

# CRIMINAL LAW JOURNAL

Volume 46, Number 1

2022

EDITORIAL – *Editor: Stephen Odgers*

**Special Leave to Appeal** ..... 3

## ARTICLES

**The High Court on Crime in 2021: Analysis and Jurisprudence – Stephen Odgers**

This article discusses all of the High Court decisions in 2021 that relate to criminal matters. It examines the principles that derive from these cases and identifies jurisprudential themes from the decisions. It discusses in detail one particular issue arising in two of the decisions (and a number of other High Court decisions in recent years) – the scope of the “proviso” in the standard form criminal appeal statutory provisions. ....

7

**When They Refuse: Encryption, Production Orders and Sentencing for Non-compliance – Daniel Hochstrasser**

A longstanding means by which law enforcement officials have sought access to encrypted data is through a court order requiring a person to provide access to the encrypted data in an unencrypted form. In order to combat evidence of extensive non-compliance with such orders, particularly where more serious offending is being investigated, in 2018 the Federal Parliament increased the maximum sentences that could be imposed for non-compliance with a production order. This article considers whether that change is sufficient to deter non-compliance with a production order, and whether the higher maximum permissible sentence may infringe the requirements of sentencing proportionality. ....

18

**Sentencing Developments in the United States in 2021: The Transition Year? – Mirko Bagaric and Jennifer Svilar**

There have been marked changes to the United States sentencing system in recent years. The reforms in 2021 by comparison were less dramatic. Possible explanations for this are the transition to a new President in January 2021 and the largest increase in the homicide rate in the history of the United States. Yet, there were still a number of important developments in the American sentencing system, including a discernible additional focus on softening the most extreme sanctions in the United States: capital punishment and life prison terms. These key sentencing developments in 2021 are explored in this article. ....

32

**Sentencing Review 2020–2021 – Lorana Bartels**

This sentencing review focuses on the sentencing of young people (YP). It commences with a brief overview of some of the specific issues in relation to sentencing YP, before presenting detailed national sentencing data from the Australian Bureau of Statistics and Australian Institute of Health and Welfare. It also examines recent policy developments, especially the proposal to raise the minimum age of criminal responsibility and legislative

reforms in 2021 in Queensland and the Northern Territory. The review summarises recent research on sentencing YP from the sentencing advisory councils in Victoria, Tasmania and Queensland. Key areas of focus are the sentencing of YP aged 10–13 and Indigenous YP; so-called “crossover kids”, that is, children involved in both the youth justice and child protection systems; the sentencing of children held on remand; and the need for trauma-informed responses in this context. .... 44

#### CASE AND COMMENT

**Recklessness in Criminal Law: Possibilities and Probabilities – James O’Hara ..... 67**