BOOK REVIEWS

A Greater Role for Parliament

The Treaty Making Process - Reform and the Role of Parliament: Report 45 of the New Zealand Law Commission.

Due to increasing globalisation, international treaties are beginning to play a greater role in the law making process. Treaties impact on the domestic laws of nations and affect the economy, foreign relations, trade and the rights of individuals within states. New Zealand is a party to a diverse range of treaties in fields ranging from the environment to international sales of goods contracts.

In its second report on matters relating to New Zealand's international obligations,[1] the New Zealand Law Commission ("the Commission") focuses on the role that Parliament should play in the treaty making process in order to ensure that such international legal instruments are incorporated and properly observed within New Zealand's domestic law.[2]

The report begins by examining the three stages of the current treaty making process. It then considers the present significance of treaty making given the internationalisation of law and increasing globalisation. It is noted that within New Zealand there have been various calls, for example, from political parties, for Parliament to have a greater role in the treaty making process. The Commission discusses some of the potential issues that may arise should Parliament's role in the process change, before then outlining its own recommendations and discussing how treaties are implemented overseas.

The Current Treaty Making Process

The second section of the report covers the three stages of treaty making; negotiation, acceptance, and implementation, and the way these stages are connected to the three branches of Government under the separation of powers in New Zealand. At present, the Executive is the only organ of government concerned with the negotiation and acceptance of treaties.

The third phase, implementation, can take effect without the involvement of Parliament, if no new domestic legislation is needed to implement the treaty. If legislation is required, then Parliament can pass a statute which implements the

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1 The report builds on a report from 1996, which covers more general information including: the aim of treaties, their negotiation and formation, how they are given effect to at the international level and their implementation through national legislation and the courts: see *A New Zealand Guide to International Law and its Sources* NZLC R34 1996.

2 *The Treaty Making Process: Reform and the Role of Parliament* NZLC R45, para 2. It is unlawful at international law for a nation to legislate domestically in a manner inconsistent with the international obligations it has assumed under treaties.

treaty by a "force of law formula" giving direct effect to the treaty text.[3] If that is not possible, Parliament can either incorporate the substance of the treaty in a statute and make reference in the statute to its international law source, or it can even incorporate the substance of the treaty in a statute without acknowledging the statute's treaty origins.

At present, Parliament does not have the ability to prevent the Executive approving a treaty, but it can delay the process of acceptance by refusing to pass any necessary legislation. The Commission notes however, that Parliament can be bypassed at the implementation phase if the Executive pronounces that New Zealand law is already consistent with the treaty, thus removing the need for legislative action.

The courts have become increasingly involved in the third stage of the process by construing statutes in a way that implements New Zealand's international treaty obligations. Thus, a treaty can still be relevant to the domestic legal system, even if it has not yet passed into domestic legislation. It was held in *Tavita v Minister of Immigration*[4] that international law will inform judges as to the content of public policy in order to promote consistent interpretation if Parliament's intent is uncertain. In *New Zealand Airline Pilots' Association Inc v Attorney-General*[5] the Court of Appeal held that domestic legislation should be read consistently with New Zealand's international obligations so far as the wording of the legislation allows, even if the wording is not mandatory.

The Internationalisation of Law and Parliamentary Sovereignty

The third section of the report discusses the internationalisation of the law and issues that have arisen as a result.

International law was once a vehicle for sovereign states to protect their citizens and territory, but through globalisation, it is now aimed at promoting co-operation ahead of protection. In this way, the concept of "absolute sovereignty" (Parliament's complete legislative freedom) has become eroded as international legal instruments deal increasingly with transnational issues, involving for example, the environment, economics, health and human rights. The increasing focus on consistency among states means that it is less realistic to view treaty making as the sole concern of the Executive. Although it is argued that this erosion of sovereignty may result in laws increasingly being made offshore, the Commission emphasises that the main issue is whether "the exercise of state sovereignty restricts parliamentary sovereignty ... to an unacceptable extent."[6]

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3 Ibid, para 36.
4 [1994] 2 NZLR 257.
5 [1997] 3 NZLR 269.
6 Supra at note 2, at para 55.

There are also questions about "democratic deficit",[7] the practice whereby treaties are entered into by the Executive without significant public or parliamentary involvement. Treaties formed in this way may be viewed as undemocratic. Similarly, on an international level, there are concerns that international organs are increasingly taking over treaty drafting thus rendering the role of elector nation states less important.

The Commission discusses some issues relevant to Maori, including the protection of taonga, intellectual and cultural property rights, and cultural values. Of particular concern is the lack of consultation with iwi. This is a right enshrined in the Treaty of Waitangi yet it is bypassed when the treaty making process is conducted by the Executive alone. The Mataatua Declaration on Cultural and Intellectual Property Rights[8] raised these issues as well as concerns regarding the lack of consultation over the General Agreement on Tariffs and Trade ("GATT"). This question is being pursued before the Waitangi Tribunal as a breach of the Treaty of Waitangi.[9]

MMP and Calls for a more involved Parliament

The fourth section of the report deals with how the new Mixed Member Proportional ("MMP") electoral system, has provoked discussion about a greater role for Parliament in the treaty making process.[10] The Multilateral Agreement on Investment ("MAI"), a treaty devised by the Organisation for Economic Co-operation and Development ("the OECD"), was seen as sufficiently important for the Labour party to call for a specific parliamentary debate on it before it was approved by the Executive.

Parliament's Changing Role in Negotiation and Acceptance

The Commission begins this section of the Report by discussing the role Parliament should have in a revised treaty making doctrine, and the balance that should be struck between greater parliamentary involvement in treaties, and the power of the Executive to freely make treaties with other states.

The Commission also considers whether the courts are encroaching too far on parliamentary sovereignty, as only Parliament has the direct constitutional role of incorporating treaty obligations into domestic law. However, given the noticeable absence of Parliamentary involvement in treaty making, the courts are

7 Ibid, para 57.

8 Passed on 18 June 1993 in Whakatane, New Zealand. The Declaration is reproduced as appendix E in *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples*, cited in *The Treaty Making Process*, supra at note 2, at para 63, n76.

9 Supra at note 2, at para 68, n83.

10 Members of Parliament from the Alliance and ACT political parties have drafted separate Bills which both aim to increase Parliament's involvement in the treaty making process; see supra at note 2, at para 73 for more detail.

"filling in the void" by inferring international obligations into public policy considerations. The Commission therefore observes that decisions such as *Tavita*, may be seen as "a response not only to internationalisation but to the legislature's failure to implement important changes to the domestic law in order to comply with obligations incurred in the international arena."[11]

The issue of "democratic deficit" is also discussed in relation to treaties where no implementing legislation is required, as in the case of the United Nations Convention on the Rights of the Child.[12] The Commission draws attention to the fact that when treaties are ratified in this manner by the Executive, there is no timely way to inform Parliament and concerned public groups who may wish to debate any contentious issues and take action.

The Executive has concerns that increased parliamentary involvement would make it harder to maintain the confidentiality of sensitive negotiations, the confidence of other parties involved in negotiations, as well as its own flexibility to respond to urgent matters such as military issues. They also raise concerns of the "clogging" of Parliament with treaties of no interest to it, and the increased use of resources on the same tasks.[13] The Commission suggests special procedures where urgency is required, and special select committees as a possible solution to confidentiality issues.

The Treaty Implementation Stage: The Practice and Issues

The fact that there is presently no coherent scheme for noting international obligations in domestic legislation is of particular concern to the Commission.[14] This problem arises when a statute implements the substance of a treaty, and either acknowledges its source or does not identify its international origins at all. Such statutes can lead to interpretation that may result in breaches of international law obligations.

In deciding whether a treaty can simply be implemented by giving 'force of law' to its wording, the Commission notes that, in the United States, treaties are categorised as either self executing, (effective on signature), or non-self executing (not effective until further action is taken). It suggests that this distinction could usefully be applied in New Zealand in this context.

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11 Supra at note 2, at para 91.

12 Signed in 1993. See ibid, para 94-96 for more detail.

13 The Commission notes that problems would arise with respect to treaty definition and the types of treaties that would be considered "important enough" to warrant parliamentary consideration and approval; see ibid, para 109-120 for further detail.

14 A treaty will not need to be implemented into domestic law in two very different situations: if it operates at the international level, affecting only the rights and obligations of states, and if the domestic legislation is considered as already giving effect to the treaty; supra at note 3, at para 128.

Law Commission Recommendations

The Commission's report endorses, reasserts and expands on the three recommendations proposed by the Honourable Justice Sir Kenneth Keith in an earlier draft of the report circulated in 1993.[15] The Commission's report finalises the material contained in this earlier draft and also adds further subsidiary recommendations. The three main recommendations relate to each of the three phases of the treaty making process; negotiation, acceptance, and implementation.

Firstly, the Commission recommends that:[16]

> [T]he value of notification and consultation with Parliament and affected or interested groups at the negotiating stage be recognised, with the purpose of developing and formalising such practices.

The Commission suggests that this recommendation could be implemented by making matters that are the subject of negotiations available via an Internet website. It also suggests that there should be increased parliamentary debate on foreign affairs and that any formal notification process could contain procedures for consultation and the receiving of submissions. In a subsidiary recommendation, the Commission suggests that either a special Treaty Committee be formed, or that relevant committees recommend which treaties are important and require parliamentary approval, rather than having an arbitrary categorisation process. In addition to this role, it is suggested that such a Committee could increase the expertise of parliamentarians in the treaty making process, and also consider treaties to which New Zealand is not a party but should perhaps join. The Commission also suggests that a notification process as to negotiations for a treaty, be made in a statement to the House by the responsible minister, or by a Treaty Committee.

In relation to the acceptance and approval of treaties, the Commission's main recommendation is that:[17]

> [C]onsideration be given to the introduction of a practice of the timely tabling of treaties so that members of the House can determine whether they wish to consider the government's proposed action.

The Report points out that the tabling of treaties gives Parliament the opportunity to debate treaty obligations. As a possible framework, the Commission suggests that all treaties subject to ratification, accession, acceptance or approval be tabled and subject to a "national interest analysis" and a Select Committee be given 15 sitting days to recommend whether any inquiry

15 "The Making, Acceptance, and Implementation of Treaties: Three Issues for Consideration", cited in *The Treaty Making Process*, supra at note 2, at ix.

16 Supra at note 2, at para 144.

17 Ibid, para 162.

into the treaty is necessary. Until the House has had an opportunity to debate the treaty, the Government will not ratify, accede, accept or approve the treaty until the inquiry is finished or the 15 day period has elapsed.[18] If urgency prevents a treaty being tabled before it is accepted, the Commission suggests the treaty be tabled at the first available opportunity. Parliament could then be given 15 days to decide whether the treaty should be disallowed. Parliamentary approval of the treaty could be shown by a simple House resolution.

As a subsidiary recommendation, the Law Commission suggests that:[19]

> [C]onsideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposes to become a party.

The Commission proposes that such impact statements should contain, inter alia, reasons why New Zealand should join the particular treaty, the obligations it would impose, the economic, social and environmental effects of joining and whether withdrawal or denunciation was provided for. The statement could also note what consultations have taken place with the community, interested parties and Maori, and whether the treaty has any impact on Treaty of Waitangi rights.

Finally, in its third recommendation, which relates to implementation, the Commission suggests that:[20]

> [S]o far as practicable, legislation implementing treaties or other international instruments give direct effect to the texts, that is, use the original wording of the treaties, and that when that is not possible, the legislation indicate in some convenient way its treaty or other international origins.

The governing principle is that domestic law must give full effect to treaty provisions as it must give full effect to other rules of international law. Also, the less directly a treaty is implemented, the greater the risk of inadvertent breaches occurring. If direct "force of law" could not be given, the source of a statute could be indicated in its title or preamble, or a definition be provided in the delegated or administrative powers.

Conclusion

The Commission's emphasis throughout the Report is on the need for Parliament to become more involved in the treaty making process. The report surmises greater involvement of Parliament would add legitimacy to the treaty-making process and would be consistent with the MMP environment.

At present, Parliament participates in treaty making only so far as

18 This framework adopts the recommendations proposed by the Foreign Affairs, Defence and Trade Select Committee; see ibid, para 165 for further detail.

19 Supra at note 2, at 179.

20 Ibid, para 195.

disapproving of treaties after they have been signed, and even then, only if legislation is required. If legislation is not necessary, then Parliament is not involved in the process at all. Given this noticeable absence as well as the lack of opportunity for public consultation, negotiation and debate, the current process is not only undemocratic, but also outdated. The Commission notes however, that the Report and the recommendations made are to be taken as a snapshot of what is deemed appropriate for the treaty making process at the moment, and that this process must always be ready to adapt to future needs.

Simon Hollander

Adams Take Two: The Students' First Port Of Call

ADAMS ON CRIMINAL LAW: 2ND STUDENT EDITION, edited by the Honourable Justice Robertson, Brooker's, Wellington, 1998.

The most comprehensive reference for substantive and procedural criminal law in New Zealand has for some time been *Adams on Criminal Law* ("*Adams*"), a loose leaf service provided by Brooker's. It is undisputedly the first port of call for practitioners of criminal law. It is the successor to Sir Francis Adam's *Criminal Law and Practice in New Zealand*[1] and has a list of contributors that reads like a "who's who" of criminal practice and scholarship, led by the Honourable Justice Robertson. *Adams* is an extensive annotation and commentary of all statutes germane to criminal law and procedure, supplemented by a few general commentaries.

A student edition of *Adams* was first published in 1996. It consisted of a few chapters of the loose-leaf service pared down and printed as a single book. This year sees the publication of *Adams on Criminal Law 2nd Student Edition* ("student edition")[2] which essentially updates the previous version in accordance with the loose-leaf service and includes, in addition, commentary on the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). The chapters included in this edition are: the Crimes Act[3]; the Evidence Acts;[4] the Bill of Rights,[5] and some short notes on the liability of corporations and the principles of severance, found in the last chapter.[6] The material covered reflects a range of topics including substantive criminal law, evidence in criminal trials, and law enforcement

1 (Wellington: Sweet & Maxwell, 1964).
2 Robertson (ed), *Adams on Criminal Law: 2nd Student Edition* (Wellington: Brooker's, 1998).
3 Ibid, ch 1.
4. Ibid, ch 2.
5. Ibid, ch 3.
6. Ibid, ch 4.

procedure. However, the book is substantially dominated by the Crimes Act chapter. Each section is a considerably distilled version of its loose-leaf counterpart. The shorter Bill of Rights and Evidence chapters are less strictly tied in to the clause-by-clause, annotative style of the Crimes Act chapter. They include the statutory text at the end of the commentary, which is generally a more "user-friendly" style for any newcomer to the material.

Since its pedigree derives from a practice oriented reference text, the student edition awkwardly adopts the role of a student text. A student unfamiliar with the criminal law is not likely to obtain much use from annotations and commentary to a few relevant statutes. A general criminal text, such as the well respected work of Smith & Hogan[7] is the logical choice for students seeking initial enlightenment on the basic principles of criminal law. New Zealand has had no such general text until very recently with the welcome arrival of *Principles of Criminal Law*[8] by Simester and Brookbanks.

It seems that the role fulfilled best by the student edition is in providing extra detail and analysis on particular statutory provisions, and this strength arises directly from the structure of the book. When a survey of relevant case law and comment on a particular provision of the Crimes Act is sought, it is a simple matter to turn to that paragraph. Annotated codes are more generally expected in practitioner's references, providing easy access to specific details for those who know what they are looking for. It can be imagined that the student edition would be useful for students studying criminal law beyond the first, and generally compulsory, course in New Zealand law schools. It also provides an excellent inexpensive supplement to a more general, principle-focused text, with its broader survey of cases and the intricacies of statutory terms. Ample indexing and tabulations of case law and statutory references are provided for navigating the book, facilitating rapid reference to a wealth of detail.

The material in the student edition is an eclectic mixture. The Crimes Act section is clearly most relevant to a student in a substantive criminal law course; however the provisions of that Act concerning police powers and trial procedures are covered with no less detail.[9] This procedural material, and the commentary on the Bill of Rights and evidence in criminal cases is likely to be more useful in classes on the law of evidence, civil rights and criminal procedure. The chapters included in addition to the Crimes Act risk the appearance of mere afterthoughts, added to make the coverage of the book appear broader. However, these sections are actually significantly more approachable than the Crimes Act section. Each deals with the subject matter under a number of discrete headings, rather than slavishly following the flow of a statute.

The student edition encompasses much of the significant recent case law, especially in relation to the Bill of Rights and the changes wrought by the much

7. Smith & Hogan, *Criminal Law* (London: Butterworths, 8th ed 1996).

8. Simester & Brookbanks, *Principles of Criminal Law* (1998); reviewed by Darise Bennington and Saul Holt.

9. Found in Parts XII to XIV of the Crimes Act 1961.

discussed case of *R v Grayson*.[10] As would be expected, the new edition also accounts for the recent legislative changes affecting the Crimes Act 1961 and the Evidence Act 1908, primarily arising from the Evidence (Witness Anonymity) Amendment Act (1997) and the criminal gang provisions of the Crimes Amendment Act (No 2) 1997. Despite its annotative format, the book supplies a wealth of informative commentary on the substantive issues behind the statutes. Taking the example of criminal attempts,[11] the student edition provides a discussion that is both clear and broad. The historical and philosophical origins are set out before subsequent paragraphs systematically dissect each element of *mens rea*, *actus reus* and the notorious problem of impossibility.[12] Far from providing a terse summary of the law as it stands, several competing views on the appropriate tests are explained and evaluated.[13] The student edition commendably provides reference to relevant academic critiques where appropriate. The same sort of comprehensive coverage is found in the commentary to all the provisions that touch on major areas of the underlying principles of criminal law. Most of the book is actually occupied by the Crimes Act chapter, which has developed into a considerable body of work in itself.[14]

Although it is billed in the Brooker's catalogue as a comprehensive text on the general principles of criminal law, and undoubtedly most principles are contained within it, the structure of the text does not appear to lend itself to the initial general study of the law which is useful to a student. It should be remembered that these are still early days in the life of the student edition of *Adams*. It has the potential to be more fully and usefully adapted to the role of a student reference, perhaps by restructuring to shield the reader from the rigours of the annotative model of its parent. As it stands in 1998, the student edition is an excellent source of material, but it remains in form not easily accessible to the student starting out on criminal law.

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10 [1997] 1 NZLR 399.
11. Embodied in Crimes Act 1961, s 72.
12. Supra at note 1, para CA72.01 et seq.
13. Ibid. In particular, paras CA72.12-72.21.
14. Chapter 1 runs to some 706 pages.

A Welcome Edition

PRINCIPLES OF CRIMINAL LAW, by Simester and Brookbanks, Brooker's, Wellington, 1998

The new text *Principles of Criminal Law*[1] is a welcome addition to the store of secondary materials on New Zealand's criminal law. It is the first text for students of criminal law in New Zealand that describes the present state of the law, through the application of the Crimes Act 1961, and analyses its effectiveness. It is a springboard for students and practitioners alike, with challenging ideas being presented to the reader regarding the appropriateness of different interpretations of the Act and the subsequent case law which has arisen from over a century of codification.

The text is orientated towards the student, commencing its discussion with a general introduction to the theory of criminal law and its underlying themes. It moves into a comprehensive analysis of the specific defences and offences provided by the Crimes Act 1961 and the common law. Part I defines and examines the nature and process of criminalisation and the content and role of the Rule of Law. Part II is concerned with the general principles of responsibility, and, in particular, examines the concepts of mens rea and actus reus. Part II also provides a useful discussion on strict and absolute liability offences, prefaced by one of the underlying themes of the text: the need to convict and punish only those who are guilty. Part III considers some of the more theoretically difficult facets of criminal liability - modes of inculpation - with chapters on the inchoate offences of attempt, conspiracy and incitement, and vicarious and participant liability for criminal offending. This part is particularly well structured and provides a comprehensive understanding of the tensions and issues present in this area of the law. Parts IV and V are concerned with exculpatory defences and specific offences respectively.

The highlight of *Principles of Criminal Law* is Part IV, which investigates the various codified and common law defences to criminal liability. Particularly impressive are the discussions on necessity, intoxication and the place of battered woman's syndrome within the defence of compulsion. These are current and topical, and regular revision of the textbook will ensure that it maintains its high level of relevance and applicability.

Criminal law is often viewed as a purely practical discipline. This is due, in part, to the high degree of codification of New Zealand criminal law. Despite the vast amount of quality academic criticism being produced and published in various New Zealand and overseas journals, this view is supported by the descriptive focus of traditional secondary materials in New Zealand – for example,

1 Simester and Brookbanks, *Principles of Criminal Law*, (Wellington: Brooker's, 1998).

Garrow & Turkington[2] and *Adams on Criminal Law* ("*Adams*").[3] Simester and Brookbanks succeed in fulfilling their aim[4] to provide a book that performs an inherently different function; to provide a significantly more academic and thought provoking approach to criminal law. The first four parts of the book, in particular, focus on an analysis of the criminal law with an emphasis on law reform rather than mere description. Thus, *Principles of Criminal Law* provides a link to academic criticism that, in many instances, gives students of criminal law an alternate view to orthodox prescriptions of law.

With the progression away from mere description, the authors are able to comprehensively chart the debate on contentious issues within the criminal law. While some readers may prefer a more pure approach to the study of criminal law, this reviewer found it extremely helpful to have the different views of academics and practitioners identified. In this way, *Principles of Criminal Law* provides the necessary impetus for both students and practitioners to better understand the politics surrounding the criminal law, especially in areas yet to be codified, such as the common law defence of necessity.

In the Preface, the authors state that their first ambition is to address a student audience.[5] As such, *Principles of Criminal Law* seeks to strike a balance between both the academic and theoretical discussion of law and the practicalities of case law and statute. The authors have achieved this goal remarkably well. Practitioners relying on *Adams* as their bible, and students relying on case law and the Crimes Act 1961 to pass a compulsory criminal law course, often do not recognise the usefulness of a sound understanding of the theoretical foundations of criminal law. An easy-to-read reference textbook, such as *Principles of Criminal Law*, may ensure that the theory of criminal law remains in the consciousness of both students and practitioners. In addition, students will find the textbook further enhanced with the publication of a cases and materials companion, currently in the pipeline.

Principles of Criminal Law will also be of particular assistance to practitioners with regard to the preparation of appeals and substantive defences, both of which require a sound understanding of the theory of law. Thus, Simester and Brookbanks (and Orchard who provided the chapter on culpable homicide) have published a comprehensive textbook that reflects the current position of New Zealand's criminal law and also aptly presents controversial issues inherent in aspects of the law.

The authors have clearly achieved their goal of providing a book that occupies a unique role, so it is disappointing that Part V is structured so similarly to *Adams*. This part of the text outlines the specific offences of culpable homicide, non-fatal offences of violence, sexual offences, theft and

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2 Criminal Law in New Zealand: (Wellington: Butterworths, 1991). Reviewed in this edition.

3 Robertson (ed), *Adams on Criminal Law; 2nd Student Edition* (Wellington: Brooker's, 1998).

4 Supra at note 1, at vii.

5 Ibid.

receipt, other forms of stealing and deception and fraud. Each offence is fully investigated with regard to its elements, available defences and requirements of proof. Seemingly, Part V is an anomaly to the rest of the book, although it continues to provide a different perspective on some issues and is oriented more towards law reform than *Adams*. In seeking to provide a complete text geared toward the first-time student of criminal law, it is necessary to have a description of the specific offences. Hence, duplication of *Adams* is inevitable, and perhaps a necessity, if the authors hope to provide an integral analysis of New Zealand's criminal law. However, it should also be possible to provide more theoretical discussion within Part V to distinguish it from *Adams*.

This long-awaited text fills many of the gaps left by the orthodox sources of criminal law, by providing access to both academic criticism and suggestions for reform. While maintaining practicality for both students and practitioners, it imparts a base from which to understand the foundations of criminal law.

Darise Bennington and Saul Holt

Courting Controversy: The Uncivil Politics of Law and Order

RETHINKING LAW & ORDER, by Hogg and Brown, Pluto Press Australia Ltd, Annandale, NSW, 1998.

Professor David Brown and Russell Hogg, noted scholars and commentators in the field of criminology, provide a fresh perspective on law and order politics in *Rethinking Law and Order*. While the primary focus is the Australian political sphere, some international comparisons are made, and the ideas espoused have relevance for all jurisdictions. Though often provocative, the proposals justifiably challenge orthodox conceptions of law and order.

The authors present an alternative perspective on criminology; that both public and political debates surrounding law and order policies are narrow and closed, rather than open and inclusive[1] The current trend is such that people with alternative opinions and viewpoints on law and order are frowned upon and viewed with suspicion. The authors refer to this as the "uncivil politics of law and order" which is a central theme of the book. The reader is reminded that it is important to recognise that in attempting to preserve civility in society, there is a risk of using means that are *in themselves* uncivil. The more the punishment is allowed to mirror the crime, the greater the risk of losing sight of the

1 Hogg and Brown, Rethinking Law and Order (Annandale: Pluto Press Australia Ltd, 1998), 1.

distinction between the two. As a consequence, the framework of a civil society is threatened instead of being preserved.[2]

The authors use the term "law and order commonsense" to reflect the popular assumptions that are made about crime and punishment, namely that the problem of crime is so serious that urgent knee-jerk reactions are often taken to stem its flow.[3] The authors see such "commonsense" as a hindrance in the effort to reduce levels of serious crimes through more effective law and order policies.[4] Of even greater concern is that "commonsense" also forms the starting point for debates and empirical research on law and order set by "primary definers", such as Judges, Ministers, Attorney Generals and, to an extent, the media.[5]

Of equal importance is the notion of "hierarchy of credibility". This suggests that the views expounded by "primary definers" are to be preferred and are more widely canvassed by the media, thus resulting in their entrenchment in popular perception. Therefore, the authors argue that the real problem is not a crisis of law and order but a "crisis of perspective".[6] The authors espouse seven elements of "law and order commonsense" which form the "bedrock of this crisis of perspective".[7]

One of these seven elements is the common assumption that the Australian crime rate is rapidly escalating. Any challenge to this is seen as "flying in the face of 'the facts' or downplaying the seriousness of the situation".[8] Accordingly, Hogg and Brown regard this assumption with some scepticism:[9]

> The news media repeatedly depict crime as a monolithic entity which is constantly and inexorably rising. Such claims are often made on the basis of an unquestioned reliance on the statements and data, such as crime statistics, provided by police and other 'primary definers'.

This is exacerbated by the politicians and the media, who manipulate empirical data to bolster particular ideologies or agendas. Thus, when statistics illustrate a trend that casts doubt on commonsense assumptions, they are discredited or minimised. Hogg and Brown forewarn the reader that statistics should not be unquestionably relied upon. Although they place strong emphasis on such data throughout the book, these are qualified in such a manner as to direct the reader towards broader related issues.

Hogg and Brown proceed to deal with the problem of violence in Australia, placing particular emphasis on interpersonal violence. Among the issues covered are violence among family members, sexual violence, and marginalisation within

2 Ibid, 3.
3 Ibid, 4.
4 Ibid, 18.
5 Ibid.
6 Ibid, 21.
7 Ibid.
8 Ibid, 23.
9 Ibid, 22. See also the concept of social knowledges at 7.

minority groups. Although it is acknowledged that violence is widespread in Australia, the authors claim that generally its extent is greatly exaggerated.[10]

Within this distortion the media also trivialises certain categories of crime, such as tax fraud and white collar crime, whilst amplifying crimes such as theft and robbery. Although the latter are important as they affect individuals directly, white collar crime has drastic implications for the community as a whole: although an indirect effect, there is a potentially enormous economic cost to society.

Those who are politically inclined will find this book informative due to the authors' consideration of various perspectives of law and order. As well as recognising that law and order has electoral significance (political parties often use the 'tough on crime' stance in their political campaigns in the hope of attracting votes), Hogg and Brown also draw attention to the fact that the politics of law and order can be used "as a medium for defining and dramatising other social divisions within society."[11] An excellent contemporary example of this in Australia is the exploitation of the issues of race and immigration by Pauline Hanson and the 'One Nation' political party. The authors' approach in dealing with these various political perspectives is not a mere exposition of the various philosophies involved. They contemplate the practical measures and innovations these ideologies have to offer, and evaluate points of commonality and divergence.

Rethinking Law and Order offers an innovative approach to an age-old debate. It provides a wealth of information for the general public and is a useful tool for politicians and policy makers. With the upcoming elections in Australia, it will be interesting to see how the theories and ideas in this book come into play. The authors provide a seductive analysis of law and order which is often difficult to refute. Notably, absent from the authors' analysis is the consideration of the impact of crime in cyberspace, particularly given the exponential growth of the Internet. Nevertheless, the book is well written and thoroughly researched. The use of empirical data and the thought provoking conclusions make the book an interesting, yet challenging read.

Jude C Pereira LLB

10 Ibid, 78.
11 Ibid, 118.

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