law was not available when I was a student.

The book comprehensively traverses the Queensland criminal law process from investigation and charge to appeals, pardons and applications by victims for compensation, even where there is no conviction.

It explains the onus and burden of proof and its now common reversal; police powers to execute warrants, search, engage in criminal conduct when investigating the most serious crimes, and arrest; the right to silence and increasing infringements upon it; police accountability, complaints against police and the exclusion of confessions as evidence in court; how charges are laid and proceedings commenced, the prosecutorial discretion to charge, the classification of offences as summary or indictable, and time frames for bringing charges; the committal process post Moynihan; the framing and presentation of indictments; plea bargaining and case conferencing; withdrawing guilty pleas; double jeopardy and related issues; disclosure, prosecutorial duties and the fair trial doctrine; juries and majority verdicts; nolle prosequis; abuse of process, prejudicial pre-trial publicity and change of trial venue; legal representation, including legal aid, self-represented defendants and the McKenzie friend; lawyer incompetence and commonly arising ethical considerations; sentencing and preventative detention; and appeals and further evidence on appeal. The concluding chapter deals with the benefits and weaknesses of restorative justice, a concept used primarily for youth and minor offending, Murri Courts, and the criminal justice system's treatment of victims.

The second reason for my delight is that the book encourages the law students for whom it was primarily written to think critically about the criminal law. It explains DNA evidence in terms easily understood by those who may not have studied science and emphasises that the possibility of innocent mismatches increases in Indigenous and ethnic populations. It discusses bail and how its refusal impacts upon Indigenous over-representation in the criminal justice system. It emphasises that the efficiency and affordability of the criminal justice

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* President of the Queensland Court of Appeal 1998-2017.

system depends on most matters becoming pleas of guilty so that substantial discounts are given to those who plead guilty, whilst questioning the justice of this pragmatism. It discusses judicial exercises of discretion, including in sentencing, and provides a brief but thoughtful analysis of Attorney Generals' appeals against sentence generally and of *Lacey v Attorney General of Qld* in particular. In the chapter on sentencing principles it refers to the significant influence on sentencing outcomes of the media, community attitudes and politicians with their focus on the victim and the not always justified perception of the need to protect a fearful community. It is those who will study this book who will guide the future reform of the criminal law. It is essential that they not only know what the law is but think analytically about how it can be improved to keep the justice in the system.

The third reason for my delight in writing this foreword is that the royalties from the sale of the book are going to Queensland's oldest and largest pro bono legal centre, Caxton Legal Centre, of which I am patron.

I congratulate the authors for their scholarship, diligence and philanthropy.

PREFACE

As teachers and practitioners of criminal law and procedure for many years, we have come together to provide a resource for students, early-career practitioners in criminal law (both prosecution and defence) and those in a variety of government and non-government organisations, who need to know about how the Queensland criminal process works.

As authors, we share the view that while it is important to develop an understanding of current criminal process, it is also important to consider the ways in which the law may impact unfairly on particular groups in our communities and how the criminal justice process might be improved. For example, Aboriginal and Torres Strait Islander people have for too long been over-represented at all levels of the criminal justice system, and increased pressure to get tough on crime may only intensify such over-representation. Can Murri Courts help to address these issues? Women are disproportionately the victims of domestic violence, what is the role of the criminal law in this context?

Criminal process is not static – it shifts and changes in response to changing views in society. There is increasing emphasis on the need for criminal process to be "efficient" and this emphasis has led to significant changes in criminal processes, including that magistrates courts can deal with ever more serious matters, the role of committals is limited, there are increased requirements related to disclosure and an offender levy has been introduced. The increased focus on the role of the criminal justice system in supporting victims of crime has had a profound impact on the way the criminal process has developed – for example, there is a greater emphasis on community protection at the sentencing stage. Community attitudes towards sexual assaults against children and serious organised crime have influenced extraordinary shifts in the way crime is policed and in the way sentencing takes place. In an era where criminal events are broadcast instantly via the internet and where there are increased pressures on court resources, the idea of what constitutes a fair trial has also been substantially expanded by the High Court and Courts of Appeal over the past 20 years. These issues, shifts and changes have challenged some of the central tenets of criminal law and are discussed throughout this text.

This project was very much a joint enterprise, and builds on previous versions of the text. The text could not have been produced without the assistance of a number of people over many years. Our thanks to Soraya Ryan SC, Mark Howden and Emille Boulot who read versions of the chapters. Our university colleagues (both past and present), especially Professors Andreas Scholenhardt and Simon Bronitt; Drs Enshen Li, Kerstin Braun, Ruth Walker, Victoria Colvin and Luke Neal have been a constant source of support, inspiration and knowledge. Thanks also to Rebekkah Markey-Towler, Marcus Thomson, Keilin Anderson and Elissa Morcombe who assisted with research.

We also thank the editor for this text, Elizabeth Gandy, who managed the project. Thanks also to our families and friends who were always there for us along the way.

Generally, the law is stated as at 8 February 2017.

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ABBREVIATIONS

ATSI	Aboriginal and Torres Strait Islander
ATSILS	Aboriginal and Torres Strait Islander Legal Service
BA(Qld)	*Bail Act 1980* (Qld)
CAA	Civil Aviation Authority
CCJRMA	*Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld)
CBO	Community based order
CDPP	Commonwealth Director of Public Prosecutions
CES	Cannabis Education Session
CIN	Cannabis Infringement Notice
CJC	Criminal Justice Commission (Qld)
CLA	*Criminal Law Amendment Act 1945* (Qld)
CMC	Crime and Misconduct Commission (Qld)
CMCA	*Crime and Misconduct Act 2001* (Qld)
COAG	Council of Australian Governments
COVA	*Criminal Offence Victims Act 1995* (Qld)
COVR	*Criminal Offence Victims Regulation 1995* (Qld)
CRO	Conditional release order
CSA	*Corrective Services Act 2006* (Qld)
CSO	Community service order
DCA	*District Court of Queensland Act 1967* (Qld)
DMA	*Drugs Misuse Act 1986* (Qld)
DPA	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)
DRD	Dispute Resolution Branch (of Department of Justice and Attorney-General (Qld))
DSOA	*Dangerous Sexual Offenders Act 2006* (Qld)
EA	*Extradition Act 1988* (Cth)
ECHR	European Court of Human Rights
ICCPR	*International Covenant on Civil and Political Rights*
ICO	Intensive correction order (Qld)
JA(Qld)	*Justices Act 1886* (Qld)
JAQ	*Jury Act 1995* (Qld)
LAQA	*Legal Aid Queensland Act 1997* (Qld)
LIPS	Litigants in person
LPBRQ	*Legal Profession (Barristers Rules) 2007* (Qld)
LPSRQ	*Legal Profession (Solicitors Rules) 2007* (Qld)
LRCWA	Law Reform Commission of Western Australia
MCCOC	Model Criminal Code Officers Committee
NCA	National Crime Authority
NCSC	National Companies and Securities Commission

ODPP	Office of the Director of Public Prosecutions
PCMC	Parliamentary Crime and Misconduct Committee
PIM	Public interest monitor
PPRA	*Police Powers and Responsibilities Act 2000* (Qld)
PSA(Qld)	*Penalties and Sentences Act 1992* (Qld)
PSO	Pre-sentence order
QCS	Queensland Corrective Services
QMERIT	Queensland Magistrates Early Referral into Treatment Program
QPS	Queensland Police Service
RCADIC	Royal Commission into Aboriginal Deaths in Custody
RISE	Reintegrative Shaming Experiments Program (ACT)
ROA	*Regulatory Offences Act 1985* (Qld)
SAJJ	South Australia Juvenile Justice Project
SEPA	*Service and Execution of Process Act 1992* (Cth)
SPER	State Penalties Enforcement Registry
TPDAQ	*Terrorism (Preventative Detention) Act 2005* (Qld)
VAQ	Victim Assist Queensland
VAU	Victims' Assistance Unit
VGOO	*Vagrant, Gaming and Other Offences Act 1981* (Qld)
VIS	Victim Impact Statement
VOCA	*Victims of Crimes Assistance Act 2009* (Qld)
VSAC	Victorian Sentencing Advisory Committee
YJ Act	*Youth Justice Act 1992* (Qld)

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Art 6(a): 15.140

Introduction

The criminal process focuses on the practical operation of the criminal law. Criminal procedure governs the lifecycle of a crime from investigation of the offending through to a charge, trial, sentence and appeal. While the title of this book suggests that the criminal process is segregated from substantive criminal law, it is actually the case that the procedures discussed in this book apply to each offence and defence discussed in substantive criminal law texts. The process is interwoven with the substantive law. Crime is not an abstract concept.

This book presents a critical analysis of the criminal process.[1] Two important texts inform the basis of our approach – "Findlay" and "Brown".[2] Unlike those books however, this text focuses on Queensland and recent developments in the state. Nevertheless, Queensland criminal law is not examined in a jurisdictional vacuum and where relevant, Queensland is evaluated by reference to other states and territories and to the Commonwealth. In many areas discussed in this book, the approach has been led by High Court decisions, which have brought all Australian jurisdictions increasingly into line.

Like the Findlay and Brown texts, we accept that the machinery is relevant to the way in which we understand the implementation of criminal law, otherwise we would have a distorted view of the operation of the criminal law.[3] This book asks how the relevant processes work, how they impact on the people involved in the criminal justice system and whether the process should impact in this way. These concerns were once the province of criminologists.[4] Along with the traditional segregation between criminal law and criminal process, criminology remained outside, or on the fringes of, the law school curriculum. Criminology developed from the discipline of sociology and focuses on the study of crime, criminal behaviour and law enforcement. However, with increasing frequency, criminological studies assist lawyers in understanding the operation of criminal law, and have greatly influenced the consideration and development of the criminal process.[5] Further, commentators, including researchers and the judiciary, increasingly fuse all three areas in their discussions of the operation, application and implementation of criminal law and process.[6]

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1 For a discussion of the critical analysis of criminal law, see M Kelman, "Criminal Law: The Origins of Crime and Criminal Violence" and WJ Chambliss, "Towards a Radical Criminology" in D Kairys, *The Politics of Law* (Pantheon, New York, 1982) pp 214-229 and 230-241.

2 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (Oxford University Press, South Melbourne (Vic) 2014); D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws* (Federation Press, Annandale (NSW) 2015).

3 Findlay et al, n 2, pp 1, 2; Brown et al, n 2, pp 1-2.

4 S Hurwitz and K Christiansen, "Introduction", *Criminology* (Fairleigh Dickinson University Press, New Jersey, 1983).

5 See, eg, D McBarnet, *Conviction: Law the State and the Constructions of Justice* (Macmillan, London, 1981).

6 The judgments of Kirby J provide many examples of this approach – see, eg, his judgment in *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575; [2004] HCA 46 at

Without an understanding of criminal procedure, it is difficult to understand the reasons some matters go to court, while others do not. Many of the policy considerations that are not clearly set out in substantive criminal law become clearer when the procedures surrounding the criminal law are examined. For example, when do police officers or staff of the Office of the Director Public Prosecutions (ODPP) pursue a criminal prosecution? The procedural context is important in answering this question. A good illustration is provided by the decision whether to charge a 15-year-old with carnal knowledge of another 15-year-old pursuant to Criminal Code 1899 QCC(Qld), s 215. Such a matter would rarely be charged; generally, the prosecutors would not exercise their discretion to charge for policy reasons. In order to understand how criminal procedure defines the limits, application and implementation of the substantive criminal law, we need to understand criminal procedure, including sentencing, in a broad sense. This broad approach explains why, in this book, we have looked at issues such as criminal lawyers' ethics, socio-legal research about pleading guilty and the potential for discrimination in the approach to policing offences.

While the Criminal Code is fairly comprehensive on substantive law,[7] it only scratches the surface in relation to criminal procedure. In Queensland, rules about the criminal process are located in a diverse range of statutes. The Code includes most of the rules relevant to the entering of the plea and the running of the trial and appeal in the higher courts.[8] However, to understand the procedures relevant to matters heard in the magistrates' courts, it is necessary to refer primarily to the *Justices Act 1886* (Qld). In Queensland, many common law criminal process rules have been legislated and significantly updated over the past 20 years. Most of the rules relevant to policing, including the investigation and charge process, have been streamlined, updated and relocated to specific legislation. Rules related to policing are now largely found in the *Police Powers and Responsibilities Act 2000*. Bail, jury and sentencing matters are located in the conveniently named *Bail Act 1980* (Qld), the *Jury Act 1995* (Qld) and the *Penalties and Sentences Act 1992* (Qld) respectively. The common law continues to be important in relation to most burden of proof issues and the concept of the "fair trial".

Many who study the criminal law are, for the most part, familiar with limiting their examination to statute law and the High Court and Court of Appeal case law. However, statistics demonstrate that over 96% of criminal matters in Queensland are finalised in the magistrates' court.[9] Most of these matters are resolved on a plea of guilty. This means that, generally, criminal law matters do not generate reported decisions. The practical effect of the criminal law on the magistrates' court and the guilty plea has implications for the protections

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[121] ff; see also PEasteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, Sydney 1998), which brings together researchers from a range of backgrounds.

7 BWright, *Codifications of English Criminal Law, Imperial Projects and the Self-Governing Codes: The Queensland and Canadian Examples* (The Queensland and Canadian Examples Research Seminar Series 2006, Law School, University of Queensland).

8 See also the *Criminal Practice Rules 1999* (Qld).

9 Magistrates Court of Queensland, "Annual Report 2015-2016", available at: http://www.courts.qld.gov.au/__data/assets/pdf_file/0005/498461/mc-ar-2015-2016.pdf.

provided to the accused through various procedural rules. Drawing on criminological research, some of these implications are discussed throughout the text.

While our liberal traditions embrace a notion of the rule of law, which stipulates that the law should be comprehensive, consistent and certain,[10] commentators have shown how a formal approach to the equal application of legal rules may promote substantive injustice.[11] It is partly for this reason that discretion is and must remain a lynchpin of criminal procedure and sentencing. This book constantly returns to the question of how discretion is exercised by judges and magistrates in the criminal justice system and on what basis they exercise that discretion. Sentencing practice provides a particularly good illustration of this issue where as a result of mandatory sentencing regimes discretion has recently been diminished. For example, a fine may penalise one offender but be insignificant to another. The penalties and sentencing legislation allows the sentencer to exercise their discretion in the allocation of fines and one of the matters the sentencer is formally able to take into account is the offender's ability to pay.[12] While in some contexts a period of imprisonment will operate as a strong individual deterrent, in other contexts it may have the opposite effect. For example, judges in the Northern Territory have recognised that young Indigenous men from Groote Eylandt may see imprisonment as a rite of passage and may commit crime in order to go to prison.[13] Thus, in order for the criminal justice process to deliver justice, it is important that the sentencer is able to exercise discretion in response to relevant local considerations.

"Fairness" is another central theme of this book. This concept, like the exercise of discretion, encompasses a concern with substantive justice. The purpose of procedural rules is to ensure a fair trial. The notion of ensuring a fair trial encompasses balancing fairness to the accused on the one hand and fairness to the community on the other hand. These two concerns demonstrate the tension implicit within the criminal justice system. While Voltaire's adage that "it is better to risk saving a guilty man than to condemn an innocent one"[14] operates on one side, on the other side there is an increasing need to evade risk and protect the community.[15] In this text, we explore the legal safeguards that exist in the criminal justice process. It has been suggested that the High Court of Australia is developing a doctrine of fair trial.[16] This concept is examined more closely in Chapter 9.

This book provides an explanation and critique of the operation of the criminal law from charge to trial, conviction, sentencing and appeal. It also looks at some

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10 See generally S Bottomley and S Bronitt, *Law in Context* (Federation Press, Sydney 2006) Part A.

11 A Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Carswell, Toronto, 1988) p 23.

12 *Penalties and Sentences Act* 1992 (Qld), s 48.

13 See *Bara Bara v James* [2000] NTSC 8.

14 Voltaire, *Zadig* (1747), Ch 6. https://ebooks.adelaide.edu.au/v/voltaire/zadig/chapter6.html.

15 Illustrated by indefinite detention provisions and criminal organisation policing; cf the increasing protection offered to the accused by virtue of the requirements of prosecution disclosure.

16 See, eg, E Colvin, J McKechnie and J O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (7th ed, Butterworths, 2015) pp 769-808.

of the developments in victim compensation and restorative justice initiatives. In effect, we have attempted to set out the criminal process as a journey from the beginning (investigation) to the end (sentencing and appeal). During the journey, the investigation, interpretation and application of relevant statutes, guidelines and policies related to criminal procedure and sentencing will be explored.