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EDITORIAL

COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE REFORMS

Nicola Wake and Alan Reed*

The genesis and impetus for the works presented in this special edition of the *Journal of International and Comparative Law* derive from a central ambition to invite leading academicians to consider optimal reform conceptualisations within the criminal justice system, guided by comparative analyses and internationalised perspectives. The aim extends to initiatives advanced by Northumbria University's Centre for Evidence and Criminal Justice Studies. While the works themselves stand as contributions of the individual scholars, they have been influenced by the overarching theme of international and comparative criminal justice and evidence scholarship. This special edition is divided into two parts. The first half of the collection explores contemporary issues in substantive criminal law and sentencing. The second half of the collection assesses evidential issues affecting the operation of the law.

The collection commences with a contribution from Barry Mitchell. Barry in "Fundamental Issues in Homicide" notes that there are good reasons why we should be less than happy with both the substantive law and the sentencing of murder. The Law Commission's recommendations for restructuring the substantive law in 2006 have largely fallen on deaf ears and the deficiencies they identified remain unaddressed. Serious concerns have also been raised about the sentencing law. One of the main assumptions behind the mandatory life sentence — that it was supported by the overwhelming majority of the public — has been doubted following careful survey research, and Sch.21 of the Criminal Justice Act 2003 (to which judges must have regard when determining the minimum term) has been heavily criticised. Through an analysis of the principal shortcomings of the status quo in England and Wales, this article suggests how the criminal justice system should deal with the more serious cases of unlawful homicide by revisiting both the definition of murder and the punishment of convicted offenders.

In "Reconceptualising the Contours of Self-Defence in the Context of Vulnerable Offenders: A Response to the New Zealand Law Commission", Nicola Wake and Alan Reed contend that there are compelling reasons for reconceptualising the contours of self-defence, and for the introduction of a bespoke partial defence complemented by jury directions and the admissibility of social framework evidence to assist vulnerable offenders who kill their abusers in a desperate attempt

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to protect themselves. In 2016, the New Zealand Law Commission recommended, *inter alia*, that self-defence be recategorised and broadened to specifically allow victims of family violence who kill to potentially claim a defence even in the absence of an imminent threat of harm, standardised on an “all or nothing” perspective. In truth, a far wider contextualisation needs to apply, beyond the limited and constrained terms of reference before the Commission. The contours of self-defence applicability ought to extend to extrafamilial vulnerable offenders, encompassing individuals subjected to human trafficking and/or modern day slavery, those trapped by ostensible gang membership and those experiencing third-party abuse who respond with lethal force. It is their assertion, after a comparative assessment of the theoretical and doctrinal precepts of a number of alternative legal systems, that the full and partial defence schema should be more nuanced. Extant laws fail to appropriately recognise the need for a *de novo* partial defence template and reflective individuated culpability thresholds.

Warren Brookbanks in “Three Strikes: New Zealand’s Experience” critically reviews the three strikes sentencing regime law that was introduced by the New Zealand Parliament in May 2010. The fundamental question of whether it constitutes good law reflecting sound penal policy or an excessive penal response to the perceived problem of violent crime is addressed. In conclusion, Warren asserts that no overarching benefits are provided beyond previously adopted sentencing options. It lacks a sound rationale and is in conflict with existing and established sentencing principles.

The fourth article, “Battered Women: Loss of Control and Lost Opportunities” by Amanda Clough considers battered women who kill their abuser and the problems they face in accessing justice. The English legal system has updated partial defences to murder in an attempt to remedy the situation by abolishing the provocation defence, and replacing it with an alternative partial defence predicated on loss of control. Amanda considers how effective these reforms are through a comparative assessment of the law in England and Wales in light of approaches adopted in alternative jurisdictions.

In “Sexual Violence, Domestic Abuse and the Approach of the Feminist Judge”, Heather Douglas identifies that one of the enduring problems identified by feminist legal scholars is the difficulty of implementing feminist legislative reforms in practice. In part this occurs because myths and stereotypes about issues such as “real rape” and domestic violence continue to be reflected and sustained by some barristers and judges in trials and other court procedures. In this context, Christine Boyle speculated, over 20 years ago, on what difference a feminist judge might be able to make in a sexual assault case. Boyle’s question has been taken up and extended to other areas of law in feminist scholarship and feminist judgments projects in recent years. Interviews conducted as part of the Australian Feminist Judgments Project provide an opportunity to further explore the question of what difference a feminist judge might be able to make in a criminal case. Forty-one judges agreed to be interviewed on the basis of their identification as feminists.

Many discussed the challenges they face in cases involving issues such as sexual assault and domestic violence and how they have responded to these challenges. The article considers how they perceive that their feminist worldview influences their approach to decision-making. Drawing on the interviewees' comments, the article identifies feminist approaches to understanding key legal concepts, managing the courtroom, controlling the admissibility of evidence and cross-examination and approaches to language.

In "Understanding the Law on Intoxicated Offending: Principle, Pragmatism and Legal Culture", Arlie Loughnan and Sabine Gless identify that the criminal law on intoxicated offending is notoriously complex and technical, featuring distinctive doctrinal constructs and exceptions to otherwise general rules. In order to contribute to scholarly understanding of the law on intoxicated offending, and with a focus on the law in Australia (Victoria and New South Wales), England and Wales, Germany and Switzerland, Loughnan and Gless present a two-part analysis of the law. First, they reveal the ways in which, in varying configurations, the legal rules on intoxicated offending in the civil and common law contexts are suspended across a tension between principle and pragmatism. Second, they explore the significance of legal culture — broadly, non-doctrinal components of the legal order including traditions, practices and institutions — making the case that dimensions of legal culture relating to intoxicated offenders achieve a reconciliation of legal principles with pragmatic concerns about intoxicated offending, thereby ameliorating the costs of honouring or attempting to honour legal principle when it comes to intoxicated offending.

Gavin Dingwall in "Circumstance, Choice and the Denial of a Superior Orders Defence in International and Comparative Criminal Justice" identifies that claims that an actor who followed orders issued by a superior should be granted a defence to a criminal offence are largely rejected in international and domestic criminal law. Various justifications have been offered: such a defence would often excuse participants in the gravest forms of criminal activity; a degree of choice remains and so some culpability is present and deterrence would be compromised if the defence could be invoked too readily. This article assesses these claims with particular regard to the notions of "circumstantial luck" and choice. It is argued that rejection of a superior order defence is justifiable, even though some of the orthodox rationales for rejection appear weak. Instead, the relevance (if any) of a superior order claim should be considered at the sentencing stage as part of an overall assessment of individual culpability.

Chrisje Brants, Adam Jackson and Frans Koendraadt in "Culpability Compared: Mental Capacity, Criminal Offences and the Role of the Expert in Common Law and Civil Law Jurisdictions" compare the situation in which an individual with diminished mental capacity is prosecuted for a criminal offence in England and Wales and in the Netherlands, with a particular focus on the role of the expert medical witness.

It is not unreasonable to assume that, whatever the jurisdiction, the existence of a condition affecting the mental capacity of the defendant may affect how the

culpability of the accused is assessed by the courts and translated into a verdict. By comparing culpability in the context of the role of experts, consideration is given to how substantive and procedural laws hang together in the different jurisdictions. A comparison between England and Wales (as an example of a common law jurisdiction) and the Netherlands (as an example of a civil law jurisdiction) may reveal very different outcomes with regard to the verdict and the way it is reached that have far-reaching consequences for the person involved. This article considers why these differences may occur, focusing, in particular, upon whether they are the result of the common law's reliance on just two possible reasons for the absence of culpability in such cases (insanity or automatism or, conceivably, diminished responsibility if murder is the charge), while the civil law is based on a theoretically underpinned doctrine that allows for a greater range of defences with regard to culpability (and its relative absence) in general.

The topic not only has possible practical implications but could also contribute to the growing body of comparative scholarship: comparisons of substantive criminal law, unlike its many procedural aspects, are few and far between. One of the reasons is that substantive law is shot through with moral considerations that are very difficult to ascertain. In this case, however, the issue is not the offence itself, but whether and how a mental condition may affect culpability. While it could be said that the recognition of such conditions is also contingent on their social and moral connotations, the effect of this is likely to be much less than in a comparison of (perpetrators) of sexual offences *per se*.

Michael Stockdale, Emma Smith and Mehera San Roque in "Bad Character Evidence in the Criminal Trial: The English Statutory/Common law Dichotomy — Anglo-Australian Perspectives" consider that evidence of bad character is an important evidential category, and its admission can have a significant impact on the criminal trial. The Criminal Justice Act 2003 (CJA 2003) provides a definition of bad character evidence (s.98/112 of the CJA 2003) that, where applicable, requires such evidence to surmount one of the gateways to admissibility in s.101(1) of the CJA 2003. Regarding some Uniform Evidence Law jurisdictions in Australia, the Evidence Act 1995 governs the admissibility of evidence to demonstrate "tendency"/"coincidence" (or the improbability thereof) and the use of bad character evidence to rebut defendant-led good character (see ss.97, 98, 101 and 110 Evidence Act 1995). The definition of bad character evidence provided in s.98 of the CJA 2003 requires "evidence of, or of a disposition towards, misconduct" and "misconduct" is further defined within s.112 of the CJA 2003 as "the commission of an offence or other reprehensible behaviour". A wealth of case law has developed around when evidence "has to do with the alleged facts of the offence charged" in s.98(a) of the CJA (an exception to the definition of bad character evidence) as well the scope of the overlap between s.98(a) and certain gateways to admissibility (eg s.101(1)(c), 101(1)(d) of the CJA 2003), which has led to a degree of flexibility and to uncertainty within the law in this area. Similarly, in Australia, in many cases, evidence incidentally disclosing other (mis)conduct by

the accused have been held to fall outside the provisions regulating the admission of tendency (and coincidence) evidence. This article explores some of the areas of uncertainty that have developed since the implementation of the 2003 reforms, informed by consideration of the approach to equivalent questions in the Australian jurisdictions.

Gary Edmond and Natalie Wortley in “Interpreting Image Evidence: Facial Mapping, Police Familiars and Super-Recognisers in England and Australia” note that it is accepted that some people have enhanced abilities to recognise familiar faces and to match unfamiliar faces. London’s Metropolitan Police has established a team of approximately 140 police “super-recognisers” to identify suspects, but limited attention has been given to the use to which their evidence may properly be put during investigations, formal interviews and prosecutions. This article explores the ways investigators have traditionally approached the identification of persons of interest in crime-related images and the use of this evidence at trial. It explains that the courts have largely been inattentive to scientific research and the known difficulties and (un)reliability of facial perception. Following a review of the scientific literature it considers admissibility jurisprudence in England and Australia. They conclude that the strategic use of independent super-recognisers would enhance the reliability of identifications from images and offer the potential to circumvent the dangers of contamination, bias and uncertainty that accompany current police and expert identifications.

The diversity of the articles presented herein demonstrates the multiplicity of challenges that the criminal justice system faces and adventitious benefits that may derive from international and comparative perspectives and the role of academicians in advancing optimal solutions for potential future reform.

