CRIME, ABORIGINALITY AND THE DECOLONISATION OF JUSTICE


Of Australia’s history of Aboriginal contact with the criminal justice system, it might fairly be said that the more things change the more they remain the same. So it is that we find ourselves marking the 25th anniversary of the final report of the Royal Commission into Aboriginal Deaths in Custody with another Royal Commission, this time into the detention of primarily Aboriginal youth in the Northern Territory. Although only in its early days, this year’s Commission already appears to be covering much of the same ground as its predecessor and, no doubt, there will be considerable overlap between the 339 largely unimplemented recommendations contained in the 1991 report and those to be made by the current commissioners.

Just as importantly, however, both of these modern inquiries share a historical antecedent: the 1905 Western Australian Royal Commission on the Condition of the “Natives”, spearheaded by Dr Walter Roth. Notwithstanding that he was working in an era when Aboriginals were still counted amongst Australia’s fauna, Roth made scathing findings of racialised police violence and neglect, findings which are still echoing over a century later. Roth wrote of police indiscriminately arresting Aboriginals and shackling them in chains, despite legislation which stipulated that this method was to be used only as a last resort. Reporting back to the government, Roth did not mince his words: “Your Commissioner has received evidence which demonstrates a most brutal and outrageous state of affairs … Children of from 14 to 16 years of age are neck-chain … in addition to neck chains, the prisoner may be still further secured with cuffs on his wrists … or on his ankles” (W Roth, Royal Commission on the Condition of the Natives: Report (Government Printer, Perth, 1905) 13-14).

These are the sort of telling historical homologies that one finds liberally interspersed through the second edition of Professor Harry Blagg’s seminal monograph Crime, Aboriginality and the Decolonisation of Justice. Blagg, currently Associate Dean of Law at the University of Western Australia, has been researching and writing about Aboriginal contact with the criminal justice system for over two decades. This book is a synthesis of his views on various aspects of this complex area of law and social policy.

Blagg’s is a deeply historical perspective, informed by his characterisation of the entire arc of the colonial narrative as one in which the police and the criminal justice system have been “the sharp instruments of dispossession”. More radically, Blagg asserts that “in many respects, the fundamental nature of this relationship [between police and Aboriginal people] has remained unchanged since invasion”. This mode of viewing contemporary police practices through the prism of history has recently gained an eminent proponent in US Supreme Court Associate Justice Sotomayor, who delivered a powerful dissent in similar terms in Utah v Strieff 136 S Ct 2056 (2016).

Yet Blagg must not be understood to be simply memorialising past wrongs; he seeks to draw lessons from them. So it is that each of the chapters in the body of this book takes a particular problem or policy issue, reflects upon it and seeks to bend it to future use. Blagg’s central thesis is that most, if not all, policy successes and failures in this area can be explained by understanding the degree to which they impose or eschew an authoritarian power dynamic, which Blagg views as an historical incident of state-sanctioned violence against Aboriginal people. Instead, Blagg advocates for a collaborative and culturally respectful method of policy formulation and implementation. Blagg subjects to this analysis such diverse issues as youth justice (the chapter on which includes uncannily prescient predictions of the systemic failures currently being highlighted in the Northern Territory), restorative justice, “zero tolerance” policing, Aboriginal self-policing initiatives, the criminal justice system’s response to family violence, Aboriginal sentencing courts and the recognition of Aboriginal customary law. This structure renders the book easily parsed and digested in chapter-sized portions; it also allows a reader to immediately appreciate how each chapter’s treatment of a discrete topic feeds
back into Blagg’s overarching thesis. This coherent structure is essentially unchanged from the first edition, which might cause one to question the necessity of a second edition.

The first edition was published in 2008 and survived for many years as a touchstone text, even as we gained the benefit of works of similar breadth and ambition, such as Thalia Anthony’s *Indigenous People, Crime and Punishment* (Routledge, Abingdon, 2013) and Don Weatherburn’s *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, Canberra, 2014). Yet by 2016, Blagg’s book was overdue for an update. While it is true that meaningful change in this area occurs at a glacial pace (when it occurs at all), the programs, policies, legislation and statistics are always changing. When the first edition went to press there had been no Northern Territory “Intervention”; we were still largely ignorant of the alarming rates at which Aboriginal persons in the criminal justice system suffer foetal alcohol spectrum disorders (something which we can no longer claim ignorance of after the blistering judgment in *AH v Western Australia* (2014) 247 A Crim R 34); we were only beginning to appreciate the rapidly accelerating imprisonment rate of Aboriginal women; and we did not anticipate the devastating effect that crystal methamphetamine (“ice”) would have on Aboriginal crime rates in urban, rural and remote communities. Yet, puzzlingly, some of these developments, and others, are afforded little or no discussion in the second edition.

Equally as surprising is the second edition’s failure to grapple with contemporary trends of increasing police powers and creeping overcriminalisation (see eg, J Hunyor, “Imprison Me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory” (2015) 8(21) *Indigenous Law Bulletin* 3). These are two phenomena the hard edges of which are currently being keenly felt by the most vulnerable members of the Aboriginal community, particularly those who are without stable accommodation and who are battling substance addictions. It must be acknowledged, however, that one book cannot hope to cover the field and that few revised editions of works of this scope succeed in advverting to all of the interim developments of relevance.

The stark reality is, as Blagg recognises, that we find ourselves in 2016 asking the same questions as we did eight years ago when Blagg’s book was first published. In the Preface to the second edition, Blagg frames the issue thus: “Once again we are faced with two alternatives: go on as we are, repeating failed strategies of colonial era social engineering; or create a new partnership with the Indigenous domain that respects Indigenous culture” (emphasis added).

For Blagg, we will get nowhere without attending to, and respecting, Indigenous culture and the customary laws that were famously described by Justice Blackburn as “a government of laws, and not of men” (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267). It is Blagg’s belief that the preservation and promotion of Aboriginal law is crucial to establishing harmony and reducing criminal behaviour in Aboriginal communities, and Blagg makes his case convincingly. Notwithstanding the somewhat limited nature of the revised material in this second edition, there is more than enough in this new publication to demand the attention of scholars and policymakers alike.

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