

# CRIMINAL LAW JOURNAL

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EDITORIAL – *Editor: Mirko Bagaric*

**The Reality of Recidivism; the Illusion of Rehabilitation** ..... 3

## ARTICLES

**The High Court on Crime in 2020: Outcomes and Jurisprudence** – *Mirko Bagaric*

This article examines the decisions of the High Court of Australia in 2020 that relate to criminal matters. The systematic analysis of all High Court judgments commenced in this journal in 2010 and is undertaken annually. The article explains the principles that arise from these cases and identifies jurisprudential themes from the decisions. .... 4

**Suppression Orders in Criminal Trials: Still Necessary in the Digital Era** – *Marco Lopresti and Andrew Burke*

Debate on whether or not suppression orders are futile in the digital era intensified following *R v Pell*. All Australian jurisdictions use a test based on necessity: that the suppression order is necessary to prevent prejudice or is in the public interest. Inherent to this test is the balance between open justice and fair trial rights; in the Australian context, the High Court has established the primacy of the latter. This article considers the purpose and historical origins of suppression orders to argue that, in criminal proceedings involving jury trials, the necessity test can be met despite the challenges of the digital era. Necessity in this context should be understood as a continuum rather than an absolute; it is not necessary that the risk of prejudice is eliminated. The strengths of the Australian approach are further illustrated by comparison with the United States where the First Amendment tips the balance in favour of open justice. .... 18

**A Case against Joint Criminal Enterprise: The Problem of Defences** – *Thomas Poberezny-Lynch*

In *Osland v The Queen*, the High Court held that in a murder trial of two accused on the basis of a joint criminal enterprise, where only one of the accused (the active participant) strikes the fatal blows, the co-accused who participated in the killing but did not strike the fatal blows (the passive participant) may be convicted of murder despite the acquittal of the active participant on the basis of self-defence. But what if the passive participant was acting in self-defence at the time of the killing, but the active participant had no defence – could the passive participant obtain the benefit of self-defence despite the active participant’s conviction? I argue that the answer is “yes”. However, this result leads to illogical and unjust outcomes. These outcomes could be avoided if a passive participant in a joint criminal enterprise is treated as an accessory, rather than a principal offender. .... 31

**Pocketing the Proceeds of Crime: A Case for Reform of Criminal Property Confiscation Legislation in New South Wales, Queensland and Western Australia** – *Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich*

This article reports on an 18-month study undertaken in three Australian jurisdictions – New South Wales, Queensland and Western Australia – into the attitudes to and impact of legislation confiscating the proceeds of crime. Forty interviews were conducted with a range of legal and government stakeholders and members of the public directly or indirectly involved in or affected by the operation of confiscation legislation. The study produced a suite of best practice recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives. ....

46

**Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia** – *Kate Warner, Lorana Bartels, Karen Gelb, Julia Davis and Caroline Spiranovic*

There is an expanding body of research measuring public perceptions of the criminal justice system’s responses to offenders in general and sex offenders in particular. However, less is known about public attitudes to the factors that the law classifies as aggravating, mitigating or merely neutral. This article presents key findings from the National Jury Sentencing Study, which sought to address this gap in knowledge in the case of sex offences using two groups: 343 jurors who had returned a guilty verdict; and 149 members of the public called for jury service who were not selected for a trial. The study shows that, in general, the public’s intuitive views of sentencing factors are well-aligned with judicial sentencing practice – a finding that contradicts the stereotypical view of the public as particularly punitive towards sex offenders. Some differences in views on factors such as good character and absence of remorse did appear and potential responses to this divergence are discussed. ....

57