

## The Criminal Trial in Law and Discourse

*Also by Tyrone Kirchengast*

THE VICTIM IN CRIMINAL LAW AND JUSTICE

# The Criminal Trial in Law and Discourse

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# Preface

*The Criminal Trial in Law and Discourse* brings together various materials from law, history and policy to demonstrate how the modern criminal trial is a transformative institution of justice. The modern criminal trial is thus more than the popularly conceived notion of the adversarial trial before judge and jury. This does not simply mean that the trial is increasingly circumvented for alternative pathways to justice, such as summary justice. Rather, the criminal trial is transformative because it functions as a decentralised site of sociological engagement. This book explores the notion that the criminal trial is a discursive institution of social power that, consistent with its genealogy and history, transforms to meet new social needs. This book follows the argument that the criminal trial is now open to discourses that, before the advent of victim rights, human rights and the critique of state power, were more narrowly conceived around the locus of the criminal.

The modern criminal trial has responded to the rise of an international human rights movement, a law and order politics, terrorism, the rise of victims' rights, and a movement toward therapeutic and problem-solving justice. As such, the debate has shifted toward the extent to which the criminal trial is transgressive, as evidenced through the debate on the classification of control orders and other forms of preventative law as an exercise of criminal or civil law. A large number of cases canvassed herein suggest that the scope of the criminal trial is negotiated with regard to competing discourses of justice, each of which present ideas as to the form and scope the trial ought to take. As these discourses are competing, there is no generally agreed model as to the criminal trial, and this is being increasingly realised through the jurisprudence of various common law jurisdictions. Arguably, this realisation has spawned a counter movement for the concerted re-assertion of the bounds of adversarial justice, mainly through the rejection of principles of inquisitorial justice. Such a counter argument remains problematic, given that the adversarial trial never took a specific form, and that comparative law tells of the significant overlap between adversarial and inquisitorial models. The point remains, however, that the criminal trial is neither normative nor prescriptive but discursive and decentralised, and its genealogy suggests that this has always been the case.

In part, this book adopts a text and commentaries approach to the organisation of a diverse set of materials relevant to the parameters of



the criminal trial. Case law and policy documents are thus extracted to illustrate the formation of discourses, a method significant to Foucault's approach, to demonstrate the use of statements and the archive from which they draw their reference and power. This book draws upon substantially unpublished materials but does include short extracts previously published across two articles: Kirchengast, T. (2009) 'Criminal Injuries Compensation, Victim Assistance and Restoration in Australian Sentencing Law', *International Journal of Punishment and Sentencing*, 5, 3, 96–119; and Kirchengast, T. (2010) 'Recent Reforms to Victim Rights and the Emerging "Normative Theory of the Criminal Trial"', *Criminal Law Quarterly*, 56, 1 & 2, 82–115.

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# List of Abbreviations

AC	Appeals Cases
A Crim R	Australian Criminal Reports
All ER	All England Law Reports
ALJR	Australian Law Journal Reports
B & Ald	Barnewall and Alderson's English King's Bench Reports
ASBO	Anti-Social Behaviour Order
BHRC	Butterworth's Human Rights Cases
BOCSAR	Bureau of Crime Statistics and Research
CCP	Code for Crown Prosecutors
CDA	Crime and Disorder Act
CJ at CL	Chief Judge at Common Law
CLR	Commonwealth Law Reports
CPS	Crown Prosecution Service
Cth	Commonwealth
Cr App R	Criminal Appeal Reports
CVRA	Crime Victims' Rights Act
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EHRR	European Human Rights Reports
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
F 2d	Federal Reporter (United States Court of Appeals)
F 3d	Federal Reporter (United States Court of Appeals)
FLR	Federal Law Reports
F Supp	Federal Supplement
F Supp 2d	Federal Supplement
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LCEW	Law Commission of England and Wales
LEPRA	Law Enforcement Powers and Responsibilities Responsibilities Act

LEXIS	LexisNexis
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NSWSC	New South Wales Supreme Court
NZ	New Zealand
NZLC	New Zealand Law Commission
NZLR	New Zealand Law Reports
ODPP	Office of the Director of Public Prosecutions
PACE	Police and Criminal Evidence Act
Qld	Queensland
QB	Queen's Bench
QWN	Queensland Weekly Notes
RPE	Rules of Procedure and Evidence (ICC)
SA	South Australia
SASC	South Australian Supreme Court
SSCA	Secretary of State for Constitutional Affairs
SCR	Supreme Court Reports (Canada)
Tas	Tasmania
TEU	Treaty on European Union
US	United States Reports
USC	United States Code
Vic	Victoria
VIS	Victim Impact Statement
VLRC	Victorian Law Reform Commission
VPS	Victim Personal Statement
VR	Victorian Reports
WA	Western Australia
WL	Westlaw
WLR	Weekly Law Reports