10th International Criminal Law Congress

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Introduction

The Attorney General, the Hon Jim McGinty MLA, and other distinguished guests too numerous to mention. I'd first like to acknowledge the traditional owners of these lands, the Noongar people, and pay my respects to their Elders.

On behalf of the Courts of Western Australia, it is an honour and a pleasure to welcome delegates and speakers to the 10th International Criminal Law Congress to Perth, and to say a few words upon the opening of this Conference.

The organisers of this Conference, and in particular, the host organisation, the Criminal Lawyers Association of WA, are to be congratulated on putting together such an interesting and controversial programme, and assembling such an eminent panel of speakers, which has in turn attracted such a distinguished group of delegates.

It if of some significance that this is the 10th such conference to be held - not just because 10 is such a significant number in a decimal system, but because the longevity and enduring success of these conferences shows the benefits which Practitioners, Judges and Academics rightly believe flow from regularly gathering to discuss topical issues in criminal law.

It is impossible to overstate the importance of the criminal law to the communities in which we all live. The primary obligation of government, in all its branches - legislative, executive and judicial - is to

ensure the safety and security of the citizens, and criminal law and its enforcement is the primary means of securing that vital objective.

The Criminal Law and Human Rights

The criminal law is sometimes seen as antithetical to human rights - especially when the perspective of the suspect or offender is taken, and his or her investigation or apprehension is said to be in conflict with a right to privacy, or silence or liberty. But in a much more substantive sense, the criminal law is the way in which fundamental human rights are protected and enforced by government. The law of homicide protects the right to life, the law of assault protects the right to personal safety, the law of theft protects the right to enjoy property, and the law of burglary protects the right to be secure in our homes and workplaces. So, in my view, the criminal law is best regarded as the agent of human rights, rather than their opponent.

This morning I would like to touch briefly upon just a few of the important topics you will be addressing in the course of this conference.

Terrorism and the Criminal Law

The first of those is the impact of terrorism, which is to be addressed in the first business session of the conference.

It is the habit of every generation to assume that it has invented a particular area of controversy or threat which has to be addressed and resolved. And so it is with the evocatively named "War on Terror". It is the practice of governments to introduce and justify significant changes to law and practice by what is usually described as an unprecedented threat to the security of the nation. But as Chief Justice Gleeson reminded us

recently, terrorism in the form of bomb plots directed at our vital institutions by religious fanatics can be traced back at least as far as 1605 and Guy Fawkes and his co-conspirators. Their discovery was said to justify torture and punishment of a ferocity that you might have thought was limited to medieval times, unless, of course, you looked at contemporary responses to the so-called war on terror 400 years later.

No reasonable person would deny that the attacks of 9/11, in Madrid, London, Bali and elsewhere have given rise to a justifiable sense of alarm within the community, and an equally justifiable need for action on the part of law enforcement agencies, including the Courts. But it is important that we keep a sense of perspective. As outrageous as these atrocities are, striking as they do at the heart of our desire for peace and security, it is a mistake to think that these are acts of a kind limited to our time or to our communities. Most communities have had to endure regular attacks upon their peace and security - sometimes from without, and sometimes from within.

My basic point is that conventional rules of criminal law and practice have rightly been regarded as adequate to protect us from many and varied threats to our security and safety over a very long period. It is an historically demonstrable fact that those rules and practices have served us well by striking an appropriate balance between the enjoyment of the liberties and freedoms we cherish in our democracy, and the protection of those liberties and rights by the law and its enforcement.

Two things flow from this. The first is that there is a practical onus upon those who would seek to alter that balance to demonstrate the deficiencies in the principles which have stood the test of time before altering them.

The second is that if we so dramatically alter those principles as to significantly erode the liberties and freedoms which are the hallmark of our democracy, then the criminal law ceases to be the means for the protection of human rights, and becomes the instrument of their oppression, and the terrorists will have won, by turning us from a community which cherishes the liberty of the individual to one which subordinates that freedom to the wishes of a powerful group - which is exactly the sort of society which they want.

A Criminal Cases Review Committee?

Later today you will be discussing the prospect of a more formal mechanism for the review of cases in which a conviction is said to have been unsafe. It is a matter of profound regret that over the last 40 or so years there have been a handful of cases in Western Australia in which people have served lengthy periods of imprisonment as a consequence of convictions which we now know to be either unsafe, or in some cases, simply wrong.

The hardship suffered by these persons is immeasurable, and I do not mean to diminish it in any way when I encourage a sense of perspective in relation to such cases. Some weeks ago, a journalist inquired whether I would give an interview in which I would be asked whether it was possible to get a fair trial in Western Australia. I declined because the question seemed to me to be too preposterous to merit serious consideration. A problem of public perception has, I think, arisen from the fact that these cases have mainly been unearthed in the last few years which has obscured the fact that they occurred over the last 45 years, over which time tens of thousands of criminal cases have been successfully completed in this State. Viewed in that context, a handful of errors is, of

course, cause for concern, but not of a sufficient magnitude to justify what some have quite wrongly suggested is a crisis of confidence in our system of justice. No system of justice, nor indeed any system which relies upon human beings and all their imperfections for its operation, can ever be entirely free of error. That observation is no reason for complacency when errors are discovered, and whenever error in the justice system is identified, its source must be rigorously investigated to reduce the risk of recurrence. However, the occasional identification and correction of error in the justice system of this State should not obscure the fact that the justice system of this State operates at least as effectively and as fairly as the justice systems of other comparable jurisdictions.

But there is nevertheless much to be said for a more formalised procedure for the review of cases in which miscarriage of justice is alleged, and, in particular, one which takes the key to the gate for such a review out of the hand of a politician, and vests it in an independent impartial authority, for all the same reasons the decision to prosecute has been taken out of the hands of politicians in all Australian jurisdictions. The existing arrangements in Western Australia basically vest responsibility for the investigation into whether there should be further judicial review in unidentified officers of the Department of the Attorney General and the power to initiate judicial review in the Attorney General himself (or herself). The danger of a perception that the investigation may be undertaken by those who have an interest in the protection of the reputation of the investigative and judicial authorities, or that the decision in relation to the provision of judicial review has been taken for political motives is obvious. There are various models, including one in the United Kingdom in which these functions are given to an authority independent of the primary investigative authorities and the judiciary, and

free of political influence or interference. There is much to be said for this model. In my view, such a model is also preferable to privately organised "Innocence Projects", the very name of which conveys a pejorative and partisan view of the criminal justice system, and a predeterminated assumption as to the outcome of cases investigated by such projects.

There has been some possible confusion in media commentary of late between the functions of a Judicial Commission, the creation of which I also advocate, which would primarily be directed to the handling of complaints of misconduct or unfitness for office on the part of judicial officers. The primary function of a Criminal Cases Review Committee would be to ascertain whether there was an arguable case of miscarriage of justice in a particular criminal case, sufficient to justify review by the Court of Appeal. While it is possible that the functions of the two bodies could overlap in a particular case, their primary focus would be fundamentally different.

Double Jeopardy

If it is time to formalise avenues for secondary appeals by defendants, usually to be invoked as a result of the discovery of fresh evidence such as DNA tests, as a matter of logic perhaps we should also ask whether the objective of public confidence in the justice system also requires us to reconsider the double jeopardy principle, which precludes a retrial of an acquitted person even when fresh evidence points strongly to his or her guilt.

It seems to me that our community is just as offended, and confidence in our justice system is just as eroded by a guilty person being acquitted as

by an innocent person being convicted. While one accepts that there might be some constraints upon the power to initiate a retrial to avoid prosecutorial harassment, perhaps we should at least consider whether the principle of finality is of sufficient weight to justify, say, a murderer or rapist, avoiding conviction when there is strong evidence of guilt, because that evidence has been obtained after an earlier acquittal.

Sentencing

This Conference will be addressed by some highly distinguished experts in the field of sentencing. This is by far the most controversial subject for any Chief Justice to ever address, and I do so with a certain amount of trepidation, against the prospect that whatever I say I will be presented by some part of the media with a slant designed to generate controversy.

The starting point for any discussion on sentencing must be a reiteration that it is the primary object of the Courts, as the third branch of government, to protect the community. Any action that does not serve that fundamental objective is a derogation from the duty of the Courts.

But there are differing views reasonably held as to the best way of protecting the community. One view, often strongly held, is that the best way to discourage crime is to impose severe sentences - sentences which reflect the severity of the particular crime. That view is consistent with the well-established sentencing principles of deterrence, both general and specific, retribution and proportionality - principles which are applied every day in our Courts.

Some would portray Judges as antithetical to these principles, but the fact is that the Courts of Western Australia imprison more offenders for

longer periods than any other State in the country on a per capita basis - only the Northern Territory has a higher rate of imprisonment. I do not present this fact as a badge of honour, but merely to put the recurrent debate about the adequacy of sentences in this State in its proper perspective. That perspective also requires account to be taken of the fact that the courts of this State have said again and again that there are particular offences for which general deterrence must be the dominant sentencing factor - offences such as trafficking in hard drugs or offences involving violence towards or sexual abuse of children - and long sentences are often given for these crimes in this State.

But there are some cases in which the dominant objective of protecting the community will best be served by also taking into account the need to reduce the risk of reoffending by a particular offender, by constructing a sentence which enables the causes of the offending conduct to be addressed, not just the symptom. This is an approach often associated with the developing field of therapeutic jurisprudence - a name which I don't like because of its touchy-feely connotations, and which I prefer to refer to as a problem-solving approach. This approach accepts that some crime will be the symptom of an underlying cause, such as substance abuse, social or socio-sexual dysfunction and so on, and recognises that unless and until the causes of the criminality are addressed, criminal behaviour by that offender will continue. Sometimes the causes of criminality will best be addressed in a custodial environment, but sometimes they will not - indeed, sometimes the institutionalisation of the offender will itself be the cause of crime. In such cases, the task of the sentencing court will be to identify the best way of addressing the cause of crime so as to reduce the risk of reoffending in the context of a sentence which is proportionate to the crime committed.

Victims

There is a nice symmetry between a problem-solving approach and an approach which gives appropriate recognition and effect to the vital interest which the victim and his or her family have in the sentencing process. Restorative justice projects give a significant role to the victims of crime which will very often assist the offender to come to terms with both the causes and consequences of their crime - and which will help him or her to see the problem and perhaps to address it.

Indigenous Offenders

In my view, problem solving and restorative justice approaches within a context of punishments which reflect the crimes committed, have a significant potential to address one of the biggest problems for this State's criminal justice system - which is the gross over-representation of Aboriginal offenders. These offenders make up 40% of the State's prison population, whereas Aboriginal people comprise only 3% of the general population. On any given day, one in 16 adult male Aboriginals is in prison. Neither I, nor, I believe, any other branch of government, regard these figures as acceptable. And, of course, this phenomenon is not confined to Western Australia.

It would be more than usually foolhardy for me to suggest that I have a solution to this apparently intractable problem, but I will venture two observations. The first is that whatever we have been doing to address the problem of Aboriginal offending has patently failed to work, so we must try something else. The second is that I doubt very much that the criminal justice system on its own can ever make any significant inroads into this problem, unless and until the causes of social dislocation which regrettably characterise some Aboriginal people are addressed by a whole

of government approach. This means that the agencies responsible for education, health, housing, community welfare, employment and occupational training and so on, must all work together to produce an holistic approach to the restoration and preservation of Aboriginal culture and the structure of our Aboriginal communities.

I hope to discuss with Executive Government ways in which communication and interaction between the judiciary and Executive Government can be enhanced in this important area, so that the Executive Government is better equipped to address the causes of the criminal conduct which is manifested in the justice system.

It must also be remembered that the vast bulk of Aboriginal crime is directed against Aboriginal victims, which exacerbates the cultural problems, but also increases the prospect of a culturally appropriate restorative justice approach, which could bring to bear the interests of the community, the victim and the offender to produce a sentence which best gives effect to those various interests.

Crime and the Environment

Two weeks ago I had the privilege of viewing some of the fantastic rock art in Kakadu National Park. There is academic debate about the precise age of the paintings - some say 20,000 years - some say 50,000 years. Even the more recent end of that range places the paintings 15,000 years before the Pyramids, 17,000 years before Alexander the Great, and 18,000 years before the Romans.

The rock art at Kakadu has survived, whereas the wonders of the Ancient World often referred to by our culture - such as the Pharos (Lighthouse)

of Alexandria, the Colossus at Rhodes, the Hanging Gardens of Babylon, etc, have all disappeared, other than the Pyramids at Giza, which are at least 15,000 years younger than the Aboriginal rock art I saw. The extraordinary fact that the Aboriginal rock art survives to this day is no doubt attributable to the fact that Aboriginal people regard their primary obligation in life as being the custodian and guardian of the land in which they live. They discharged that obligation in an exemplary fashion until European settlers arrived 225 years ago. White Australians have been here for only a tiny fraction of the time since the rock paintings were installed at Kakadu, and yet we have managed to imperil not only their existence, but the environment of the rest of the continent.

The rainfall in Perth has decreased by about 25% over about the last 30 years, and scientists do not expect it to return to prior levels. Those of you who flew across the Nullarbor to get here today, may have noticed the vast areas of salt-degraded land to the east of Perth which used to grow wheat, and before that, trees, but which is now virtually useless.

If the conduct of white Australia was judged by the moral standards of black Australia instead of the other way around, we would all be found guilty of the most heinous crimes against the environment, deserving of the most severe punishment.

It seems likely that the adverse effects which our culture and industrial activities are having upon our environment will be the enduring political topic of the next decades, if not centuries. In that context, it is likely, indeed to be hoped, that legislatures will respond by creating more offences in this area, which will give rise to a number of nice questions.

One of the problems which bedevils prosecutions in this area is the capacity of large corporate defendants to complicate and confuse the issues in the case using expensive and extensive expert evidence. In cases in which the environmental issues are peculiarly within the knowledge of a defendant, which will often be a large corporation, there might be something to be said for reversing the onus of proof, and thus the party who derives advantage from complication and complexity.

And nice questions will also arise in respect of the penalties imposed for environmental offences. There are already very large fines available for such offences, but often even large fines are insignificant when compared to the profits to be derived from the offending conduct by, say, a large mining or smelting operation. Perhaps offenders could be made to pay a multiple of the profits derived from the offending conduct. Or should we be looking at custodial penalties for relevant officers of offending corporations, and if so, which officers? How do we deal with the impecunious environmental vandal - say, the farmer on the brink of insolvency who illegally clears trees? I don't offer any answers to these questions, but do suggest that the political recognition of the importance of these issues in the coming years will require them to be addressed in gatherings such as this.

Conclusion

In the time available, I have only been able to skate across the surface of some of the issues you will have a chance to consider in more detail. I conclude by wishing you all the best in your deliberations, which I am sure will be characterised by the directness and frankness of expression for which criminal lawyers are justly renowned.