

CRIMINAL LAW JOURNAL

Volume 43, Number 3

July 2019

EDITORIAL – *General Editor: Mirko Bagaric*

Indigenous Incarceration: Time for a Pragmatic Solution – Sentencing Discounts and Retrospective Reductions in Prison Terms 157

ARTICLES

Mistakes That Negate Apparent Consent – *Andrew Dyer*

This article argues that there is a need for the various State and Territory legislatures to reform the law concerning those mistaken beliefs that negate a complainant’s apparent consent to sexual activity. While, at least on its face, the position in Western Australia, the Australian Capital Territory and Tasmania is unacceptably broad, the list of vitiating mistakes in the relevant New South Wales, South Australian, Victorian, Northern Territory and Queensland legislation is too narrow. In all jurisdictions, Parliament should give the courts greater guidance than it does about when a conviction is to be returned in a mistake case. As well as providing for a non-exhaustive list of vitiating mistakes, it should make it clear that, whenever a sexual offence complainant has made a but for mistake, a conviction should follow unless an interest of the defendant and/or a pressing public policy concern outweighs the complainant’s interest in sexual autonomy. 159

Putting Jurors First: Legislative Simplification of Jury Directions – *Greg Byrne and Chris Maxwell*

The *Jury Directions Act 2015* (Vic) contains the most comprehensive reform of the law of jury directions introduced in any common law jurisdiction. Both the subject matter of the reforms and the process for developing them were unusual. The Jury Directions Advisory Group (JDAG) was central to the reform process. This article from the co-convenors of JDAG describes how the Advisory Group worked and explains the importance of the collaborative approach between government, the judiciary and the legal profession which underpinned the reforms. This article highlights the radical nature of the reforms and examines the early indications of their effectiveness. 180

Appeals against Conviction on Indictment: Process, Outcome and NSW Reform after *Kalbasi v Western Australia* – *David Hamer*

The High Court’s recent decision in *Kalbasi v Western Australia* (*Kalbasi*) should present no obstacle to the adoption of the New South Wales Law Reform Commission’s proposed reform to the “common form” conviction appeal legislation. The statutory expression “substantial miscarriage of justice” clearly requires clarification. While the proposed reform separates process and outcome considerations into different grounds of appeal, this would not deny the potential for interaction recognised in *Kalbasi* – process flaws inhibiting the court’s ability to assess the appropriate outcome. With respect to outcome assessment, the *Kalbasi* majority considers that the appeal court should form its own view whether the evidence proves guilt. The reform proposal, respecting the jury’s constitutional role, asks how a reasonable jury would view the evidence. Consistently with all *Kalbasi* judgments, the proposal recognises that where a process error denies the defendant a fair trial, the appeal should be upheld without regard for outcome. 201

LEGISLATION COMMENT

Dancing with Death: Why the NSW Homicide Offence of Drug Supply Causing Death May Cause More Harm than Good – *Elyse Methven*

In November 2018, the New South Wales government rushed a new homicide offence of “drug supply causing death” through Parliament. It is now a crime – punishable by up to 20 years’ imprisonment – for a person to supply a prohibited drug for financial gain where another person self-administers the drug and dies. The offence was implemented in response to drug-related deaths at music festivals. While similar provisions exist in the United States, the crime of drug supply causing death is the first of its kind to be enacted in Australia. This article critically examines the new offence. I critique the haste with which the legislation was introduced and identify problems that may arise in relation to prosecutions, especially with regard to proof of causation and mens rea. I argue that this “law and order” response to drug-related harms is not only unjustified; it may also do more harm than good. 215

DIGEST OF CRIMINAL LAW CASES 228