BOOK REVIEWS

The Criminal Injustice System, edited by J. BASTEN, M. RICHARDSON, C. RONALDS & G. ZDENKOWSKI. (Australian Legal Workers Group, N.S.W., and Legal Service Bulletin Co-operative Ltd, Victoria, 1982), pp. i-xi, 1-321, with Table of Cases and Tables of Statutes. Recommended retail price $14.00. (ISBN 0 95947 2711).

1. The Costigan-Packer Debate

Kerry Packer, undoubtedly one of the most powerful men in Australia, issued a press statement in early November 1984 in which he denied a series of allegations made against him in the final report of the Costigan Royal Commission.[1] In it he rejected claims of involvement in a number of extremely serious criminal offences including drug trafficking, homicide and tax evasion. In so doing he subjected the methods employed by Costigan in the conduct of his four-year inquiry to the most trenchant criticism. That criticism has been shared by many commentators as well as leading politicians including such notables as the Prime Minister Bob Hawke and the New South Wales Premier Neville Wran. Interestingly enough the latter two have recently been the subject of extremely serious allegations of criminal activity themselves. These matters alone, although they form but part of an entire mosaic, have contributed to a complete alteration of the political agenda concerning the operation of the criminal justice system. It has become one of the predominant political issues in this country and may well remain so until recent demands for a concerted effort to remove the most serious abuses are heeded.

But to return to Kerry Packer for a moment. In an earlier statement in which he revealed to the world that he was the notorious "Goanna", apparently code-named thus by the *National Times* in its revelations of parts of the Costigan Report, Packer indicated that he simply wished to be afforded the rights of an ordinary housebreaker. No doubt it was sheer inadvertence that caused his legal counsel to avoid any reference to an "alleged" housebreaker in the statement. Surprising too is the media magnate's humble desire to have his position equated to that of the "ordinary" person coming under the notice of the authorities. Nevertheless the reference raises issues of fundamental importance. What are the aims and objectives of our criminal justice system? Does the system in practical terms satisfy those objectives? In particular, does the system guarantee that every person (including the ordinary housebreaker and Mr Packer) is equal before the law?

2. *'The Criminal Injustice System'*

Against that background I found re-reading *The Criminal Injustice System* to be a most valuable experience. I had first read it shortly after its publication in early 1982 because the subject matter was of considerable interest to me and because the editors were each well-known to me as were many of the contributors. In praising the publication it is perhaps appropriate for me to declare an interest in that I know and admire the work of a number of people associated with the project.

The editors make the claim, which is thoroughly justified in the opinion of this reviewer, that they have produced "an important collection of essays on aspects of criminal justice in Australia". Until the pioneering efforts of Chappell and Wilson a little over a decade ago in their celebrated work *The Australian Criminal Justice System*[2] this was an area almost totally devoid of critical attention. The debate is now, at least, well and truly in the public arena and much of the material which emerges from this publication considerably elevates the standard of that debate.

The perspective adopted by the editors is one for which they make no apology and it is immediately apparent from the book's quirky if ambiguous title. One might be led to idle musing about whether the editors are inferring that there are injustices in the system or alternatively that the system itself is one of total injustice. At the very least the material presented gives rise to real concerns about serious, perhaps endemic, examples of injustice. It is plainly apparent that the editors suggest that "justice" itself is an extremely elastic concept and that, whenever and however it is dispensed, it is done so in a highly individualised manner.

The editors impose certain limitations upon the scope of their work. The topics covered are highly selective as are the commentators. No attempt is made to provide for contributions from key participants on the prosecution side of the fence such as police officers, police prosecutors or Crown law authorities. Furthermore members of the judiciary are noticeably absent. There is, however, a reference to Mr Justice Murphy as having chaired one of the sessions of the conference in which the book had its genesis. His Honour's views on the subject matters covered by the book together with those of Wendy Bacon, who contributed to the discussion following that session, would no doubt have any publisher clamouring for a second edition.

3. *Police Interrogation*

The book is divided into three parts — police interrogation, trial procedure and the politics of law reform. Entire areas, as is

conceded, such as post-trial matters are excluded altogether. Within the broad area of criminal interrogation, police interrogation alone is considered. The editors justify this selection on two different but interdependent bases. First it was widespread disquiet about police interrogation methods that provided the stimulus for the publication. The editors explain that the Australian Legal Workers Group held a meeting in March 1980 to discuss the apparently widespread practice of police officers fabricating statements containing admissions of guilt of criminal offences allegedly made by suspects. That process is referred to in the vernacular as a "verbal". That meeting generated considerable interest and in early 1981 a national conference on the "Criminal Injustice System" was organised. The book owes its existence in large part to papers presented at the Conference and discussion provoked by them, although it is clear that considerable editorial work has been undertaken. Secondly, there are the very revealing findings made by Nina Stevenson in a highly innovative and significant research project. Stevenson examined the transcripts of all indictable cases completed in a six week period in 1979 by the Sydney District Court to obtain an insight into the nature of evidence presented in a sample of criminal trials. Despite the author's acknowledgement about the limitations of her study, the startling conclusion is reached that "in over 96% of the cases there was evidence of oral, written or oral and written admissions or confessions" (pages 108-109).

Given the obvious reliance by the prosecution upon confessional material in securing convictions and given the widespread complaints about the improprieties of police interrogation practices, the editors feel justified in devoting more than one-third of the book to the topic. Stevenson's research puts the issue in even sharper focus. Her study reveals that "nearly 50% of the trial time in which witnesses were giving evidence was spent determining the admissibility or veracity of confessional evidence" (page 107). If one's concern was limited purely to matters of cost-effectiveness of current practices, her revelation that approximately 19% of all trial time was devoted to *voir dire* hearings, would be extremely disquieting. Quite apart from any prejudicial consequences which could flow from that finding, any management consultant would be able to indicate an alternative which would be preferable to leaving a jury "cooling its heels" for that period of time. Once the police allege that a suspect has made admissions, the die is cast. It is a position from which the prosecution can scarcely resile. Not surprisingly any investigation subsequently conducted by the police after having charged the

suspect in such circumstances, will be designed to purely bolster their case. It is glib to suggest that the police are then likely to act with any great degree of detachment or objectivity. As Stevenson's research indicates, confessional material is almost invariably part of the prosecution brief. One can safely assume that it normally forms an integral part of its case when presented in court because of the very strong inference that a person is unlikely to say something against his or her interest unless it is true. In court challenges to such evidence by an accused person could readily be anticipated. However, it is the apparent extent of those challenges revealed in the Stevenson findings which gives rise to disquiet. I would venture to suggest that few challenges to confessional evidence led by the Crown are inspired by mere whim. Seldom are such challenges totally ignored, should they be unsuccessful, in the sentencing process.

Given the apparent incidence of police improprieties in the conduct of interrogations and in the light of the foregoing, a number of matters present themselves for urgent attention. At the outset, the assertion that police officers are unreliable witnesses about what allegedly occurred during an interrogation needs to be considered. Various procedures have been suggested to overcome the inherent difficulties. Tape and video recording have been repeatedly suggested to no avail. Still no method to ensure an independent record of the interrogation has been devised. Neither is there any definitive material concerning the incidence of "verballing" in Australia. Clearly such material would be useful, although it has to be conceded that it is inherently difficult to obtain. In the meantime the key questions of why the practice of verballing exists at all and what steps can be undertaken to remove it need to be confronted. The question of whether or not the present evidentiary rules concerning the issues of voluntariness and fabrication of confessional material are satisfactory requires examination. Those legal rules and the anomalies to which they give rise are also analysed by Stevenson (from page 116). A simultaneous exercise designed to test the efficacy of the present laborious procedures for examining those matters needs to be undertaken given Ms Stevenson's findings.

Furthermore the very appropriateness of the present interrogation process itself needs to be scrutinised. The aims and objectives sought to be achieved need to be delineated but at very least one can assume that they include the pursuit of the truth of the matter under investigation in its entirety. The fascinating study of women homicide offenders undertaken by Ms Bacon and Ms Lansdowne together with the two studies of police interrogation

of Aborigines and children respectively by Neil Rees raise very squarely the issue of whether present interrogation techniques satisfy that objective. Those studies refer to a variety of significant factors all of which, even with good faith from both interrogator and suspect, render it unlikely that the entire episode will be revealed. They make reference to the complex psychological process involved, the perspective adopted by the majority of police interrogators and the vulnerabilities and highly emotional state of most suspects heightened no doubt by the location in which most interviews occur. One certainly might wonder whether the traditional record of interview format, in which questions are asked and answers are elicited, is adequate given that the parameters of such an interview are set by the questioner. The apparent inadequacies are highlighted, it is suggested, by the procedure recently adopted by accused persons of furnishing in the first instance a dock statement and then going into the witness box for the purposes of cross-examination. If our present interrogation methods are deficient in any respect, so far as the investigation of crime is concerned, then consideration needs to be given to alternatives. Are the procedures themselves defective and in need of reform? Should other methods of investigation be relied upon? Are the deficiencies related to the methods employed? Are, as is suggested by Dimelow in the book under review (page 105), present members of the police force unable or inappropriate, given their present methods, to conduct proper interrogations?

These questions, whilst being highly important in themselves, assume even greater significance in the context of the Costigan-Packer debate. That fascinating confrontation serves only to highlight the need for a critical re-assessment of the fundamental objectives of our system of criminal justice. It is a matter of regret that in a book designed to point out inherent injustices in the system that little or no effort is made to either provide guidance in this respect or a framework against which the ensuing discussion can be set. Of course there is considerable material available, references to which may well have enhanced the book.

4. Two Models of the Criminal Process

A very useful starting point, it is suggested, is the work of another Packer, Herbert L. not Kerry. That commentator refers to two contrasting models of the criminal process as being the "crime control" model and the "due process" model respectively. Packer[3] refers to both at length and the short extracts that follow reveal the philosophies underlying each approach. The "crime control" model requires:

> that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime ... The model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited. There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimising the occasions for challenge....
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> The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt.... If there is confidence in the reliability of informed administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency.

On the other hand, the

> Due Process Model encounters its rival on the Crime Control's own ground in respect to the reliability of fact-finding processes. The Crime Control Model ... places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, non-adjudicative fact-finding that stresses the *possibility of error* [emphasis added].
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> People are notoriously poor observers of disturbing events — the more emotion-rousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no-one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). Considerations of this kind all lead to a rejection of informal fact-finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him....

In discussing any model of the criminal process consideration needs, as Packer suggests, to be given to the rules themselves, their rationale, their content, their implementation, and the appropriate sanctions to be invoked when the rules have been broken.

5. *Trial and Pre-Trial Procedure*

The second part of the book consists of a selection of aspects of trial and pre-trial procedure. Both O'Connor and Lane in separate chapters pay lip-service to the due process model. They

suggest various formal safeguards together with a variety of review mechanisms concerning the prosecutorial process. O'Connor makes reference to the recommendations of Mr Justice Lusher in his *Report to the Commission to Inquire into New South Wales Police Administration* (1981). Lusher recommended the end of the police prosecution branch and the establishment of a prosecutions department consisting of lawyers under the control of the Attorney-General. In other words it was suggested that the investigating and prosecuting functions of the police should be separated. Needless to say the proposal has not been given legislative recognition. The other two chapters in this section are premised again on a due process notion of the criminal justice system. The right to legal representation, based on a notion of equality before the law, is a fundamental part of this theory. The significance of legal representation and the availability of legal aid and its implications are discussed by Peter Cashman, whilst various aspects of the role of the jury in the criminal justice system are considered by John Willis. The case is made out for there to be a critical re-assessment about each of the steps in the criminal justice system both in terms of the methods relied upon and the person or persons vested with responsibility for performing the assigned tasks. Two quick examples will suffice to demonstrate the point. First, immediate consideration needs to be given to the present listing arrangements for courts in New South Wales. Listing responsibilities are presently performed by the office of the Clerk of the Peace and the Solicitor for Public Prosecutions, which, as the name implies, also acts as the solicitor instructing the Crown in prosecuting indictable matters. The perception of a conflict of responsibilities exists and that alone should result in a complete separation of the two functions particularly in light of recent allegations. Secondly, the circumstances in which the decision to charge a suspect is made warrants consideration in particular circumstances given the consequences which flow from it. The Attorney-General has, in relation to a limited number of cases such as incest, to give his consent to a prosecution. It may well be appropriate to make the Attorney-General's consent, or that of his delegate or that of a Director of Public Prosecutions, a pre-requisite to prosecution for additional offences such as conspiracy and complex commercial matters. On the basis of considerations of cost alone such an approach may well be justified in the light of the so-called Greek conspiracy case and the Barton litigation.

6. *Politics of Reform*

The final section of the book is entitled the Politics of Reform. Were it to focus solely on government achievements in improving the criminal justice system it would have been of very short duration. However, the emphasis is rather on the obstacles facing the reformer and in this regard the chapter contributed by former South Australian Attorney-General Peter Duncan is instructive. The obstacles it appears, are overwhelming. Mr Justice Kirby, who recently retired from the Chairmanship of the Australian Law Reform Commission to take up active service on the bench, was closely associated with the production of that Commission's important report on *Criminal Investigation* in 1975. Despite the fact that one of the report's principal authors is now the Federal Attorney-General, none of its recommendations have been implemented. There are numerous other examples, referred to by Mr Justice Kirby in the preface as a "mortuary of reports", which have been consigned to the legislative dustbin. Two such reports, the *Beach* and *Lucas* inquiries, are analysed here in depth by Peter Sallmann and Peter Applegarth respectively.

Governments have been very successful in resisting changes to the criminal justice system. Apart from reforms to the substantive law undertaken by more progressive governments, there simply has not been any apparent or perceived need or inclination to go further. The reasons for inaction no doubt are many and varied, albeit in the face of the overwhelming evidence and well documented material which has resulted from the exhaustive researches of eminently well credentialled investigators, usually appointed by the very governments which subsequently ignore their findings.

As was indicated at the outset, recent experience suggests that the very functioning of the criminal justice system is now a most explosive political issue and that it is one of the issues which assumes greatest significance for members of the community. It seems reasonable to assume that it occupies a much higher position in the political agenda than has been the case hitherto. Never before, in recent history at least, has there been similar concern about, or scrutiny of, the criminal justice system. A number of factors appear to have contributed to the issue's higher profile although it is extremely difficult to disentangle cause from effect. First, Costigan holds the view, shared by many others, that the incidence of criminal activity is so widespread in the Australian community, its effects so pernicious and the influence of those involved in major enterprises so pervasive, that the very fabric of this society is threatened. Secondly, the reaction to the

Costigan report has itself been intriguing. The debate has not been about his general conclusions concerning the size of or imminence of the perceived threat but rather about his methods of investigation. Furthermore his identification of persons of power and influence as having an involvement in major criminal enterprises, of itself, regardless of his methodology, is sufficient to provoke controversy. The political stakes are instantly raised. Thirdly, Costigan's findings have been revealed at the very time when allegations against other persons in positions of influence are being frequently made. So much so that the signs are that the system is on overload with constant suggestions of widespread corruption and influence peddling in Government, the judiciary, the legal profession, the police force and in all other levels of the criminal justice system. Fourthly, the nature of criminal activity has changed or perhaps the re-definition of certain activity as being criminal has occurred. It is only comparatively recently that crime in the suites has been a focus of concern in the same way that crime in the streets always has been. Fifthly, extensive media coverage has been provided in respect of the seemingly never ending spate of inquiries and Royal Commissions which touch upon aspects of the system. This no doubt has contributed to a greater public awareness of the issues involved. The treatment of these issues are now well and truly entrenched in the sub-culture. Highly acclaimed television mini-series such as "Scales of Justice" presumably owe their success in part to viewer perceptions that the events depicted mirror contemporary reality. Weekly shows, including "60 Minutes", designed to cater to the mass entertainment market regularly program items touching aspects of the criminal justice system, with no apparent diminution in their ratings. Finally, and very tellingly, the material presented in this book amounts to an indictment of the system. The very fact that police malpractice exists can only serve to undermine the system. By continuing the practice of "verballing", police officers who perform a pivotal role, are registering a vote of total "no confidence" in the very system they are designed to promote.

For all the reasons referred to above, it is suggested that politicians have a vested interest in ensuring that there is an immediate overhaul of the system. The New South Wales Law Reform Commission is presently working on a reference on *Criminal Procedure*. That would be an appropriate focus for the commencement of the necessary therapeutic cleansing process. Fundamental to its investigations is consideration of the issues

thrown so demonstrably into the arena by the Costigan Report and the *Criminal Injustice System*.

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FOOTNOTES

1. F. Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984).
2. D. Chappell and P. Wilson, *The Australian Criminal Justice System* (2nd ed. 1977).
3. H. Packer, *The Limits of the Criminal Sanction* (1968).

Safeguarding the Worker: Job Hazards and the Role of the Law, by NEIL GUNNINGHAM, LL.B., M.A., Senior Lecturer in Law at Australian National University. (The Law Book Company Ltd, Sydney, 1984), pp. i-xxiv, 1-426 with Bibliography and Index. Paper bound recommended retail price $42. (ISBN 0 455 20504 3).

Guidebook to Australian Occupational Health & Safety Laws, by ADRIAN MERRITT, LL.B., PhD., Barrister of the New South Wales and Australian Capital Territory Supreme Courts, Senior Lecturer in Law at University of New South Wales. (CCH Australia Ltd, Sydney, 1983), pp. i-viii, 1-525 with Case Table and Index. Paper bound recommended retail price $41. (ISBN 0 86903 337 8).

The two books under review provide some much needed scholarly work on the body of law in Australia that purports to protect workers' health and safety. British law on this topic has had such standard commentaries as Redgraves (now Fife and Machin)[1] and the insight provided by reports of committees of inquiry such as that chaired by Lord Robens.[2] But in Australia the mish-mash of laws that has grown up at state and federal level, has been bereft of book-length commentary and critique. Dr Adrian Merritt's work provides an extended commentary on the current legal framework, and she focuses successively on (a) employers' liability at common law; (b) structure and scope of protective legislation — the old approach; (c) reform — proposals and achievements (up to the Occupational Health and Safety Act 1983 (N.S.W.)); and (d) breach of statutory duty. Mr Neil Gunningham's text is less of a handbook and more of an analysis.