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Modern Criminal Law of Australia by Jeremy Gans

Jodie O'Leary

Bond University, Jodie_O'Leary@bond.edu.au

Elizabeth Greene

Bond University, Elizabeth_Greene@bond.edu.au

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BOOK REVIEW
MODERN CRIMINAL LAW OF AUSTRALIA
BY JEREMY GANS

JODIE O'LEARY* AND ELIZABETH GREENE**

It is not often that you laugh out loud when reading a textbook, but that is exactly what happened when we read *Modern Criminal Law of Australia*.¹ The author's humour, sometimes overt and sometimes subtle, shines through the introduction to this text and his wit is sure to assist in student engagement with the subject matter. Humour, though, is not the only thing that makes this text unique. It is a criminal law textbook, designed largely as a learning tool. However, the table of contents is not reflective of the usual topics to be found in other criminal law textbook iterations. Chapters are headed with a single word, designed around themes that appear in criminal law and procedure. Offences and defences are not the hub of the text; instead references to offences are illustrative only of the wider concepts. It is this feature that drew us to this text.

The book's promise was to transcend the barriers of jurisdiction specificity, to 'give readers a robust fishing rod in place of a rich meal of a few prize fish.'² Such an approach appealed to us given recent requirements to teach postgraduate only cohorts (Juris Doctor ('JD') students, many of whom are mature age, many of whom are from other states or even other countries). It is in a similar context that the book developed. Jeremy Gans teaches Criminal Law and Procedure in Melbourne's dedicated JD program. Towards the end of the introduction to his book, Gans states that he is open to feedback.³ He suggests that readers from 'traditional code' states may be suspicious of the book's value.⁴ We formed the impression that he may be slightly nervous about, but would nevertheless appreciate, comments from such an

* Assistant Professor, Bond University Faculty of Law, Gold Coast, Queensland, Australia. LLM (High Dist), Grad Dip Legal Prac, BA, LLB (Hons).

** Senior Teaching Fellow, Bond University Faculty of Law, Gold Coast, Queensland, Australia. BA, LLB. Both authors lecture in Criminal Law and Procedure at the Faculty of Law, Bond University and practiced as lawyers in Queensland's criminal courts.

¹ Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012).

² Ibid 4.

³ Ibid 18.

⁴ Ibid 8.

audience. As teachers and practitioners of criminal law from one such state, Queensland, we are happy to oblige.

Chapter 1 is headed 'Words'. It explores the importance of statutory interpretation in Australian criminal law. Gans largely avoids Latin legal maxims (that students find difficult to learn and easy to forget) in favour of a focus on the language, context, and purpose of sections specifically and statutes generally. He then canvasses specific rules of statutory interpretation that are pertinent to reading statutes with criminal law repercussions. Chapter 2 is about 'Choices', predominantly those made by police in arresting and charging, and those by prosecutors as to when and how to proceed. Gans uses disorderly behaviour type offences in both Chapters 1 and 2 to demonstrate the application of his themes of words and choices. The examples provided will prove interesting to students, some being topical (such as Victoria's provisions on 'upskirting' and the Chaser's stunt at the Asia-Pacific Economic Cooperation Leaders Summit in 2007) and others relatable (such as reference to one Australian law student's continued interaction with police).⁵ We expect though that students will struggle with the amount of grey, especially in Chapter 1. That Chapter highlights the difficulties and controversies associated with the application of statutory interpretation tests. While it is of course appropriate to make students alive to the fluidity and debate that exists in the law and demonstrate how such inconsistencies can be used by various parties to support interpretations that suit their own purposes, the amount of back and forth seems excessive. We suspect this complexity may result in students skipping the content and proceeding straight to the easy to read summary at the conclusion of the Chapter.

For teachers of the Queensland Criminal Code, Chapter 3's material sounds very familiar. 'Conduct' examines the concepts of action, intention and voluntariness through the lens of the *Criminal Code Act 1995* (Cth). The Chapter makes it clear that all jurisdictions, whether they fall within the scope of common law or are dictated by codes, require common elements to be proven to determine liability. These general criminal law requirements of liability are the foci of this Chapter. There is a continuing case example throughout, related to a driving offence, which exemplifies the application of these elements, giving them relevance and meaning. Overall, Chapter 3 provides a thorough overview of the broad requirements for establishing general criminal liability.

⁵ In the cases of *Coleman v Sellars* [2000] QCA 465; *Coleman v Power* [2004] 220 CLR 1; *Coleman v Greenland* [2004] QSC 37; and the UN Human Rights Committee, *Communication No. 1157/2003: Coleman v Australia*, 17 July 2006, [7.3].

Chapter 4 identifies the nature of the liability proven, in terms of the outcome of the criminal conduct (the 'Results'). Foreseeability, recklessness, causation, negligence, mistakes and carelessness are all investigated, with reference also to environmental laws and liability for pollution. For code states, such as Queensland, these concepts are often specified within particular offence provisions, rather than being general arguments that can be raised in any context. This difference between common law and code states potentially affects an accused person's liability, depending on which scheme applies. Nevertheless, there are extant similarities among the code and common law states.

Closely related to Chapter 4, and recognising the overlap, Chapter 5 looks at the topic of 'Circumstances'. This Chapter considers the construction of offences, and expounds the need to interpret or infer liability based on the meaning of the sections themselves. The discussion of the offence of trafficking, in the context of a variety of state, federal and foreign domestic legislation, shows that although the offences sound similar the actual wording can create interpretations and nuances that lead to a myriad of outcomes. This Chapter is very interesting, the issue of semantics being a delight for many law academics and students alike.

The material presented in Chapter 6 on 'Sentences' seems similar to other texts in this area, although we note that some criminal law texts fail to address sentencing at all. The similarity may be due to the reliance on principles in both sentencing legislation and sentencing judgments. Noting the significant breadth of content required to do justice to sentencing law across numerous jurisdictions, the discussion is restricted only to the assessment of offence seriousness in sentencing decisions. This limitation is both the Chapter's strength and its drawback. The Chapter provides an in depth study of this aspect of sentencing but, on the other hand, other important aspects of sentencing are not analysed in the text.

Chapter 7, 'Standards', assesses the applicable considerations when establishing liability, using the offence example of slavery. The general idea of proof involves the prosecution satisfying the court of facts beyond reasonable doubt, but Gans delves further into the question of what exactly needs to be proved. He scrutinizes other problematic issues of proof such as hypothetical consequences, ordinary person tests and what they really involve, and the need to establish what an accused was thinking or intending at the time of an offence. This was an interesting and thought-provoking chapter.

'Groups' are discussed in Chapter 8. This Chapter seamlessly covers the potential application of criminal law to corporations and other modes of participation in crime, such as joint commission and complicity, across various jurisdictions. The use of the facts from case examples to explain how the law would be applied in different states

or territories makes a potentially difficult aspect of criminal law easier to comprehend.

Chapter 9, 'Failures', considers conduct where the intended crime is not committed, but liability is established on an alternative basis. Attempts, incitement and conspiracy are canvassed in some detail in this Chapter. There is some acknowledged overlap between federal and state codes and common law, and Gans comprehensively raises every possible basis for liability.

Chapter 10, 'Exceptions', looks at a variety of situations where the circumstances create exceptions to liability – where situations of duress, necessity or insanity mean that an accused can rely on some stated code exception, or inferred exception, to avoid guilt. The viability of these exceptions, and the issues associated with establishing them, are described.

Stakeholders often seemingly ignored in traditional criminal law texts, 'Victims' and 'States', are considered in Chapters 11 and 12 respectively. The Chapter on 'Victims' largely includes material that would otherwise be found in offence-specific chapters in traditional texts. For example, detailing victim consent as it relates to sex offences or other forms of assault and explicating victim responsibility as interveners or initiators of offences ultimately committed against them. The Chapter on 'States' identifies the potential role of states in criminal offences. It was carefully researched and the content was well argued. While it was of great interest to us as academics in the criminal law field and would be of particular interest to specialist practitioners, we wonder whether some of this material (especially that relating to the state as an offender) is beyond the needs of student consumers of compulsory criminal law courses.

All in all we very much enjoyed reading Gans' book. For us, it fulfilled its promise of inter-jurisdictional application. Wearing our practitioner hats, we were interested to learn about other jurisdiction's systems and found gems of knowledge that seem otherwise ignored in many criminal law texts. We see value in combining some of the issues, as Gans has, in a single chapter. However, wearing our academic mortarboards, we are not convinced of the utility of this approach for teaching. We found it a little convoluted in terms of accessing the applicable law. Gans may have provided the fishing rod but it was difficult to know where to cast the line. We anticipate difficulty in content-delivery and would be interested in hearing more about Gans' way of confronting this problem.