

THE CRIMINAL LAW - A 'MILDLY VITUPERATIVE' CRITIQUE

Justice Mark Weinberg¹

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I wish that I could claim credit for the somewhat evocative term 'mildly vituperative'. Regrettably, I cannot. So far as I can tell, the author of that expression was Sir Rupert Cross who, in 1973, responded to criticism of a report to government that he had written, using somewhat intemperate language that he described as 'mildly vituperative'.² Professor Cross was, as anyone who knew him would attest, a gentle man. However he could, on occasion, let fly. He famously, and correctly, once described a decision of the House of Lords as 'gibberish'. For reasons that will become apparent, the expression 'mildly vituperative' struck me as being entirely apt as a title for this lecture.

That takes me to the purpose of tonight's talk which is, of course, to honour the memory of Professor Peter Brett. Sadly, I only ever met Peter Brett on one occasion. It was in 1974. I had by then been teaching law in Sydney for just over two years. I was anxious to return to Melbourne, and I had applied to this law school for a position as a senior lecturer.

The University of Melbourne flew me down as part of the selection process. It was Peter Brett who interviewed me first. I can still remember clearly some parts of our discussion, which began something like this:

Mr Weinberg, I see that you profess an interest in jurisprudence. Tell me, then, how would you assess Wittgenstein's contribution to linguistic theory?

¹ Judge, Court of Appeal, Supreme Court of Victoria. I wish to thank my associate, Louise Fedele, for her invaluable assistance in the preparation of this paper. It goes without saying that the views expressed are my own, and should not be taken as in any way reflecting the views of any other member of the Court.

² See, generally, Sir Rupert Cross, 'The Evidence Report: Sense or Nonsense - a Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee' [1973] *Criminal Law Review* 329.

I suppose it could have been worse. He might have asked me to comment upon Cartesian dualism, and its influence upon the development of the criminal law. That was, after all, a subject in which he had a particular interest. Nonetheless, it was scarcely an auspicious beginning. Here I was, a young law teacher trying desperately to impress one of this country's leading scholars, and being utterly floored by the very first question asked.

To this day, I cannot say whether Peter Brett was serious, or whether he was just having fun. I suspect the latter. I answered his question regarding Wittgenstein as best I could. I said, quite truthfully, that although I had heard of the man, I had no idea what his views on linguistics, or indeed any other subject, may have been. My answer must have impressed Professor Brett in its candour, if not its erudition, as I was shortly thereafter offered a senior lectureship at this law school.

I very much looked forward to working with Peter Brett. As a student at Monash University, I had been taught criminal law by his close friend, Professor Louis Waller. Professor Waller was a great teacher; one of the best I ever encountered. My understanding of the criminal law had been shaped by Brett and Waller's *Cases and Materials in Criminal Law*, then only in its second edition.³ At that time, I was also interested in Professor Brett's highly original work in what he termed 'integrative jurisprudence', which focused upon the relationship between the law, as a social science, and other disciplines.

Of course, criminal law as taught in 1966 took a very different form to the way in which that subject is taught today. Then, students were expected to focus upon the black letter analysis of leading English scholars such as Glanville Williams, John Smith, and Brian Hogan. The criminal law was largely common law, and the principles that we studied derived largely from English courts. The cases were read in order to extract general principles of the kind that featured in what Glanville

³ Peter Brett and Louis Waller, *Cases and Materials in Criminal Law* (Butterworths, 2nd ed, 1965).

Williams described as the 'General Part'. Indeed, as I recall, my criminal law course devoted a good deal of time to a single case, *R v Dudley and Stephens*.⁴

Although now generally regarded as somewhat archaic, *Dudley and Stephens* had a lasting impact upon me. Even now, some 45 years later, and having forgotten most of what I learnt at law school, I can still call to mind Lord Coleridge's somewhat pious observation that we are often compelled to set standards for others that we ourselves cannot reach. I can also bring to mind his Lordship's admonition that acceptance of the doctrine of necessity as a defence to a charge of murder 'might be made the legal cloak for unbridled passion and atrocious crime'.⁵ As it happened, *Dudley and Stephens* was the first judgment that I ever read. I was enthralled by it. From that time on, I was captive to the criminal law.

Let me now say just a few brief words about Peter Brett. He was born in London in September 1918, just two months before the First World War ended. He was the third child of Alfred Bretzfelder, a builder, and his wife Raie. Brett was obviously an accomplished student. In 1939, he graduated LLB with first class honours from the University of London. In that same year, he changed his name by deed poll. He served with the British army in the Second World War, and rose to the rank of Captain with the Royal Fusiliers. From 1946 to 1951, he worked in the Office of the Treasury Solicitor in London.

Thereafter, an academic career beckoned. In 1951, he was appointed to a senior lectureship in law at the University of Western Australia. He taught there until 1955, when he took up a position as a senior lecturer at this law school. In 1961, he was promoted to Reader. In 1963, he was appointed the first Hearn Professor of Law. The following year, he was appointed Professor of Jurisprudence.

⁴ (1884) 14 QBD 273 (*Dudley and Stephens*). Both accused were convicted of murder, in what was plainly, and at every level, a monstrous miscarriage of justice. For a fascinating account of the trial and the proceedings before the Queen's Bench Division see, generally, Neil Hanson, *The Custom of the Sea* (Doubleday, 1999).

⁵ *Dudley and Stephens* (1884) 14 QBD 273, 288.

Brett spent much of 1958 and part of 1959 at Harvard Law School, where he was Ezra Ripley Thayer Teaching Fellow. He took his SJD from Harvard in 1960. His work for that degree culminated in the publication of his scholarly text, *An Inquiry into Criminal Guilt*.⁶

Louis Waller described Peter Brett in the following terms:

Short in stature, Brett had tight, greying curls and a mobile face, dominated by flashing eyes which were magnified by thick spectacles. He was a fluent and sometimes eloquent speaker, and a stimulating, though occasionally disconcerting, teacher. His chief interests were criminal law, evidence, administrative law and legal philosophy, and he taught and wrote extensively on these subjects. He was generous in sharing ideas, and encouraged his colleagues and students to undertake interdisciplinary research.⁷

Professor Brett was a man of strong opinions, and by all accounts he was perfectly prepared to share them with others. It was said by some that he had a sharp tongue. Some of his students considered him to be somewhat intimidating. However, it is fair to say that even those who regarded him in that way recognised that they were fortunate to have been taught by such an outstanding scholar.

It is perhaps less well-known that Peter Brett was extraordinarily kind towards his junior colleagues. He was also, as I understand, a man who displayed considerable empathy towards students who were making a real effort but who were having genuine difficulty with their studies.

By today's standards, some of Peter Brett's ideas would almost certainly be regarded as politically incorrect. In addition, his teaching style, which embraced a vigorous form of Socratic dialogue, might not now meet with general approval. I frankly doubt that Peter Brett would be greatly troubled by criticisms of that kind.

Professor Brett was, of course, a highly intelligent and very clever man. His publications demonstrate the breadth of his scholarship, across a host of different

⁶ (Law Book of Australasia, 1963).

⁷ Louis Waller, 'Peter Brett (1918 - 1975)', *Australian Dictionary of Biography*, Australian National University <<http://adb.anu.edu.au/biography/brett-peter-9577>>.

disciplines. But there was much more to Peter Brett than simply being smart. Throughout his life, he showed a commitment to the pursuit of justice. Often, and at considerable personal cost, he took up unpopular causes. He made powerful enemies. He put his reputation on the line when he publicly fought for the rights of convicted criminals such as Robert Tait,⁸ Darryl Beamish,⁹ and Leith Ratten.¹⁰

It is altogether fitting that the University of Melbourne should honour Professor Brett. I should like to think that, wherever he may now be, Peter Brett would be amused by the title of this lecture. For Brett himself could, at the one time, be both a model of academic detachment, and a user of earthy, if not vituperative, language. Surely, in this country, no-one else but Peter Brett would, in 1963, have had the temerity to describe Glanville Williams, the doyen of all legal scholars, as having produced an analysis of the nature of crime that was ‘intellectual[ly] bankrupt’.¹¹

Some preliminary caveats

My focus in this lecture is upon the substantive criminal law, not the criminal law in general. I am not presently concerned with summary crimes, which constitute the vast majority of offences prosecuted in this State. What I have to say here is confined to that very small number of cases that are dealt with in the higher courts, namely those cases tried on indictment.

My next caveat is to note that my own experience with the criminal law has been skewed towards appellate work. In other words, throughout my entire career,

⁸ See *Tait v The Queen* (1962) 108 CLR 620. Brett fought, successfully, to save Robert Tait from the gallows in circumstances where the Premier of the day, Sir Henry Bolte, was determined to have him hanged. This led to one of the most memorable exchanges in the history of the High Court, when Sir Owen Dixon enjoined the State of Victoria from carrying out Tait’s execution. Tait was obviously insane.

⁹ Brett was convinced that Darryl Beamish was innocent. He was right. Sadly, it was not until April 2005 that Beamish’s innocence was recognised by the Western Australian Court of Criminal Appeal, and his conviction quashed. See *Beamish v The Queen* [2005] WASCA 62.

¹⁰ Here, Brett was perhaps on shakier ground. It was said, however, that Sir Henry Winneke, who was the trial judge in Leith Ratten’s case, had been surprised that the jury brought in a verdict of guilty.

¹¹ Professor Brett said of Professor H M Hart’s earlier comment in 1958 to that effect that he could ‘think of no better description’. See Peter Brett, *An Inquiry into Criminal Guilt* (Law Book of Australasia, 1963) 20.

I have tended to focus upon that relatively small number of cases where it is alleged that something has gone badly wrong.

My third caveat is that I have chosen to concentrate selectively upon just a few areas of substantive law which I believe to be in need of urgent attention. I do not propose to say anything at all about a host of important subjects, including criminal procedure and sentencing. Those are matters for another day.

With these caveats in mind, let me turn to the central themes of this lecture.

Background

I spent 10 years as a judge of the Federal Court of Australia. During that time, I had only occasional contact with the criminal law. I had little time to keep abreast of key judgments in the area, or of significant legislative changes.

In 2008, I left the Federal Court and moved across to the Court of Appeal. In some ways, the transition to appellate crime was rather like 'old home week'. However, I soon discovered that the criminal law with which I now had to deal bore little resemblance to the criminal law that I had grown familiar with over the years. It was not long before I started to think that there was something seriously wrong with the way in which the criminal justice system was operating in this State.

A number of problems struck me almost immediately. One was delay. Cases that used to be dealt with fairly swiftly now seemed to be taking far longer to come on for trial. The same was true of criminal appeals.

I discovered that one reason for the delay in cases coming on for trial was that the County Court was required to give priority to the trial of sexual offences over all other matters.¹² This meant that other offences were, in effect, being relegated, to be dealt with at a later time. My understanding is that this is still the case. I am told that the problem of delay is so great in regional Victoria that an accused charged

¹² See generally s 212 of the *Criminal Procedure Act 2009* which provides that the trial of a person for a sexual offence must commence within three months of committal.

with offences of dishonesty will have to wait years after committal for the trial to commence.

As regards the delay in hearing criminal appeals, I am pleased to say that the situation is now being addressed. At one point, about a year ago, there were almost 600 criminal appeals pending. The average delay in hearing an appeal against conviction was then between one and a half and two years. Appeals against sentence were routinely taking 12 months or more to be heard. Through a combination of procedural and other reforms, many of them court-initiated, the number of criminal appeals pending has been significantly reduced, and now stands at less than 400. Nonetheless, delay remains a significant issue.

The second significant change that I noted was that criminal trials seemed to be taking far longer to complete. Trials that 20 or 30 years ago would have occupied, at most, a few days now seemed to stretch into weeks. Part of the problem seemed to me to be that judges' charges to the jury had become inordinately long. In some cases, I noted that the charge took longer to deliver than the time taken for all of the evidence to be led.

The third significant change that I noted was that a seemingly high percentage of appeals were succeeding. Plainly, that was a matter of concern. Whenever a new trial is ordered, there are profound consequences for all those involved, as well as for the community.

This leads me to ask two questions. Why is it that criminal trials today seem to take so long? And why is it that so many criminal appeals succeed?

As I hope to demonstrate, there is one key contributor. The criminal law today is simply too complex, and quite unnecessarily so.

Others share that view. Louis Waller was kind enough to write to me several weeks ago. He said he was sorry that he would not be able to attend this evening. Nonetheless, he was not reticent about what I should say. He encouraged me to

‘give the criminal law a few well-placed whacks’. He added, and I quote, that ‘perhaps Peter will have his earthly connexions on, and utter the words “hear hear”’.

I am sure that both Peter Brett and Louis Waller would agree that the criminal law, more than any other branch of the law, should be clear, coherent, and comprehensible. They would also agree that the current state of the criminal law is far from satisfactory. They would say that we have lost sight of the fact that, in our system, serious criminal cases are tried by juries. They would say that too many aspects of the criminal law appear to have been designed for use by appellate judges or legal scholars, and not for ordinary members of the community.

The criminal law that I studied was largely common law. It is interesting to see how much that has changed. In 1864, the *Criminal Law and Practice Statute 1864* occupied some 88 pages. By 1890, the *Crimes Act 1890* had grown to 140 pages. In 1915, the relevant *Crimes Act* had expanded to 167 pages,¹³ and in 1928 it had reached 186 pages.¹⁴ Even by the mid-sixties, the *Crimes Act 1958* took up a mere 208 pages.

It is a sobering thought that the *Crimes Act 1958* in its current form runs for some 546 pages. However, that is by no means the whole story. Anyone wishing to practise as a criminal lawyer in this State must now also have regard, on a regular basis, to the 410 pages of the *Sentencing Act 1991*; the 279 pages of the *Drugs, Poisons and Controlled Substances Act 1981*; the 211 pages of the *Evidence Act 2008*; and the 392 pages of the *Criminal Procedure Act 2009*. As well, it may be necessary, from time to time, to delve into the 303 pages of the *Confiscation Act 1997*.

Throw in, for good measure, the 771 pages of the *Criminal Code Act 1995* (Cth) (and sundry other Commonwealth statutes that create indictable offences), and the task of the criminal lawyer in simply keeping abreast of the statute law that now largely governs all criminal offences becomes apparent.

¹³ *Crimes Act 1915*.

¹⁴ *Crimes Act 1928*.

That is not to say that there was no urgent need for legislative reform of the criminal law. The common law was, in many respects, in an unsatisfactory state. One has only to consider the utter confusion surrounding offences of dishonesty, prior to the adoption in this State of the *Theft Act 1968* (UK) provisions,¹⁵ to understand precisely what I mean. Codification, in whole or in part, of the common law can be enormously beneficial. Of course, I am referring to codification that is well planned, and well drafted.

Regrettably, some of the legislative changes to the criminal law that have been introduced in this State seem to me to have achieved little, other than adding unnecessary complexity.

Statutory self-defence

In 2005, the Victorian Parliament amended the *Crimes Act 1958* to abolish the partial defence of provocation.¹⁶ It did so, it would seem, in response to one particular case that had been widely publicised and had caused a good deal of consternation.¹⁷

The legislature also turned its attention to self-defence as a defence to homicide. More specifically, it created a new statutory offence available as an alternative to murder, which it termed 'defensive homicide'.¹⁸ Regrettably, it did so in a way that has led to a good deal of confusion and uncertainty.

The key provisions relating to defensive homicide are ss 9AC, 9AD and 9AH of the *Crimes Act 1958*. Section 9AC provides for a new statutory form of self-

¹⁵ *Crimes Act 1958* amended by the *Crimes (Theft) Act 1973*.

¹⁶ *Crimes Act 1958* s 3B.

¹⁷ See *R v Ramage* [2004] VSC 508. James Ramage was acquitted of the murder of his estranged wife, Julie, but convicted of manslaughter in circumstances that caused many in the community to doubt that justice had been done in the particular circumstances of that case. The Law Reform Commission recommended the change to provocation, as well as the introduction of statutory self-defence provisions, within a month of the completion of Ramage's trial. See Victorian Law Reform Commission, *Defences to Homicide* (Final Report, 2004).

¹⁸ *Crimes Act 1958* s 9AD. Section 4 provides that where, on a trial for murder, the jury are not satisfied that the accused has committed that offence, but are satisfied that he or she is guilty of an offence under s 9AD, they may acquit of murder and find the accused guilty of defensive homicide.

defence where the charge is one of murder. Essentially, that section provides that a person is not guilty of murder if he or she carries out the conduct that would otherwise constitute that offence if, at the time, that person believed that conduct to be necessary to defend himself or herself, or another, from the infliction of death or really serious injury.

Statutory self-defence under s 9AC differs from common law self-defence in at least one key respect. A genuine belief of the kind stipulated by s 9AC constitutes a complete defence to a charge of murder, irrespective of whether that belief is reasonably held.¹⁹ At common law, any belief on the part of the accused that was relied upon as the basis for self-defence had to be 'reasonable'.²⁰

Section 9AD provides that where a person kills another in circumstances that, but for the belief specified in s 9AC, would have amounted to murder, that person is guilty of defensive homicide if he or she did not have reasonable grounds for that belief. Defensive homicide carries the same maximum penalty as manslaughter, namely 20 years' imprisonment.

A cursory reading of s 9AD may suggest that defensive homicide was introduced in order to restore what was once the common law offence of manslaughter by excessive force. In *Viro v The Queen*,²¹ the High Court rejected the Privy Council's refusal, some years earlier, to countenance that form of manslaughter.²² Regrettably, *Viro* turned out to be a disaster for the administration of criminal justice. The directions that it required be given to the jury in relation to self-defence were expressed in language that was confusing at best, and incomprehensible at worst.²³

¹⁹ It should be noted, however, that statutory self-defence is narrower in some respects than was common law self-defence. Section 9AC requires a belief that it is necessary to act as the accused did in order to meet a threat of death or really serious injury. At common law, a threat of lesser injury would suffice.

²⁰ *Zecevic v DPP (Vic)* (1987) 162 CLR 645 ('*Zecevic*').

²¹ (1978) 141 CLR 88 ('*Viro*').

²² *Palmer v The Queen* [1971] AC 814.

²³ The six propositions put forward by Mason J, as his Honour then was, were replete with double and triple negatives.

Fortunately, the High Court was prepared to revisit the matter. In *Zecevic*,²⁴ the decision in *Viro*²⁵ was overruled and self-defence was restored to its former simplicity. And so the law on self-defence stood until 2005.

Whatever the Law Reform Commission may have intended by recommending changes to the law of self-defence in 2004, it is clear that defensive homicide is not, in fact, a statutory re-introduction of manslaughter by excessive force. At common law, that form of manslaughter was predicated simply upon more force having been used than was reasonably necessary. However, defensive homicide says nothing about excessive force. Rather, it requires an accused to have genuinely but unreasonably believed that his or her actions were necessary. The focus is upon the need for the actions, rather than the amount of force used.

A colleague of mine in the trial division of the Supreme Court, who has recently had the misfortune to have directed a jury in accordance with the statutory self-defence provisions, has told me that, in his opinion, even *Viro*, with all its many difficulties, was easier to apply than the current law. That lament speaks volumes.

At present, a judge may be required to give the statutory self-defence direction in relation to a charge of murder, followed by a direction as to the availability of defensive homicide as an alternative to that charge. If manslaughter is also available as a further alternative, as is often the case, the judge must then give the jury the quite different statutory self-defence direction required under s 9AE.

The manslaughter self-defence direction, unlike that required for murder, has an objective component. The jury will have to be told that self-defence will fail if the accused did not have reasonable grounds for his or her belief. Under s 9AC, a genuine but unreasonable belief not negated by the Crown affords a complete defence to a charge of murder. However, under s 9AE, an equally genuine but

²⁴ (1987) 162 CLR 645.

²⁵ (1978) 141 CLR 88.

unreasonable belief not negated by the Crown is no defence at all to a charge of manslaughter.

With respect, directions of this kind are likely to be regarded as entirely mystifying. The jury is likely to be even more mystified if the particular facts of the case give rise to the operation of s 9AH. That section creates a series of special rules in relation to self-defence where the circumstances of the killing involved 'family violence'.²⁶ It was obviously intended to afford 'battered women' the protection that they were considered to have been denied by the common law.²⁷

Putting to one side the difficulties associated with definitions of 'family member' and 'family violence',²⁸ s 9AH allows self-defence to be invoked in response to a charge of murder, or of manslaughter, and for the purposes of defensive homicide, even if the accused was responding to a harm that was not immediate, and even if the response involved excessive force.

Thus, in a trial that involves a charge of murder, an alternative charge of manslaughter, and some evidence of family violence, a charge to the jury regarding self-defence will have to encompass no fewer than three separate directions as to the elements of that defence. Moreover, there will have to be a further set of directions as to the elements of defensive homicide. None of this makes very much sense.

The problems do not end there. For common law self-defence continues to apply to offences that involve violence, though not actual killing.²⁹ So a judge trying

²⁶ *Crimes Act 1958* s 9AH(4) defines 'family violence' as violence against that person by a family member.

²⁷ The introduction of s 9AH may have been a response to cases such as *Osland v The Queen* (1998) 197 CLR 316, where 'battered woman syndrome' had been raised in support of a claim of self-defence, which the jury rejected. It was suggested that the law of self-defence should be broadened to take into account the special position of women faced with the intractable difficulty of living with abusive men, but not actually facing imminent death or serious injury at the time of the killing.

²⁸ See *Crimes Act 1958* s 9AH(4).

²⁹ At one point it was thought that common law self-defence continued to run in tandem with statutory self-defence in charges of homicide. That would have added further to the already extraordinary complexity brought about by the new provisions. However, in *Babic v The Queen* (2010) 203 A Crim R 543, the Court of Appeal held that there is no longer scope for common law self-defence in relation to homicide offences.

an accused on a charge of attempted murder must put statutory self-defence in accordance with s 9AC, but common law self-defence in relation to the alternative offence of intentionally causing serious injury.

Self-defence should not give rise to so many problems. It is perhaps the oldest, and most basic, of all excuses in the criminal law. It ought to be possible to explain the elements of self-defence to a jury in just a few short sentences. In *Zecevic*,³⁰ the High Court showed that this could be done. The doctrine was explained clearly and concisely, as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary.³¹

Many judges in this State, when preparing their jury directions, make use of the Victorian Criminal Charge Book.³² It is a valuable asset, and enormously helpful to trial judges.³³ It is remarkable to note that it now takes 11 pages of the most detailed bench notes simply to summarise the provisions of the *Crimes Act 1958* that deal with self-defence in relation to homicide. Indeed, the model charge recommended for defensive homicide itself runs for more than three pages.

I should add that the offence of defensive homicide has given rise to a number of specific problems. Defensive homicide is essentially an alternative to murder. What is to happen, then, if an accused is tried for murder, acquitted of that offence, but convicted of the alternative of defensive homicide, and succeeds in having that conviction overturned on appeal? A new trial may be warranted. However, can the Court of Appeal sensibly order a retrial on a charge of defensive

³⁰ (1987) 162 CLR 645.

³¹ Ibid 661 (Wilson, Dawson, Toohey JJ).

³² Prepared under the auspices of the Judicial College of Victoria.

³³ I should make it clear that I am a member of the committee of judges that meet regularly to update the Charge Book. Insofar as it is may be regarded as unduly complex or inaccurate, I accept my share of the blame.

homicide? It is one thing for an accused to plead guilty to that offence in answer to a charge of murder. It is a different matter altogether to charge someone with defensive homicide, bearing in mind that it is an element of that offence that the accused genuinely holds the belief set out in s 9AC, but has no reasonable grounds for that belief. How is the Crown to establish the existence of that seemingly exculpatory, but entirely subjective, belief?

The problems do not stop there. Can an accused charged with attempted murder be convicted instead of attempted defensive homicide? Is aiding and abetting defensive homicide open as a verdict? If so, how should a judge direct as to the mental element of the aider and abettor?

Putting to one side all problems associated with the drafting of the statutory self-defence provisions, there are also real questions as to whether the provisions as drafted have given effect to the policy underlying their introduction. My understanding is that virtually all of those who have been convicted of defensive homicide, since the introduction of that offence in 2005, have been male. The section does not seem to be operating in the way that was intended. It has afforded little or no additional protection to women charged with killing abusive partners.³⁴ It is time for the legislature to reconsider the wisdom of having introduced these changes.

The mental state for rape

At common law, the mental state required for rape was clear and easily understood. In *R v Flannery and Prendergast*,³⁵ the Full Court made it plain that if an accused genuinely believed that there was consent to sexual intercourse, that negated rape. This was because the state of mind required for rape was either an awareness that the complainant was not consenting, or a realisation on the part of the accused that the complainant might not be consenting, coupled with a determination to have sexual intercourse irrespective of whether there was consent or not. A belief in consent was inconsistent with either of these states of mind.

³⁴ In fact, the first woman to be convicted of defensive homicide in this State was Eileen Creamer, in March 2011. Until then, all 13 persons convicted of that offence had been male.

³⁵ [1969] VR 31.

In *Director of Public Prosecutions v Morgan*,³⁶ the House of Lords came to exactly the same conclusion. Their Lordships observed that an accused who believed, whether reasonably or not, that the complainant had consented to sexual intercourse could not be guilty of rape.³⁷

Of course, the law relating to sexual offences, and particularly the offence of rape, was in need of urgent legislative reform. It was entirely appropriate that any act of sexual penetration done without consent, and not just penile penetration, should meet the requirements of the *actus reus* of rape. It was also entirely appropriate to recast the law in this area in gender-neutral terms. And, of course, it was right that complainants should be afforded protection from the scandalous and irrelevant cross-examination to which they had subjected for many years.

However, the legislature went much further than that. It sought, in effect, to codify each of the elements of rape, making it now an entirely statutory offence. The ingredients of rape are to be found in ss 36, 37, 37AAA, 37AA, 37B and 38 of the *Crimes Act 1958*.³⁸

These provisions commence by defining 'consent' as 'free agreement'. They then outline a series of circumstances in which a person is deemed *not* to have freely agreed to an act of sexual penetration. For example, a person is deemed not to have freely agreed where they submit to sexual penetration because of force or the fear of force, or the fear of harm of any type; or where the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing.

With great respect, the matters so designated need hardly have been spelt out. It is surely obvious that anyone subjected to sexual penetration in such circumstances has not 'freely agreed', or indeed relevantly 'consented' to sexual

³⁶ [1976] AC 182.

³⁷ These principles were restated by the Full Court in *R v Saragozza* [1984] VR 187, and had also been adopted in both South Australia (see generally *R v Wozniak and Pendry* (1977) 16 SASR 67) and New South Wales (*R v McEwan* (1979) 2 NSWLR 926).

³⁸ The *Crimes Amendment (Rape) Act 2007* inserted, *inter alia*, ss 37AAA and 37AA, and substituted s 37 and parts of s 38.

contact. A jury would hardly need to be told that the existence of any one of these circumstances must be regarded as negating 'free agreement'.³⁹

The provisions that now govern rape go on to prescribe a series of directions that, assuming they are relevant to the facts in dispute, must be given to a jury with regard to the matters set out therein. These include, in relation to the issues of both consent and the mental element of rape, a series of what might be termed 'deeming provisions'.

One problem that has arisen on a number of occasions in recent times stems from the language used in the provisions that set out the mental element required for rape. In accordance with s 37AA(b), if evidence is led, or an assertion is made, that the accused believed that the complainant consented, the judge is required to direct the jury that, in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was either not consenting or might not have been consenting, they must consider, *inter alia*, whether that belief was reasonable in the circumstances.

Taken on its own, a direction of that kind accords entirely with basic principle. The problem is that the section then goes on to say that in determining whether that belief was reasonable, the jury must have regard to the particular circumstances that are then set out, and whether the accused was aware of those circumstances. The circumstances in question, however, include those identified in s 36. Yet none of those circumstances have anything to do with the mental state required for rape. They all relate entirely to the issue of consent, which is part of the *actus reus* of the offence.

It is here that real difficulty has arisen. The relevant sections contain, as I have indicated, a series of deeming provisions. Once the actual state of mind of the

³⁹ At common law, it was understood that rape could be committed as a result of conduct in which the free and conscious permission of the victim had not been obtained. For example, it was always understood that the offence was committed when a man had sexual intercourse with a woman while she was asleep (See J.W.C Turner, *Kenny's Outlines of Criminal Law* (18 ed, 1962) 192; or after he had 'forced her to consent by threats' (*R v Jones* (1861) 4 LT 154).

accused is linked to these deeming provisions in the way that the sections now require, there is a genuine conflation of two quite separate elements, namely *actus reus* and *mens rea*.

The task of a trial judge in applying the law pursuant to these provisions is by no means easy. Regrettably, that task has been made even more difficult by a number of factors, one being that the model charge contained in the Charge Book has been held to have been erroneous. Regrettably, that error had significant consequences.

The error was first detected in *Worsnop v The Queen*.⁴⁰ There, the jury had been directed, in accordance with the model charge, as follows:

Evidence of [the accused's] belief in consent must be taken into account by you when determining whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not, or might not be, consenting. Even if you find that the accused did have such a belief, you will still need to decide whether the prosecution has proved this fourth element. You might find that the accused believed the complainant was consenting, but still be satisfied, beyond reasonable doubt, that the accused was aware of the possibility that the complainant was not consenting. In that case the fourth element would be met.⁴¹

The Court of Appeal held that this direction was erroneous because

if the jury concluded that the applicant believed that [the complainant] was consenting to ... penetration, the Crown necessarily failed to establish the fourth element [of rape] to the criminal standard. It mattered not that the belief was, let it be assumed, unreasonable. It followed that the last part of the charge just cited was erroneous.⁴²

⁴⁰ [2010] VSCA 188 (*Worsnop*).

⁴¹ Ibid [20] (emphasis altered).

⁴² Ibid [21]. However, in this case, although the decision below was erroneous on a question of law, the proviso under the *Crimes Act 1958* s 568(1) was applied and the appeal was dismissed.

The error identified in *Worsnop* has led to the quashing of a number of convictions for rape.⁴³

The sheer complexity of the law relating to the mental element in rape can be seen from a brief perusal of *Neal v The Queen*.⁴⁴ There the issue was whether awareness on the part of the accused of the complainant's state of intoxication necessarily meant that he was aware that the complainant was either not consenting, or might not be consenting. The Court held, consistently with *Worsnop*, that notwithstanding the difficulties arising from the drafting of the key provisions, a belief that the complainant was consenting precluded a finding that the accused was aware of the possibility that the complainant was not consenting.

It is interesting to note that in any standard text on the criminal law that was written, say, 30 years ago, the mental element of rape barely rated more than a brief mention. This was regarded as a straightforward matter, and one which almost never gave rise to any difficulty. Regrettably, that cannot now be said. Once again, the legislature should look closely at the way in which the key provisions are drafted.

Extended common purpose

On this occasion, it is the courts, and not the legislature, that must be blamed for having made this branch of the law so extraordinarily complex.

It ought surely be possible, by this stage of the development of the criminal law, to formulate with precision just how the basic principles of complicity should operate. Regrettably, that is not the case. If anything, jury directions regarding complicity are becoming ever more confusing, and difficult to follow.

⁴³ See, eg, *Gordon v The Queen* [2010] VSCA 207; *Wignall v The Queen* [2010] VSCA 327; *Roberts v The Queen* [2011] VSCA 162; *Walker v The Queen*; *Kormez v The Queen* [2011] VSCA 160; *Getachew v The Queen* [2011] VSCA 164; and *Neal v The Queen* [2011] VSCA 172.

⁴⁴ [2011] VSCA 172.

Part of the problem lies in the fact that appellate courts continue to express identical concepts in different terms. However, even beyond these terminological difficulties there are still areas of uncertainty that need to be resolved.

This situation is plainly unsatisfactory. Yet, it need not be so. The law regarding complicity was once relatively straightforward. In *R v Lowery and King (No 2)*,⁴⁵ Smith J directed the jury, in relation to acting in concert, in the following terms:

The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime.⁴⁶

His Honour then directed the jury as to aiding and abetting. He did so at a time when the law maintained a distinction between felonies and misdemeanours, and it was therefore necessary to speak in terms of principals in the first and second degree. Of course, that is no longer the case. Nonetheless, his Honour's charge was expressed in language that was direct and simple and, appropriately modified, could easily be applied today. He instructed the jury as follows:

Now there is another aspect of the law relating to criminal responsibility which it is necessary for me to tell you about. Even if there is no prior understanding or arrangement that the crime shall be committed a person is guilty in law of a crime committed by the hand of another - another whom the law calls the principal in the first degree - if the person is present when the crime is committed and aids and abets the commission of it. In such circumstances he is called the principal in the second degree and he is equally guilty of the crime with the principal in the first degree. Aiding and abetting in this connexion means doing one or other of these three things while aware that the crime is being committed: first, intentionally helping the principal in the first degree to commit the crime, or, secondly, intentionally encouraging him by words or by your presence and behaviour to commit it, or, thirdly, intentionally conveying to him by

⁴⁵ [1972] VR 560 (*Lowery and King*).

⁴⁶ Ibid 560.

words or by your presence and behaviour that you are assenting to and concurring in his commission of the crime. A person present at the scene of the crime and so aiding and abetting a person to commit a crime is in law a principal in the second degree and is guilty in law of the crime committed by the hand of the principal of the first degree.⁴⁷

Regrettably, however, this perfectly simple formulation has been rendered far more difficult to apply as a result of various ‘glosses’ placed upon it in subsequent cases. For example, in *Johns v The Queen*,⁴⁸ the High Court considered the operation of a particular provision of the *Crimes Act 1900* (NSW) dealing with accessories before the fact. For reasons that I find difficult to understand, the Court in that case endorsed a distinction between the criminal liability of accessories before the fact, and the liability of principals in the ‘second degree’. The Court held that, whereas an accused could only be convicted on the basis of aiding and abetting if the Crown established that he or she adverted to the probable consequences of the primary offender’s actions, an accessory before the fact could be convicted if he or she merely adverted to the *possible* consequences of those actions. This came to be known as the doctrine of ‘extended common purpose’.

It is not surprising that this doctrine has given rise to much difficulty. In the first place, the willingness of courts to use terms such as ‘common purpose’ and ‘joint criminal enterprise’ interchangeably, along with the term ‘acting in concert’, has led to confusion and uncertainty. Secondly, and in addition, the doctrine of ‘extended common purpose’ does not sit well with orthodox principles of criminal liability. There is no sensible reason why the liability of an accessory before the fact should be potentially greater than that of a direct participant in the commission of an offence. I shudder to think what Peter Brett would have made of all of this.

In *McAuliffe v The Queen*,⁴⁹ the High Court had the opportunity to overrule *Johns*⁵⁰ and reintroduce some coherence into this branch of the law. The case was a simple one, involving a joint attack by several offenders upon a victim whom they

⁴⁷ Ibid 561.

⁴⁸ (1980) 143 CLR 108 (*Johns*).

⁴⁹ (1995) 183 CLR 108 (*McAuliffe*).

⁵⁰ (1980) 143 CLR 108.

intended to bash. They all participated in that attack. One of the accused kicked the man in the chest, which caused the victim to fall into a puddle in the rocks some metres from the edge of a cliff. The offenders then all left.

Plainly, the case could have been dealt with as one of acting in concert, or aiding and abetting. Instead, somewhat inexplicably, the trial judge directed the jury as to extended common purpose. He told the jury that the prosecution had to establish, beyond reasonable doubt, a common intention on the part of the three offenders to bash someone; an intention on the part of the one who actually inflicted the blow that led to death to cause at least grievous bodily harm; and as against the others, either a common intention to inflict grievous bodily harm, or a contemplation that the infliction of such harm was a possible incident in the common criminal enterprise.

The principles of complicity ought to be quite straightforward. They are instead confusing and uncertain. Recently, in *Likiardopoulos v The Queen*,⁵¹ the Court of Appeal dealt with a number of aspects of this branch of the law. Among the questions to be resolved were whether, in a case of 'joint criminal enterprise', the 'presence' of the accused was required at the time of the act or acts causing death; whether the accused had to know, or believe, that death would result from the acts of the principal or principals; whether it was a requirement that there be a causal link between any act of 'procuring' and the conduct of the principal; and whether it was an abuse of process for the Crown to have accepted a plea of guilty by the principals to manslaughter, but to have sought a conviction for murder against the accused on the basis of counselling or procuring.

The trial judge in *Likiardopoulos* had given the jury a most elaborate direction as to 'joint criminal enterprise'. It ran for, literally, pages. That direction was in accordance with the bench notes and model charge referable to 'joint criminal enterprise' contained in the Charge Book.

⁵¹ [2010] VSCA 344 (*Likiardopoulos*).

The Court of Appeal observed that the nomenclature used to describe ways in which more than one person may be liable as a principal offender for a criminal venture has presented a recurring problem. The Court referred to *McAuliffe*,⁵² where the High Court had treated common purpose, common design, concert, and joint criminal enterprise as more or less interchangeable terms. It noted that in *Osland v The Queen*,⁵³ McHugh J had made much the same point.

The Court of Appeal observed that the problem with nomenclature had been exacerbated in more recent times, by the distinction drawn by the High Court between ‘traditional common purpose’ and ‘extended common purpose’. Importantly, it rejected the submission, advanced on behalf of the applicant, that the concept of ‘joint criminal enterprise’ was no more than a synonym for ‘acting in concert’. The Court explained that in *Lowery and King*,⁵⁴ Smith J had not endeavoured to state the law exhaustively but had addressed a specific situation, namely one in which both offenders were present.⁵⁵ It was for that reason that Smith J had stipulated ‘presence’ as a requirement of acting in concert.

As regards the mental element for counselling and procuring, the Court again noted that the trial judge’s directions regarding this matter had occupied many pages. In upholding that direction (which was given in accordance with the model charge), the Court referred to a significant body of authority. I should note that *Likiardopoulos*⁵⁶ is currently the subject of an application for special leave to appeal.

The Court of Appeal also dealt with some of the complexities associated with complicity in *Arafan v The Queen*.⁵⁷ Once again, it should not be necessary to canvass a host of authorities in order to ascertain the state of the law on a matter as basic as this.

⁵² (1995) 183 CLR 108.

⁵³ (1998) 197 CLR 316.

⁵⁴ [1972] VR 560.

⁵⁵ The Court referred to *R v Jensen and Ward* [1980] VR 194 and *R v Morgan* [1994] 1 VR 567, 570 in that regard. It also noted *R v Clarke and Johnstone* [1986] VR 643 and *R v Franklin* (2001) 3 VR 9.

⁵⁶ [2010] VSCA 344.

⁵⁷ [2010] VSCA 356.

It is obvious that the law relating to complicity is far too complex, and uncertain.⁵⁸ It is likely that only legislative reform can overcome these difficulties.

General jury directions

I turn next to the subject of jury directions in general and the extent to which, by their sheer length and complexity, they have contributed to the problems with the criminal justice system in this State. Much has been written on this subject. For that reason, my comments will be brief.

I note that in a speech delivered by Lord Justice Moses of the English Court of Appeal late last year, and presented again at the Berlin conference of the Australian Bar Association in July of this year, comment was made about the fact that in Scotland the standard jury direction normally takes between 15 and 18 minutes.⁵⁹

The position in the United States is broadly the same. Most jury charges there are in standard form, and are delivered within half an hour to an hour. Of course, judges do not attempt to summarise the evidence in these charges.

In Victoria, the position is entirely different. Jury directions take hours, if not days. If anything, they are becoming longer, and more prolix. This cannot be good for the administration of criminal justice.

This issue was the subject of an excellent report prepared by the Victorian Law Reform Commission in 2009.⁶⁰ The Commission recommended that legislation be enacted containing general principles which guide the content of all jury directions. Moreover, directions should be clear, simple, brief, comprehensible and tailored to the circumstances of the particular case. At present, many jury directions that I have seen would fail to meet even a single one of these requirements.

⁵⁸ For some examples see, generally, *Osland v The Queen* (1998) 197 CLR 316; *Gillard v The Queen* (2003) 219 CLR 1; *Truong v The Queen* (2004) 223 CLR 122; and *Arafan v The Queen* [2010] VSCA 356.

⁵⁹ Lord Justice Moses, 'Summing Down the Summing Up' (Speech delivered at Judiciary of England and Wales Annual Law Reform Lecture, 23 November 2010).

⁶⁰ Victorian Law Reform Commission, *Jury Directions* (Final Report, 2009).

Why is that so? The first, and perhaps most important, reason is that judges today are required, whether pursuant to statute or at common law, to give juries the most comprehensive and detailed warnings about a host of specific matters, none of which were deemed necessary in the past.

Some commentators have questioned the need for any such warnings to be given.⁶¹ Others have criticised not so much the fact that the warnings are given but, rather, that they are delivered in such detailed and complex terms. They have expressed doubts as to whether these warnings have any beneficial effects, or whether they only add to the complexity of the trial and the risk that it may miscarry.

The Commission's report on jury directions identifies several areas where, in its view, the law requires urgent attention. The first of these is the warning that must be given regarding lies as 'consciousness of guilt'. This warning (which in this State has been extended to post-offence conduct more generally)⁶² stems from the well-known decision of the High Court in *Edwards v The Queen*.⁶³

The Commission is highly critical of the *Edwards* direction. As its report notes, lies are just a species of circumstantial evidence.⁶⁴ No specific warning is required of the dangers of acting upon evidence of that kind, although it may be just as incriminating and just as ambiguous as evidence of lies.

Edwards,⁶⁵ as understood in this State, requires the trial judge to identify with precision every piece of post-offence conduct relied upon by the Crown as evidence of 'consciousness of guilt', and to warn the jury in the most detailed of terms as to how that evidence can and cannot be approached. The need for an *Edwards* direction to be given has led to many convictions being overturned.

⁶¹ Mirko Bagaric and Geoffrey Flatman, 'Juries Peers or Puppets: the Need to Curtail Jury Instructions' (1998) 22(4) *Criminal Law Journal* 207.

⁶² *R v Ciantar* (2006) 16 VR 26; and *R v Cavkic (No 2)* [2009] VSCA 43.

⁶³ (1993) 178 CLR 193 ('*Edwards*').

⁶⁴ Victorian Law Reform Commission, *Jury Directions* (Final Report, 2009) 38, 3.14.

⁶⁵ (1993) 178 CLR 193.

The matter is still more complicated. A trial judge must decide whether to give what is sometimes described as the ‘full’ *Edwards* direction, or whether instead to give only what is known as a ‘*Zoneff*’⁶⁶ direction. If the latter direction is given, the judge will tell the jury that they are not to treat any lies that they conclude the accused has told as an admission of guilt, but to treat them instead as relevant only to the credit of the accused. Jurors undoubtedly find directions of this kind perplexing.

Much of this is unnecessary. In the United States, juries are told about the possible significance of lies in just one or two short paragraphs. Certainly, they are not directed in anything like the detail set out in the seven or so pages currently stipulated for an *Edwards* direction in the Charge Book.

Warnings which are probably unnecessary, and certainly confusing, must now be given in a host of other areas. Some of these warnings reflect nothing more than common sense. Of course, juries should be warned of the dangers of mistaken identification. Courts in this country have long-recognised the fallibility of eye witness identifications, and the need to instruct juries appropriately as to factors that might increase the risk of mistaken identification. It does not follow, however, that each and every component of what is known as a ‘*Domican*’⁶⁷ warning must be given in every case. For example, I cannot understand why a jury, when warned as to the dangers of mistaken identification, should be told that they must take into account the fact that memory fades over time. Jurors are not stupid. They should not be treated as though they were.

Some warnings are couched in language that defies understanding. For example, the law relating to propensity evidence used to be relatively straightforward. The ‘similar facts’ rule involved a question of admissibility only, to be resolved by the judge. These days, once evidence of prior misconduct is led, a whole series of warnings must be given as to the use to which such evidence can and

⁶⁶ *Zoneff v The Queen* (2000) 200 CLR 234.

⁶⁷ *Domican v The Queen* (1992) 173 CLR 555.

cannot be put. The theory behind these warnings is no doubt sound. But, frankly, I wonder whether, in practice, such warnings really serve any useful purpose. In fact, they may do more harm than good.

Consider, as an example of the difficulty these warnings pose, the by no means unusual case of an accused charged with sexual offences against a number of different complainants. The Crown seeks to have the charges tried together. It argues that this should be permitted because the evidence is 'cross-admissible'. It relies upon ss 97 and 98 of the *Evidence Act 2008*, which deal with tendency evidence and coincidence evidence respectively. The judge rules in favour of the Crown.

Assume further that the Crown also seeks to rely upon what is known as evidence of 'uncharged acts'. This evidence is said to be relevant in various ways such as, for example, by providing what is known as 'context'. Once again, the judge rules in favour of the Crown.

Now, however, the really difficult problems arise. The jury must be warned of the ways in which they can, and cannot, use such evidence. They must be given, in relation to the evidence led as to both coincidence and uncharged acts, what is described as a 'propensity warning'. That is, they must be told that they should not conclude, merely from the fact that the accused has previously committed acts that are discreditable, that he or she is a person likely to have committed the offence or offences charged.

All this is perfectly clear. However, what happens when, as is often the case, the evidence in question is admitted not merely as going to coincidence, or as evidence of context, but also because it satisfies the requirements of tendency? Now the judge must somehow convey to the jury that insofar as the evidence is considered as going to tendency, the propensity warning does not apply. But when that same evidence is considered as going to coincidence or context, and not tendency, that warning does apply. Any jury would look askance at such a direction.

To make matters worse, in many such cases the jury will also have to be given what is described as an 'anti-substitution warning'. This means that they must be told that they should not reason that although the accused may not have committed the actual offence charged, he should still be convicted because he deserves punishment for having committed other offences. A warning of that kind may be regarded as nothing more than an insult to the integrity of the jury.

In the Charge Book, the bench notes regarding warnings to be given in relation to propensity evidence now take up 11 full pages. Although trial judges are repeatedly encouraged to avoid slavish adherence to the language of the model charge contained in the Charge Book, there is always a risk that significant departure from the terms of the warnings set out therein may lead to a conviction having to be quashed. It is hardly surprising, in those circumstances, that most trial judges are cautious, and follow the language of the model charge closely, even to the point of directing the jury about matters that are not really in issue. It is hardly surprising, in such circumstances, that jurors are left mystified.

Conclusions

I have said enough to indicate some of my concerns about developments in the criminal law in this State.

I have focused particularly upon the unnecessary complexity that now attends most aspects of the law in this area.

It is not difficult to work out why this is so. Legislation today is often drafted in a style that is highly prescriptive and all but incomprehensible. When a draftsman tries to anticipate every conceivable eventuality, the result is usually total confusion. And when the draftsman tells judges, in detail, how in every case they must instruct jurors, the problem is likely to be compounded.

The courts themselves have contributed in no small measure to the unnecessary complexity of the criminal law. Appellate judgments are sometimes

expressed in language that might make sense to legal technicians, but is extremely difficult for anyone else to understand. Over-elaboration of rules, of the kind that the law now invites, may lead to the importance of basic principle being overlooked.

I have a feeling that Louis Waller was right, in his note to me, when he said that Peter Brett would have uttered the words 'hear hear' when he heard my lament about the state of the criminal law. Professor Brett would also have wanted to say, I think, that we have lost sight of some key values in the way in which the law now operates.

Peter Brett's approach to the criminal law rested upon one fundamental proposition. His basic belief was that punishment could only ever be justified if the person to be punished was in some way morally blameworthy. He would, I am sure, have accepted that the notion of moral blameworthiness extended beyond the traditional concepts of *mens rea*, these being intention, knowledge, and subjective recklessness. He would have accepted that some forms of serious negligence were encompassed within that notion.

Peter Brett, however, would not have accepted the idea that anyone should be convicted of a serious criminal offence without any moral obloquy being associated with his or her conduct. He would strongly have opposed the ever-increasing use of the legislative device of the 'deeming provision'. He would have resisted the tendency, on the part of the Parliament, to legislate for a reversal of the onus of proof, not just in the field of drug offences, but more generally. He would have found utterly distasteful the current move towards the use of objective, rather than subjective, liability.⁶⁸ Once again, however, these are all matters that could be the subject of another paper, at another time.

But Peter Brett would also have accepted that legislative reform of the criminal law, if properly conceived and carefully implemented, was beneficial. He would have approved, I think, of a number of recent legislative reforms to the

⁶⁸ See, for example, the 'intoxication' provisions in s 9AJ of the *Crimes Act 1958*.

criminal law. For example, he would have regarded our current treatment of the mentally impaired as greatly preferable to the way in which such cases were dealt with in the past. He would also have approved of the reforms brought about by the *Criminal Procedure Act 2009*, a number of which have finally brought criminal procedure in this State into the 21st century.

It should not be forgotten, in that regard, that Peter Brett was largely responsible for the highly successful introduction into Victoria of the *Theft Act 1968* (UK) provisions. His contribution to the modernisation of the criminal law is, of course, only a small part of his enduring legacy.

I thank the Melbourne Law School for doing me the honour of allowing me to present this paper in Peter Brett's memory. We should acknowledge that we are all, in various ways, in his debt.