VICTORIA LAW FOUNDATION LAW ORATION

Banco Court, Supreme Court of Victoria — 21 July 2016

OF MOZART, MODERN DRAFTING AND THE CRIMINAL LAWYERS' LAMENT

Justice Mark Weinberg[1]

1 May I begin by thanking the Victoria Law Foundation for having organised this evening's event. It is an honour to have been invited to speak to you tonight. I am, of course, conscious of the fact that among previous presenters in this series have been a number of great legal luminaries.

2 I have no doubt that some of you have come here this evening for one reason only. That is to see how, if at all, Wolfgang Amadeus Mozart, perhaps the greatest musical genius of all time, can legitimately be linked to a subject as soporific as modern drafting, still less to a subject as parochial as the ongoing grievances of the criminal bar.

3 There will be cynics among you who believe that I have included Mozart in the title of this paper simply to bolster the attendance tonight. As I hope to demonstrate, you are mistaken. You will have to wait in order to find out why.

4 As the Munchkins said to Dorothy, 'It is always best to start at the beginning'. In my case, that was as a law student, almost exactly 50 years ago. It was then, under the expert guidance of a great teacher, Professor Louis Waller, that I first came across the tragic tale of Messrs Dudley and Stephens, and the events surrounding the shipwreck of the yacht Mignonette. Since that time, I have been both intrigued and fascinated by the criminal law.

---

[1] Victorian Court of Appeal. The views expressed in this paper are, of course, my own. They should not be taken to reflect the opinions of any other member of my Court. I wish to acknowledge the assistance given to me in the preparation of this paper by my former Associate, Louise Fedele, and by Justice Kaye's present Associate, Bridie Kelly.

5 In the 1960's, the criminal law both in this State, and throughout much of the rest of Australia, was largely common law. Many of the most serious offences, murder, manslaughter, rape, as well as assault, and larceny were judge-made. So too were the general defences, such as provocation, self-defence, duress, intoxication, and insanity. The same was true of inchoate doctrines, such as complicity, attempt, incitement, and conspiracy.

6 The rules governing criminal procedure developed largely from court decisions, as did the law of evidence. As for sentencing, it did not exist as a separate body of legal doctrine.

7 Of course, none of that is any longer true. Today, our criminal justice system is basically governed by statute. Putting to one side the bluster of Rumpole, and his constant invocation of 'the golden thread', the criminal law is all about statutory interpretation.

8 The shift from common law to statute, and in some cases, to codification, is generally regarded as having been both necessary, and desirable. Unquestionably, the criminal law as it stood was in dire need of reform. Whereas criminal law, perhaps above all other branches of the law, ought to be created in a systematic and principled manner, it has all too often developed by way of ad hoc response to particular situations which have confronted courts. Fifty years ago, the criminal law had come to be seen as incomprehensible, inconsistent, and uncertain.

9 Academic lawyers, in particular, have long led the push for legislative reform in this area. And they were right to do so. But reform can come at a price. In some respects, that price is continuing to be paid.

10 The case for legislative reform and perhaps, ultimately codification, is not based upon the misplaced assumption that change of this kind is likely to reduce the incidence of crime. Rather, it is based upon a belief that when reform is carefully implemented, the law can be made more accessible, and coherent.

11 It is of course possible to achieve these goals through legislation that is well thought out, and appropriately drafted. In England, the *Theft Act 1968* was a carefully considered 'mini' codification of almost the entire law relating to property offences. However, even then, the courts have encountered difficulty with some of its provisions.

12 The courts in England have also struggled with other legislative reforms. As Professor A T H Smith correctly observed,[2] the extraordinary interpretation given to the *Criminal Damage Act 1971* by the House of Lords in *R v Caldwell*[3] and to the *Road Traffic Act 1972* in *R v Lawrence*[4] would give even the most hardened advocate of codification pause for thought. The same could be said of their Lordships' judgment with regard to the statutory offence of conspiracy under the *Criminal Law Act 1977* in *R v Ayres*[5], and their extraordinary treatment of the offence of attempt under the *Criminal Attempts Act 1981* in *Anderton v Ryan*[6].

13 As Professor Smith goes on to say, there has long been a movement in favour of codification of the entire criminal law. The aims of any code must be to promote accessibility, comprehensibility, consistency and, certainty. A code should digest an entire field of law consisting of decisions and legislation and weld them into a coherent whole. It must aspire to being comprehensive, and must envisage that, ultimately at least, common law doctrines will be abolished.

14 A function of a code should be to provide all those who are concerned in some way with the criminal justice system (and that includes those who are subject to that system) with a fixed starting point for ascertaining what the law is.

15 The common law has generally failed in that regard because it did not afford that common base. Even though when a code is enacted there will always be

---

2 'Codification of the Criminal Law (1) The Case for the Code,' [1986] Crim LR 285, 286.

3 [1982] AC 341.

4 [1982] AC 510.

5 [1984] AC 447.

6 [1985] 2 All ER 355.

difficulties of interpretation, there will at least be fundamental agreement as to what it is that is being construed. Finally, a criminal code, as distinct from an ordinary statute, should permit judges and others who have recourse to it to look for and find answers within the four corners of the document itself.

16 In Victoria we have, in one sense, only just begun the process of codification. Thus far, that process has essentially been confined to criminal procedure and evidence. The Commonwealth, on the other hand, has embraced codification wholeheartedly, but not always, as I hope to demonstrate, to good effect.

17 As regards the substantive law, in this State most serious offences, murder and manslaughter apart, are now governed exclusively by statute.

18 I should, at this stage, make a disclaimer. Much of my work in the Court of Appeal consists of hearing criminal appeals against both conviction and sentence. That means that I see the criminal law through the prism of legal argument. I recognise that this is a distorted picture because of course the vast majority of criminal trials concern facts, and the law very much occupies a subsidiary role.

19 Nonetheless, my work on this Court means that I am privy, in all sorts of ways, to the views of those who are forced on occasion to engage with legal issues, practitioners and judges alike. My assessment is that few of my judicial colleagues, and even fewer of my friends at the criminal bar, would have anything at all good to say about large swathes of our current criminal law.

20 In my opinion, a number of their complaints have substance. The criminal law of today is not the criminal law of the past. It is far more complex, and technically difficult to master. In some respects, and for some judges and practitioners, it has become almost a nightmare.

21 In this paper, I will seek to defend four propositions regarding the current state of our criminal law:

a) legislatures, both state and federal, have enacted too many laws;

b) a number of these laws are incredibly prolix;

c) some of the provisions contained within these laws are unnecessarily complex, lack coherence, and are far too prescriptive; and

d) the laws are too frequently amended.

Too many laws

22 In Victoria today, there are an extraordinary number of statutes that deal, in various ways, with aspects of our criminal justice system.

23 In the field of substantive law these include the *Crimes Act 1958*, the *Drugs Poisons & Controlled Substances Act 1981*, and the *Jury Directions Act 2015*. With regard to criminal procedure, they include the *Criminal Procedure Act 2009*, the *Crimes (Mental Impairment Unfitness to be Tried) Act 1997*, and the *Bail Act 1977*. The law of evidence is now essentially codified by the *Evidence Act 2008*. Finally, sentencing is encompassed within the *Sentencing Act 1991*, and to some degree within the *Confiscation Act 1997*.

24 There are numerous other state Acts that create criminal offences of various kinds, as well as regulating the investigation and prosecution of these matters. See for example, the *Children Youth and Families Act 2005*, the *Corrections Act 1986*, the *Firearms Act 1996*, the *Occupational Health and Safety Act 2004*, the *Road Safety Act 1986*, and the *Serious Sex Offenders (Detention and Supervision) Act 2009*.

25 Almost 30 years ago, I wrote the forward to the first textbook on Commonwealth criminal law published in this country.[7] It was a relatively short book, encompassing within some 300 pages virtually all aspects of substantive law, procedure and sentencing.

---

7 Deborah Sweeney and Neil John Williams, *Commonwealth Criminal Law*, (The Federation Press, 1990).

26 A book of that length can still be written today, but it has become almost impossible to deal, within it, with the entire body of federal criminal law.[8] Over the past 20 years there has been an explosion of Commonwealth criminal law. It now encompasses, inter alia, such areas as bribery of foreign public officials, people smuggling (both in its simple and aggravated forms), terrorism, offences against humanity and related crimes, slavery, trafficking in persons, child sex offences outside Australia, trafficking controlled drugs and precursors, identity crime, money laundering, telecommunications offences, and computer offences.

27 Unlike Victoria, the Commonwealth has essentially dealt with the bulk of criminal offences within a single statute, which represents at the same time a complete codification of the law. I refer in that regard to the *Criminal Code Act 1995* ('the Code').

28 The *Crimes Act 1914* deals with police powers of investigation, and also contains within in it Part 1B, the sentencing regime that operates in relation to all Commonwealth offences.

29 In addition, the Commonwealth has its own statute dealing with confiscation of assets, the *Proceeds of Crime* Act *2002*.

30 Anyone charged with a Commonwealth offence will be tried in a state court exercising federal jurisdiction. Accordingly, the provisions of the Victorian *Criminal Procedure Act 2009*, and the Victorian *Evidence Act 2008* will apply to such a trial, via the operation of the *Judiciary Act 1903* (Cth).

31 As well, both the *Corporations Act 2001* and the *Competition and Consumer Act 2010*, make provision for a number of indictable offences, all of which involve contravention of federal criminal law. I note with interest that it has been reported this week that the first indictable cartel prosecution under the *Competition and Consumer Act 2010* has been launched. Any charges laid under those provisions will,

---

8 Troy Anderson, *Commonwealth Criminal Law* (The Federation Press, 2014).

I understand, be heard in the Federal Court. Given the extraordinary complexity of the relevant cartel provisions, I can only wish my colleagues in that Court the very best of luck.

32 All this means that anyone wanting to practise criminal law must have at least a good working knowledge of some 20 or so separate Acts of Parliament, State and Federal. That contrasts starkly with European systems, which have managed to set out the entirety of their criminal law, and their law of criminal procedure, within just one or two tightly drafted codes.

33 Federalism will always pose difficulties, not the least in coping with the overlap between federal and state laws. There exists the possibility for unanticipated constitutional difficulty to arise.[9]

34 Putting that somewhat obscure issue to one side, it is worth asking whether we need so many quite separate and distinct statutes, and codes, to govern the operation of our criminal justice system. My answer would be an emphatic 'No'.

Laws that are unduly prolix

35 It will come as no surprise to hear me say that I believe that many of our laws are expressed in language that is convoluted, and poorly expressed.

36 Dealing first with Victorian legislation, it is sobering to note that in 1958, at the time of the last consolidation, the *Crimes Act* ran for 208 pages. Today, it extends to 645 pages. Of course, the reach of the criminal law has grown over the years and that provides a partial explanation for this apparent verbosity. Moreover, as I said earlier, there is little now left of the common law. It follows that Parliament must say more if it is to define, and regulate criminal law. Even so, the sheer size of this Act, in its present form, must invite scrutiny.

---

9 *Dickson v The Queen* (2010) 241 CLR 491.

37 It was not until 2009 that the legislature first felt the need to enact a comprehensive statute dealing with criminal procedure. The *Criminal Procedure Act* has now blown out to 398 pages.

38 Twenty years ago, the *Drugs, Poisons & Controlled Substances Act 1981* managed to deal with the entire body of law relating to illicit drugs in 152 pages. That Act now runs to 393 pages.

39 Prior to the enactment of the *Sentencing Act 1991*, there was no comprehensive statute dealing with sentencing. That Act, in its original form, ran for 120 pages. It now extends to 541 pages. I note that the current edition of Fox & Freiberg,[10] runs for 1073 pages. That is just a few pages short of the 1200 pages or so that made up the first edition of War and Peace.

40 The *Confiscation Act 1997*, which enables confiscation of tainted property and the proceeds of crime, originally ran for 183 pages. It now extends to 428 pages.

41 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* originally ran for 88 pages. It has now grown to 206 pages.

42 Both the Commonwealth and New South Wales enacted uniform evidence legislation in 1995. At that time, Victoria elected not to follow suit. However, in 2008 Victoria fell into line. The *Evidence Act* now runs for 221 pages.

43 If, as I think, Victorian statutes are becoming ever more verbose, the position regarding Commonwealth statutes is, if anything, worse.

44 The *Crimes Act 1914*, when originally enacted, managed to set out the entire body of Commonwealth criminal law, as it then stood, in 25 pages. By 1998, that Act had grown to 331 pages. In its current version, it extends to an astonishing 857 pages. It encompasses Part 1AA, which is headed 'Search, information gathering, arrest and related powers,' and covers 58 pages. There then follow a series of

---

[10] Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014).

extraordinarily detailed provisions which deal primarily with police powers in the context of terrorism offences.

45 When we finally get to Part 1B of the Act (believe it or not at page 281) we come to the provisions that deal with sentencing of federal offenders. These provisions run for close to 100 pages, and are among the most obscure, and difficult to follow, that the Commonwealth has ever enacted. I shall have more to say about them in due course. The remainder of the Act deals with a series of disparate topics including, eventually, some of the traditional federal offences, such as those against government, and those relating to the administration of justice.

46 This is far from the end of the tale. In 1995, the Commonwealth enacted the *Criminal Code Act,* to which the Code is a schedule. The first tranche of the Code contained 28 pages. That was understandable because it was always intended that the legislation be introduced in stages. In accordance with the methods traditionally used for drafting criminal codes, what may be termed the 'General Part' was enacted first.

47 Within a decade, the Code had grown to 451 pages. It now runs for 887 pages. I do not wish in any way to offend those who doubtlessly laboured conscientiously to draft the Code. I must say, however, that I know of no one who has ever had to deal with the Code who has had a single kind word to say about it.

48 Finally, and in the same vein, the Commonwealth has enacted its own confiscation legislation. In its original form, the *Proceeds of Crime Act 1987* ran for 91 pages. The current version of that Act, the *Proceeds of Crime Act 2002*, runs for 388 pages.

49 This growth, in both the number and length of Commonwealth statutes is, of course, by no means confined to the criminal law. In their extremely thorough and helpful text, Professors Pearce and Geddes note that in 1950, the Commonwealth Parliament passed 80 Acts, all of them published in just one slim volume of 281

pages.[11] In 2000, 372 Commonwealth Acts were passed, and published in five volumes, taking up 4383 pages. It is a sobering thought that the amount of legislation enacted by the Commonwealth each year is now so great that I understand that it is no longer produced in hardcopy.

50 The figures set out above are depressing. They speak for themselves.

Unduly complex and excessively prescriptive

51 The former Chief Justice of Australia, the Honourable Murray Gleeson, when delivering this very oration in 2008 stated:

> One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now found in Acts of Parliament rather than judge-made principles of common law…a federal judge devotes almost the whole of his or her judicial time to the application of an Act of the federal parliament, whether it be about corporations law or bankruptcy or family law or migration.[12]

52 His Honour could have made much the same point regarding the work of state judges, and their work in the field of criminal law.

53 It is the inescapable duty of the court to endeavour, as best it can, to ascribe some meaning to every provision within every statute. In that task, the court may be assisted by reference to various canons of construction. However, it is fair to say that for every interpretive principle that can be called in aid, there is likely to be an equal and opposite interpretive principle that suggests a different answer.

54 Of course, the task of interpretation will also be assisted by making assiduous use of the doctrine of precedent.

55 In the course of an address given in 2007, Chief Justice Spigelman said:

> Law is a fashion industry. Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal

---

11 Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia*, (LexisNexis, 8th ed, 2014), [1.2].

12 Chief Justice Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights,' Victoria Law Foundation Oration, Melbourne, 31 July 2008, 1.

> interpretation – a focus on the plain or ordinary meaning of particular words — is no longer in vogue. Purposive interpretation is what we do now in constitutional, statutory, and contractual interpretation, there does appear to have been a shift from text to context.[13]

56 Perhaps the former Chief Justice spoke a little too soon. Later pronouncements by the High Court, exemplified by that Court's judgment in *Thiess v Collector of Customs,*[14] have arguably shifted the balance back towards textualism, with just a hint of qualification. In *Thiess*, their Honours said:

> Statutory construction involves attribution of meaning to statutory text. As recently reiterated:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[15]

57 Some pundits have suggested that modern drafting could be improved by greater use of what is described as 'plain English.' Pearce and Geddes[16] bell that particular cat by referring to *R v Roach*[17], where Tadgell J pithily observed:

> Plain English alone achieves nothing. To be useful it must run in tandem with clear thought.

58 The learned authors go on to refer to *Halwood Corporation Ltd v Roads Corporation,* where Ormiston JA, referring to 'plain English drafting', had this to say:

> I am not sure that, in the right hands, the redrafting of statutes and other legal documents could not be of benefit to all. The vice, so far, of plain English is not so much in the concept as in its execution. It is no use redrafting statutes unless the person responsible for the redrafting has a complete understanding of what it is that has to be achieved. It is difficult enough to amend existing laws let alone to rephrase and reorganise statutory concepts which have been understood in a particular way over many years. To achieve a satisfactory

---

13 Chief Justice Spigelman, 'From Text to Context: Contemporary Contractual Interpretation,' Risky Business Conference, Sydney, 21 March 2007, 1.

14 (2014) 250 CLR 664 ('*Thiess*').

15 Ibid. 671. The passage cited is taken from *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

16 Dennis C Pearce and Robert S Geddes *Statutory Interpretation in Australia* (Butterworths, 8th ed 2014), [2.44].

17 [1988] VR 665, 670.

> end a very deep knowledge of the legal concepts is required, in order to achieve simplification of language which does not defeat the objects of the legislature. Moreover 'plain English' cannot simplify complex concepts and it is more frequently the need to simplify the concepts that is required rather than the use of 'modern' language. Again, well instructed minds can achieve that end but if the concepts are not to be changed, clarity will not always lead to brevity. [18]

59 Judges these days often find themselves having to grapple with seemingly intractable problems of interpretation. In many cases, a constructional choice must be made. That choice is not always an easy one. The problems are exacerbated, at an appellate level, when it is understood that any interpretation accorded to a particular provision may have to be explained to a lay jury, by way of jury direction.

60 Regrettably, there have been a number of instances where, by reason of poor drafting, the criminal law has been left in a state of uncertainty.

61 I have spoken in the past about some of the provisions that have given rise to particular difficulty. Fortunately, a number of these have recently been repealed. I refer in particular to the abortive attempts in the past, in this State, to legislate for both statutory self-defence, [19] and the elements of rape.[20] Thankfully, we no longer have to concern ourselves with these provisions.

62 There are, however, a number of examples of poor drafting to be found in current statutes that continually give rise to problems. For some reason, many of these are to be found in the *Sentencing Act*, which I must confess is not my favourite piece of legislation.

---

18 [1998] 2 VR 439, 452.

19 Sections 9AC, 9AD, 9AH of the *Crimes Act 1958* which until these provisions were recently repealed set out, in their entirety the law of statutory self-defence in this State. They also created the unwieldy, and conceptually confused offence of 'defensive homicide.' I criticised these provisions in a paper delivered at the University of Melbourne in August 2011 on the occasion on the Peter Brett Memorial Lecture. See generally, Justice Mark Weinberg, 'The Criminal Law – A Mildly Vituperative' Critique,' (2011) 35 MULR at 1177.

20 Sections 36, 37, 37AA, 37AAA, 37B and 38(2) of the *Crimes Act 1958*, which, until most of them were repealed in 2014, set out in statutory form the law relating to the offence of rape, with particular emphasis upon the element of absence of consent. The interpretation of these provisions created extraordinary difficulty. See *Getachew v The Queen* (2012) 248 CLR 22.

63 A recent example is s 44, which was introduced in 2014. That section enables a court when sentencing an offender to make a community correction order in addition to imposing a sentence of imprisonment. However, the section goes on to provide that a court may do so:

> only if the sum of all the terms of imprisonment to be served (after deduction of any period of custody that under section 18 is reckoned to be a period of imprisonment or detention already served) is two years or less.

64 This mode of expression illustrates a good deal of what is wrong with some modern drafting. Apart from its turgid and obscure language, s 44 has already created a number of problems for trial judges. It has also caused difficulty for the Court of Appeal. The section cannot readily be reconciled with the obligation imposed by s 11 of the same Act to fix a non-parole period (save in narrowly defined, and usually irrelevant circumstances), in any case in which the total effective sentence is for a term of two years or more. This has led a number of County Court judges to sentence in a manner that has been described by the Court of Appeal (perhaps unkindly) as 'artifice,' resulting in a spate of sentences of exactly 23 months' duration. The method by which that 23 month period is achieved is often contrary to basic sentencing principle. This is all done so that imprisonment can be combined with a community correction order, which may be a laudable object. However, it involves working backwards from a desired result, rather than dealing appropriately with each offence on its merits.[21]

65 Another example of infelicitous drafting, resulting not just in complexity, but also confusion, comes from Parts 2A and 2B respectively of the *Sentencing Act*. These provisions create special sentencing regimes for what are described as 'serious offenders' and 'continuing criminal enterprise offenders,'.

66 With regard to 'serious offenders', s 6B divides these into four classes: 'serious sexual offenders', 'serious violent offenders', 'serious drug offenders,' and 'serious arson offenders'. In order to tell whether a particular offender falls within one or

---

21 See for example, *Dordevic v The Queen* [2016] VSCA 166.

other of these classes, it is first necessary to turn to a schedule to the Act to discover what particular offences can trigger the operation of these provisions. There is then a set of elaborate criteria outlining the factors that are specifically relevant to whether the offender is, in fact, a 'serious offender'. For example, the court is required to have regard to a conviction or convictions for a relevant offence irrespective of whether recorded in the current trial or hearing, or in another trial or hearing, or in different trials or hearings heard at different times, or in separate trials of different charges in the one indictment.

67 Supposedly, the point of all this is that s 6E provides that every term of imprisonment imposed by a court on a 'serious offender' for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term.

68 If this all sounds extraordinarily complex, that is because it is. Worse still, experience has shown that these provisions are basically useless. So far as I can tell, s 6E, enabling a sentencing judge to impose a disproportionate sentence upon a 'serious offender', has yet to be invoked, despite that section having been introduced some 20 years ago. It should have been obvious to those who came up with the idea for this section that this would be its fate. Sentencing judges have always had ample power to impose appropriate sentences for offences such as rape, without having to embark upon the slippery path of disproportionate sentencing.

69 I note that some years ago s 6E was described by the Court of Appeal as 'draconian'.[22] All that saves the section from that epithet today is that it is effectively a 'dead letter'.

70 Much the same can be said of the 'continuing criminal enterprise' provisions contained within Part 2B. Theoretically, the effect of s 6I, within that Part, is to double the maximum penalty that is available when sentencing an offender who

---

22 *R v Higham* [1997] 1 VR 280, 283 (Charles JA, Winneke P agreeing).

meets the criteria for that description. In practical terms, the section is rarely used, in any direct sense. Once again, there is ample scope within orthodox sentencing principles to deal effectively with any major fraudster who has committed a series of offences, each involving more than $50,000.[23]

71 A third area where the *Sentencing Act* has been shown to be ill considered in part, as well as badly drafted, lies in what is described as 'baseline sentencing'. As is well known, in 2014, the Victorian Parliament introduced this form of sentencing, with the obvious aim of increasing sentences for 'baseline offences'.

72 The entire exercise was always doomed to fail. The case that exposed the fallacy underlying what the legislature had purported to do was *DPP v Walters (a pseudonym)*.[24] It concerned a sentence imposed for incest. The baseline provisions declared Parliament's intention to be that at some unspecified time in the future, a sentence of ten years' imprisonment would become the 'median sentence' for that particular offence.

73 As the majority of the Court of Appeal observed:

> Parliament has thus expressed its intention using the language of statistics. 'Median' is a statistical term used to identify the middle number in a series of numbers.[25]

74 The majority accepted that the legislature's intent could readily be discerned. However, in a landmark judgment, the Court held that this intent could not be implemented. That was because the baseline provisions were silent as to how a judge seeking to impose a sentence for incest was to do so 'in a manner compatible with' that stated legislative intention. In effect, there was a gap or defect in the legislative regime, which, according to the majority, was simply incurable. It was not the role of the Court to fill that gap, or cure that defect.

---

23 The *Sentencing Act* also now allows for accused to be charged with what are called 'course of conduct' offences. These are different from representative counts, as well as what are described as 'rolled up' counts which can be used on a plea of guilty. The provisions are complex, and will give rise to future difficulty.

24 [2015] VSCA 303.

25 Ibid [5].

75 I could spend far more time on the defects associated with the *Sentencing Act*, but I will spare you my thoughts on that matter. Instead, I will move very briefly to consider two of the problem areas that have always bedevilled aspects of the *Evidence Act 2008*. These are hearsay, and tendency and coincidence.

76 As regards hearsay, s 59 of the *Evidence Act* relevantly provides:

> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
>
> (2) Such a fact is in this Part referred to as an ***asserted fact***.
>
> (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

77 Section 60 goes on to state:

> (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
>
> (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2)).
>
> …..

78 I would question whether provisions drafted in such opaque terms, can possibly match, for simplicity and clarity of exposition, the following formulation:

> Evidence of a statement made to a witness by a person who is not himself [or herself] called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. [26]

79 Why could not the hearsay rule be defined, for statutory purposes, in the terms formulated by Sir Rupert Cross:

---

[26] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

> Assertions of persons, other than the witness who is testifying, are inadmissible as evidence of the truth of that which was asserted.[27]

80 The problem is that the drafter wishes to encompass within one or two sections of an Act a body of learning that developed over many years regarding the scope of the hearsay rule, and in particular whether it extends to 'implied assertions.' Two points can be made. First, that question will only arise in the rarest of cases. Secondly, this issue has largely been resolved by the courts. The attempt to compress all of the learning on this subject into a statutory definition has led to confusion, and on occasion to error. It might be thought that the cake is not worth the candle.

81 As regards ss 97 and 98 of the *Evidence Act 2008*, dealing respectively with tendency and coincidence evidence, there is little that I can usefully say at this point. These sections provide constant work for the Court of Appeal, and are the bane of many trial judges. They represent the worst features of an Act that is otherwise well drafted and has succeeded in putting the law of evidence on a sound conceptual foundation. The relationship of these provisions with s 55 (the test for relevance), and s 137 (the probative value versus prejudice balancing test) is at best uncertain. The High Court's recent decision in *IMM v The Queen,*[28] has done little to resolve that uncertainty.

82 Moving then to Commonwealth statutes which continually lead to trouble for both judges and practitioners, the provisions of the Code occupy a starring role. Take for example, the treatment accorded to the term 'Dishonesty' in the Code. That term is defined as meaning:

> a) dishonest according to the standards of ordinary people; and
>
> b) known by the defendant to be dishonest according to the standards of ordinary people.

---

27 Rupert Cross, *Evidence*, (Butterworths, 3rd ed, 1967) 380.

28 (2016) 330 ALR 382.

83 The criminal lawyers in this audience will immediately recognise this formulation as importing the two part objective and subjective test for dishonesty adopted by the English Court of Appeal in *R v Ghosh*.[29] That approach is squarely at odds with the wholly objective test adopted in *Peters v The Queen*[30] in relation to the offence of conspiracy to defraud, under s 86(1)(e) of the *Crimes Act* 1914. The question then arises as to whether the Code definition of dishonesty applies to the term 'dishonesty' in relation to other Commonwealth legislation. That includes, for example, the *Corporations Act 2001*. Alternatively, is the *Peters* definition applicable to that Act?[31] Issues of that kind are part of the constant struggle to make sense of the Code, and to apply it in a coherent manner.

84 Another problem that arises under the Code is the treatment accorded to drug offences. The legislature, in its wisdom, has chosen to have gradations of offending in drug cases, all linked to the quantity of the drug in question. This leads, almost inevitably, to charges being contested where there is no issue as to the fact of drug dealing, but only a dispute as to knowledge of the exact quantity of the drug in question. That is hardly a sensible approach, particularly when there are multiple gradations within the statute.

85 Worse still, this form of drafting, which is widely used throughout the Code, unnecessarily complicates trials. There is potential for error, in relation to a number of offences, given that different fault elements are applicable to different aspects of the conduct elements of these offences. This renders the task of directing a jury extraordinarily difficult.

86 These comments are particularly applicable to the money laundering provisions under the Code. It is almost impossible to understand why we should have six separate gradations of dealing in the proceeds of crime, depending upon the value of the money and other property in question. These range from money or

---

29 [1982] 1 QB 1053.

30 (1998) 192 CLR 493, ('*Peters*').

31 See *SAJ v The Queen* [2012] 36 VR 435.

property worth $1 million or more (s 400.3 — max 25 years), $100,000 or more (s 400.4 — max 20 years), $50,000 or more (s 400.3 — max 15 years), $10,000 or more (s 400.6 — max 10 years), $1000 (s 400.7 — max 5 years) and any other value (s 400.8 — max 12 months). It is hard to imagine a worse form of drafting for an offence of this kind. As I previously indicated, the matter is made more complex by the fact that different fault elements apply to different components of the offence.[32]

87 Turning from the problems associated with the drafting of the Code to the sentencing provisions contained within Part 1B of the *Crimes Act*, the key provision is s 16A(2). That sub-section sets out the various matters to which a sentencing judge must have regard, as well as those to which no regard should be had.

88 For reasons that I have never quite been able to grasp, one factor that was omitted from an otherwise lengthy, and seemingly comprehensive, list of relevant sentencing considerations contained within s 16A(2) was general deterrence.[33] It is astonishing to think that it took the legislature until 2015 to rectify that omission.

89 Consider also s 16A(1), which provides as follows:

> In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

90 It would be hard to imagine a more absurd provision. Is it even conceivable that the drafter thought that without s 16A(1), judges would regard themselves as being at liberty to impose sentences of a severity which were, to their minds, inappropriate?

91 I will not go on in this vein. There are numerous other examples of recent statutes, particularly at the Commonwealth level where, to put it kindly, the drafting is less than user friendly.

---

32 *Singh v The Queen* [2016] VSCA 163.

33 *Director of Public Prosecutions v El Karhani* (1990) 21 NSWLR 370.

92 There are no doubt many and various reasons for this. One important factor, I suspect, is a misplaced concern on the part of some modern drafters (acting no doubt on misguided instructions from some legislators) that there should be a taxonomy of substantive offending which reflects various aggravating factors. Thus, instead of one offence, we have a number, each with its own particular elements and characteristics. It may be thought that drafting in this way has the beneficial effect of leaving it to juries, rather than judges, to make the particular assessment of the gravity of the offence required. The downside of this, of course, is that the law is rendered more complex. Juries whose roles are already sufficiently onerous, are required to embark upon even more difficult tasks.

93 In making these criticisms, I do not wish to be misunderstood. I recognise that drafting is a difficult process. It requires considerable skill, and experience. Language is an uncertain and imperfect means of communication. Developments in science and technology, and other areas, mean that legislation will inevitably have to deal with ever more complex issues. Some of these cannot readily be distilled into clear and simple concepts, at least without distorting meaning.

94 I also understand that drafters must ensure that the product of their work is capable of being understood, not just by the most erudite of jurists, but by all sections of the community. They must try, as best they can, to anticipate as many possible contingencies as can reasonably be foreseen. And they are no doubt aware that there will be a class of reader who will not approach the task of interpreting their work in a sympathetic, or even common sense manner.[34]

95 Even making due allowance for these difficulties, however, there is something unsettling about the way in which some modern statutes are drafted. Statutes that create criminal offences, in particular, must be capable of being readily understood.

96 In addition, judges can surely be credited with some modicum of common

---

[34] Dennis C Pearce and Robert S Geddes *Statutory Interpretation in Australia* (Butterworths, 8th ed 2014), 5.

sense. They should not be forced to trawl through provisions that, in some cases, are so obscure as to lead almost to a 'brain explosion'. Sadly, distrust of the judiciary, and of its ability to exercise sound judgment, lies at the heart of much of the unduly prescriptive drafting that we see.

Amended too frequently

97 For some reason that I cannot fathom, criminal statutes, more than most other Acts of Parliament, seem constantly to be amended. Some degree of restraint in this area would be a good thing. Bad laws should, of course, be repealed or amended. Whether every anomaly should be instantly corrected is a different matter. It ought to be possible to avoid tinkering with provisions that are in almost daily use, and to leave their amendment to a single comprehensive amending Act, perhaps introduced no more frequently than twice a year.

98 It is often difficult to tell exactly when a particular amendment came into effect. In criminal matters, in particular, that information is essential. If the amendment concerns matters of substantive law, it needs to have been in force at the time of the relevant offending. If it is procedural in nature, that may not be the case.

99 One of the most thankless tasks that anyone concerned with the criminal law must regularly undertake is working through what are described as 'transitional provisions'.

100 In an effort to reduce the size of legislation by avoiding the repetition of common provisions, both Victoria and the Commonwealth have enacted provisions that relate to such matters as dates of commencement of Acts, and the effect upon the law of the repeal of an Act. Drafters assume a knowledge of the relevant interpretation Act when they prepare legislation.

101 Interpretation Acts reserve what are known as 'rights.' There is a substantial body of authority dealing with the meaning of that term in the context of such provisions. Sometimes fine distinctions must be drawn.

102 Nonetheless, every time a criminal statute is amended, there are certain to be problems that will have to be resolved.

103 In the period from 1 January 2013 to 30 June 2016, the Victorian Parliament enacted numerous amendment Acts, each of them potentially having a significant impact upon the workings of the criminal justice system. The figures are instructive, and are as follows:

- *Crimes Act* – amended by 25 separate amendment Acts;
- *Criminal Procedure Act* – amended by 25 separate amendment Acts;
- *Drugs Poisons & Controlled Substances Act* – amended by 10 separate amendment Acts;
- *Sentencing Act* - amended by 34 separate amendment Acts;
- *Confiscation Act* – amended by 12 separate amendment Acts;
- *Crimes (Mental Impairment Unfitness to be Tried) Act* – amended by seven separate amendment Acts;
- *Evidence Act* – amended by seven separate amendment Acts;
- *Bail Act* – amended by 10 separate amendment Acts; and
- *Jury Directions Act* – amended by two separate amendment Acts.

104 Many of these individual amendment Acts contained within them a number of separate amendment provisions. Thus for example, Division 7 of the *Justice Legislation Further Amendment Act 2016,* amended three separate sections of the *Sentencing Act.* On occasion, judges and practitioners fail to pick up the fact that a section that was assumed to be applicable to the matter at hand had in fact been repealed.

105 The Commonwealth is no better in this regard. As far as Commonwealth legislation is concerned the figures for the same period, 2013–2016, are as follows:

- *Crimes Act 1914* – amended by 19 separate amendment Acts;

- *Criminal Code* – amended by 26 separate amendment Acts; and
- *Proceeds of Crime Act* – amended by 10 separate amendment Acts.

106 Fewer amendments, spaced out over longer periods, would enable greater consultation by drafters, in particular with those who are appropriately qualified to comment upon possible unintended consequences. It would also enable greater attention to be given by drafters to the impact of the proposed change upon the coherence of the Act as a whole, as well as its relationship with other cognate statutes.

107 Perhaps our political leaders, and not just our drafters, might do well to reflect upon these thoughts regarding the criminal law. Contrary to the views of some, not everyone in this community is well equipped to comment upon its technical aspects. Criminal law is a vastly complicated body of rules, where almost every provision in almost every Act is likely to be intertwined, to some degree, with others. Change one part, and you may inadvertently change others. That is true even in relation to sentencing, that most difficult of judicial tasks, where everyone seems to have an opinion, but not always one that is well informed.

Consequences of poor drafting

108 Every time a judge is confronted with a provision that is either poorly drafted, or requires a lengthy trawl through numerous other sections in order to make sense of it, some harm is done. If the judge ultimately falls into error, and the matter has to be corrected on appeal, the situation is made even worse.

109 Figures helpfully provided to me by the Office of Public Prosecutions indicate that, between 2005 and 2016, there were 345 successful appeals against conviction, roughly 30 per year. Many of these cases had to be tried again, at emotional cost to the parties and witnesses, and at financial cost to the community. Of that number, 132 appeals involved findings of misdirection on the part of trial judges.

110 Of course, there would also have been a significant number of successful appeals arising out of evidentiary rulings, and a small number arising out of procedural irregularities.

111 It would be interesting to know how many of these successful appeals involved the misinterpretation, by trial judges, of statutory provisions. My suspicion is that the number would be high.

112 The legislature, if it goes about the task properly, is perfectly capable of producing high quality, well–drafted reform of the criminal law. In 1879, Sir James Fitzjames Stephen wrote the report of the Criminal Code Bill Commission, and the draft Bill appended thereto. In my view, that was an example of the very best of legislative drafting. The draft Code formulated with elegance, clarity, and precision, the substantive elements of every serious crime then known to the law. In addition, it dealt with criminal procedure, and with sentencing. Indeed it foreshadowed the creation of an entire appellate structure in criminal matters, hitherto unknown to the criminal law, and only ultimately adopted some 30 or so years later. It managed to do all this in the space of 150 pages.

113 As we know Stephen's work led to the draft Criminal Code (Indictable Offences) Bill of 1879. That Bill lapsed in Parliament. It seems that there was strong judicial resistance, at the time, to codification of the criminal law.

114 Stephen, however, had the last laugh. His Code was enacted in India, and has partly survived intact. It has been adopted, to a considerable degree, in Canada. It forms the basis for the Criminal Codes of Queensland and Western Australia.

115 In the United States, the Model Penal Code of 1962 represents another example of what can be done when codification is carried out in a sensible manner. The Model Code has been adopted by a large number of American States.

116 In England, attempts to codify the criminal law have hit a proverbial brick

wall.[35] That is a pity. It leaves the common law, as shaped by the judges, as a primary source of legal doctrine. As far as the common law is concerned, it must be said that, by and large, the House of Lords has not distinguished itself in the field of criminal law.

117 I should say, however, that in their more recent guise as the Supreme Court of the United Kingdom, and as the Privy Council on appeal from Jamaica, their Lordships have redeemed their reputation somewhat. I refer to *R v Jogee* and *Ruddock v The Queen*[36], where the common law principles of complicity were reformulated in a manner that could hardly be bettered, at the same time, ridding the common law of the pernicious doctrine of joint criminal enterprise. It is to be hoped that at some point our High Court will emulate their Lordships' example.

Mozart

118 I had thought when I was asked to present this paper that I would be the first person ever, in this State, to invoke Mozart in a speech on an otherwise technical legal topic. I was disappointed to learn that this was not the case.

119 In 2014, Justice Susan Crennan delivered the Victoria Law Foundation oration for that year. Her topic, in what was a splendid paper, was 'Magna Carta, common law values and the Constitution'. She noted that as a composer, Mozart had been prodigiously ambitious. She said:

> A first performance of one of his compositions, written when he was 16, before a royal court elicited the royal criticism that the music contained 'too many ideas'. Given 800 years of history and evolving legal culture in Australia and the United Kingdom, it is impossible not to fear, and indeed admit, that discussing tonight's topic will involve touching too lightly and too selectively on too many ideas.

120 Justice Crennan invoked Mozart by way of what I would describe as 'anticipatory self-deprecation'. Far be it from me to challenge her Honour's

---

35 See generally A T H Smith, 'Criminal Law and the Law Commission 1965–2015', [2016] Crim L R 381.

36 [2016] UKSC 8 and [2016] UKPC 7.

exposition of musical history. The exact details of her account of the Mozart story are, however, questionable.

121 That story first emerged in a biography of Mozart written by Franz Niemetschek in 1798. According to the author, the Emperor Joseph II had commissioned the opera 'The Abduction from the Seraglio.' When he heard it played, he complained to Mozart 'that is too fine for my ears – there are too many notes.' This was said to have elicited the somewhat impudent reply from Mozart, 'there are just as many notes as there should be.'

122 Another, more satisfying, version of the Mozart story can be found in the film 'Amadeus.' Here the Emperor is praising Mozart's work, describing the premiere of his opera in Vienna as 'an excellent effort.' The dialogue then proceeds as follows:

Mozart	So then you liked it? You really liked it, Sire?
Emperor	Well of course I did, it's very good! Of course now and then – just now and then – it seemed a touch, er –
Mozart	What do you mean, Sire?
Emperor	Well, I mean occasionally it seems to have – oh how shall one say? (turning to Orsini-Rosenberg) How shall one say, Director?
Orsini-Rosenberg	Too many notes, Your Majesty?
Emperor	Exactly, very well put. Too many notes.
Mozart	I don't understand. There are just as many notes, Majesty, as are required, neither more nor less.
Emperor	My dear fellow, there are in fact only so many notes the ear can hear in the course of an evening. I think I'm right in saying that aren't I, Court composer?
Salieri	Yes. Yes, on the whole, yes, Majesty.
Mozart	But this is absurd!
Emperor	My dear, young man, don't take it too hard. Your work is ingenious. It's quality work. And there are simply too many notes, that's all. Cut a few and it be perfect.
Mozart	Which few did you have in mind, Majesty?

123 Reputable scholars have questioned both the 'too many ideas' and 'too many notes' versions of the Mozart story. First, it seems that the translation of the original German, from Niemetschek's biography, is not 'too many notes' but rather 'an extraordinary number of notes'. The anecdote, which has often been repeated, may have unfairly given the Emperor a bad reputation concerning both his own musical abilities, and his appreciation and support of Mozart.

124 Indeed, I understand that there is actually a substantial body of scholarly writing defending Emperor Joseph II from such criticisms.[37] The famous complaint 'too many notes' is generally perceived to be a gaffe, uttered by a blockhead. Yet, as Jan Swafford, an eminent music critic and commentator pointed out, whatever it was that the Emperor may in fact have said simply echoed what nearly everybody, including Mozart's greatest admirers, believed about him.[38] Mozart was so imaginative that his music was considered at times demonic. It was regarded by many as 'overloaded and overstuffed.'

125 Although Justice Crennan stole my thunder by referring to the Mozart story in the way that she did, I will unashamedly borrow her use of that story as mitigation for what might fairly be regarded as 'the light and selective' treatment of tonight's topic.

126 But I would add that there is more to my invocation of Mozart than this. If his compositions were demonic, so too are a number of the criminal statutes with which we, as the poor consumers of this product, daily have to grapple. If his work was 'overloaded and overstuffed,' that is a perfectly apt description of many of the provisions that feature in legislation of the kind that I have been considering in this paper. If Mozart's work contained 'too many ideas', or 'too many notes,' the same can surely be said (with the slight adaptation from 'ideas' or 'notes' to 'too many words') of much of what our drafters regularly bequeath to us.

---

37 See Derek Beales, (2006), 'Joseph II, Joseph(in)ism,' *The Cambridge Mozart Encyclopaedia*, Cambridge University Press, 232-239.

38 Jan Swafford, 'Too bizarre, Mozart!', *The Guardian*, 4 June 2004

127 There has long been a debate as to who first proffered an apology for having written a long letter, explaining that if the author only had more time, he would have written a shorter one. That witticism has been attributed, at various times, to the 17th century mathematician and philosopher Blaise Pascal, as well as to Benjamin Franklin, and Mark Twain.

128 As an aphorism, it contains an important truth. It is far harder to write succinctly than discursively. It takes more time and effort to do so. In the end, however, those charged with the vital task of turning words into law must understand that sometimes the less they have to say, the better it is said.

- - - - -