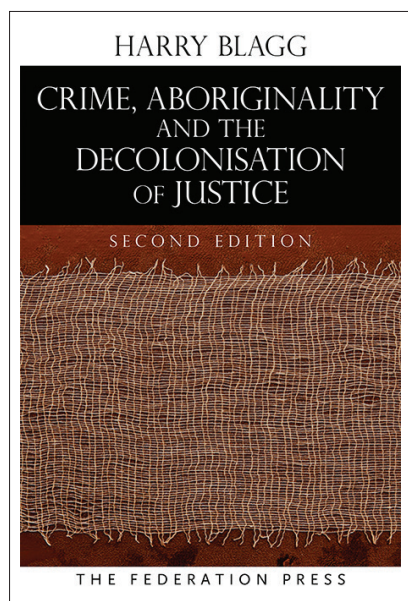


Crime, Aboriginality and the Decolonisation of Justice

By Harry Blagg | 2016



Aboriginal people are massively over-represented in the criminal justice system. They are among the most imprisoned people in the world. The rate of imprisonment of Aboriginal people continues to rise, increasing by 52 per cent in the last decade. Aboriginal prisoners comprised 27 per cent of the prison population last year. At the 2011 census, Indigenous people comprised just 3 per cent of the population.¹ The rate of imprisonment of Aboriginal people is up to fifteen times that of non-indigenous people.

We have been confronted by the recent revelations of the treatment of Indigenous youth in juvenile justice facilities in the Northern Territory, revelations which have resulted in the establishment of a royal commission.

Harry Blagg is a recognised authority in this field. He is professor of criminology and associate dean of research at the Law School of Western Australia. He has undertaken extensive research into the issues surrounding Indigenous people and criminal justice.

The first edition of this book was published in 2008. This second edition

has been updated to discuss emerging issues such as Foetal Alcohol Spectrum Disorder and the Commonwealth Government's 2007 intervention in remote Northern Territory communities.

The subject is approached from an academic perspective. The opening chapters carefully set the work within academic traditions in criminology, sociology and anthropology. The discussion of ontology, epistemology, teleology and liminal spaces may prove heavy going for readers unaccustomed to such scholarly discourse. It is, however, necessary to understand the theoretical framework behind Blagg's views and recommendations.

One concept that emerges from the book is that colonisation is not a finite historical event. Rather it is an ongoing phenomenon. The 'colonial' processes of dispossession, genocide and assimilation are perpetuated by marginalising and denying the legitimacy of Indigenous culture and law. This ongoing colonisation gives rise to the concept of 'decolonisation of justice' referred to in the book's title.

Blagg also views as fundamental a change in perspective from seeing the issue as one of an 'Aboriginal problem' to seeing that there are a range of deep seated problems faced by Aboriginal people. By recasting the issue in these terms, the process of addressing the issue changes. It moves away from the 'colonising' process in which the existing dominant power structures impose solutions, towards a process in which Aboriginal people and traditions themselves play a significant role in resolving the problems.

He suggests that from the perspective of Aboriginal people, the existing structure represents an alien law imposed without their consent and in a manner that denies recognition of their own law.

Blagg makes the obvious, but often overlooked, point that Aboriginal people are also over-represented as victims of crime, acknowledging the often endemic violence in Aboriginal communities. He sees the over-representation both as perpetrators and victims of crime as a consequence of disadvantage and marginalisation experienced by generations of Aboriginal people.

Blagg suggests that there are intrinsic differences between the Western and the Aboriginal view of the world. Acknowledging that difference is fundamental to addressing the causes of the over-representation of Aboriginal people in the criminal justice system. What he refers to as an Aboriginal domain (comprising areas such as ceremony, cosmology, kinship and law) continues to exist alongside the non-Aboriginal domain. He contends that there is a need to generate hybrid initiatives in the space between these two domains. Such hybrids represent a decolonisation of justice precisely because they operate between Aboriginal and non-Aboriginal structures and thereby avoid the risk of assimilating the Aboriginal component of the process. Blagg cites as examples of such structures:

- Circle Sentencing courts;
- Aboriginal or Koori courts;
- healing centres;
- Aboriginal self policing initiatives;
- community justice groups;
- elders groups;
- 'on-country' camps; and
- homelands and outstations.

Issues concerning Aboriginal youth justice are discussed. Blagg points out that in Western Australia, by the age of 18, around 80 per cent of Aboriginal youth have had contact with the justice system. On any day, upwards of 80 per cent of youth in detention in Western

Crime, Aboriginality and the Decolonisation of Justice (The Federation Press, 2016)

Australia are Aboriginal. Youth suicide in Aboriginal Australia has been described as the highest in the world. Many Aboriginal children grow up in highly disturbed environments characterised by alcohol and drug addiction and violence.

Blagg sees child removal strategies as particularly significant in generating this situation. He says that incarceration of Aboriginal youth is another mechanism by which young Aboriginal people are removed from their families. In the case of young people from remote areas, they are frequently taken far from their communities. Incarceration carries with it a further risk that young people will be socialised within an environment that has a distorted view of Aboriginal culture. He suggests that issues of Aboriginal youth justice can be more effectively addressed by shifting the focus from mainstream institutions like courts and detention to hybrid structures (such as 'on-country locations) based in Aboriginal custom.

He examines processes of restorative justice which he characterises as the collective resolution of how to deal with offending and the harm caused by crime. He argues that the time for this approach has passed and that it has been superseded by the re-emergence of Aboriginal customary law. He identifies a particular problem with restorative justice models arising from the manner in which implementation of the process was often controlled by the police. Because these existing power structures within the criminal justice system remain essentially non-Aboriginal, Blagg maintains that 'Aboriginal-owned' community justice mechanisms represent a more effective response.

He notes a problem encountered by attempts to involve Aboriginal elders in community justice mechanisms: while the involvement of elders in improving

justice for indigenous people is crucial, it can be difficult to identify just who should occupy that position. He also cites instances in which elders have exploited their position.

In order to reduce levels of violence in Aboriginal communities, some form of policing is essential. Blagg recommends a partnership between Aboriginal communities and the police, so that the police will be perceived as serving the community rather than exerting force over it. He notes a perception within Aboriginal communities that police focus on minor infringements of the law. He asserts that the Northern Territory 'Intervention' resulted in a massive increase in Indigenous prison rates (including many prosecutions for driving-related offences) with no increase in prosecutions for intimate partner violence or notifications for child abuse.

He sees the potential for Aboriginal community patrols to address social disadvantage without involving the criminal justice system. Such patrols currently operate in urban, rural and remote areas. They act both as a link and a buffer between Aboriginal people and government agencies. In New South Wales, the Aboriginal Justice Council supports 15 community patrols operating in Sydney and in rural areas.

Blagg notes that the court system has been effective in adopting a flexible approach. Many jurisdictions have established Aboriginal courts and Circle Sentencing courts which allow Aboriginal elders to participate in the court process. They include in the sentencing phase of proceedings an examination of the issues underlying the offending and the needs of victims. One shortcoming is the fact that they are only available after a plea of guilty.

Blagg addresses the issue of family violence noting that Aboriginal people

identify family violence as the main issue in their communities. He identifies a tension between the typical depiction of and response to domestic violence in the general community and the issues surrounding family violence in an Aboriginal context. Blagg questions whether the criminal law is necessarily the most effective response to the issue of family violence in Aboriginal society, advocating an approach that leans toward finding pathways to family healing.

Blagg argues that Aboriginal society is a distinctive, functioning social system, not just an ethnic subset of society. Consistent with the findings of the 1986 Australian Law Reform Commission inquiry, he says that Aboriginal customary law is practised and maintained in daily life: not only in remote areas but also in urban areas.

Blagg maintains instead that our refusal to enter into a dialogue about Aboriginal law is at the centre of the problem. In his view, the violence within Aboriginal communities is not a product of Aboriginal culture. Traditional law does not condone physical or sexual violence. Rather he sees the violence within Aboriginal communities as a result of the impact of the negative and destructive aspects of non-Aboriginal culture imposed through the process of colonisation. Blagg concludes with this observation:

We urgently require a new, decolonised version of justice, founded upon respect for, and recognition of, the Aboriginal domain and its laws and cultures, and we need to do it now.

Endnotes

1. 'Aboriginal jail rates increase by 50 per cent, but rehab fails to reduce offending' Bianca Hall, SMH 23 August 2016

Contract Law: Text and Cases (2nd ed)

By D Thampapillai, C Bozzi & A Bruce | LexisNexis Butterworths | 2016

There was a time when life seemed much simpler – legal research consisted of identifying the right key word in the case citator volumes and then consulting the appropriate law report. I did have a small bundle of unreported cases that I had collected from colleagues and opponents over time, but they never seemed to be quite on point to deliver that knock-out blow.

Now, the first half hour or so of my working day is taken up with reviewing the case alerts from the previous day and updating my card system by subject index; and even then there are several providers of such alerts (Jade, LexisNexis, Benchmark...). The man on the moon might be forgiven for thinking that the most important skill of a barrister is the ability to search and retain information from multiple electronic databases rather than the traditional art of advocacy and persuasion.

When I am briefed in a case that may give rise to, for instance, an equitable estoppel, it is to my card index and a recent case that I first turn. Textbooks still have their place and, for me, it is usually in areas with which I am less familiar: an advice in a less familiar area easily justifies purchasing a text book to get started before searching for recent cases that may not have made it into my card index.

In an area such as contract, there is a plethora of textbooks, but from a practitioner's point of view it is difficult to get past the status of texts such as Carter's Contract Law in Australia and Cheshire and Fifoot's Law of Contract (Australian edition) (Full disclosure requires me to state that I have not yet traced any common ancestor relevant to the latter, but I am ever hopeful).

The authors of Thampapillai, Bozzi and Bruce's Contract Law Text and Cases (2nd Edition) are not, however, trying to

break into the practitioner market – the introduction makes it clear that the book is aimed at law students and indeed the first chapter is headed An Introduction to Law School. Judged by its stated targets and aims, I think it is a success.

I still recall my tutor at college advising me that I would pass my degree as long as I could regurgitate the main cases in each area and identify the relevant principles and strands, but I would get a good degree if I could then add to that some independent thought, such as by identifying inconsistencies or gaps in particular areas. Her advice was helpful in an academic context and is helpful now in considering this book.

Applying that standard, this book has all the Chapter headings that one would expect: Offer, Acceptance, Consideration... The Doctrine of Frustration, Misrepresentation, Misleading or Deceptive Conduct... Termination for Breach, Remedies for Breach of Contract; there are useful headings within each chapter: The traditional model and alternative views [to offers], The global view of contract formation... A framework for invitations to treat, Mere puffery...; many of those headings have useful text boxes containing summary propositions: By puffery, we mean statements that induce a contract but that do not of themselves constitute binding offers. These are statements that are so far-fetched that no reasonable person would believe them; and there are useful extracts from many of the main cases, both from this and overseas jurisdictions. It also has a Key Points for Revision at the end of each Chapter that provide a useful checklist of useful propositions.

There are Review Questions, but I must admit to a reticence about answering them without being formally briefed and having signed a costs agreement!

So is there anything in this book that may give rise to independent, or at least useful, thought? I would say yes. To give one example, there is a useful discussion of what is described as 'The ambiguity gateway and the construction debate', which includes reference not only to the High Court dicta from *Jireh International Pty Ltd v Western Exports Services Inc*, *Electricity Generation Corp v Woodside Energy Ltd* and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*, but also extracts from recent decisions of the Court of Appeal in Western Australia in *McCourt v Cranston* and of Sackar J in this state in *Campbelltown City Council v WSN Environmental Solution Pty Ltd*; and an extensive extract from *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*, a decision of the Supreme Court of Singapore, Court of Appeal that includes a comparative review of the relevant jurisprudence.

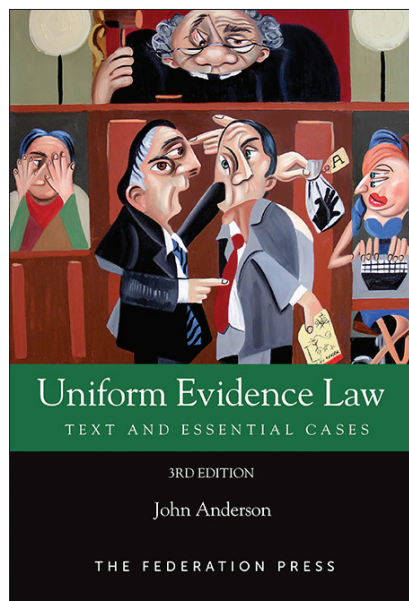
The chapter on estoppel is similarly extensive, although there is no reference to the current debate as to whether equitable promissory estoppel may be available as a sword or only a shield (see for example the discussion in the Court of Appeal of this state in *Ashton v Pratt*).

Overall, this is a sophisticated student text, incorporating jurisprudence not only from across Australia but also in other common law jurisdictions; and there is much that will prompt independent thought rather than simple regurgitation. It incorporates much that would be useful to a practitioner, particularly in its summary of recent authorities, and it will now be on my shelf (by virtue of preparing this review) as an early port of call before resorting to the text of the relevant recent authorities.

Anthony Cheshire SC

Uniform Evidence Law: Text and Essential Cases

By John Anderson | The Federation Press | 2016



This is an excellent textbook, which actually reads more like a novel than a text book!

The laws of evidence are perhaps some of the most complex laws that practitioners will face and this book provides the basics and up to date cases on the main areas of evidence law.

Although the Introduction to the book states that 'The book is designed primarily as a tool for teaching and learning the principles of the law of evidence in the context of a tertiary level course', it is still a useful book for practitioners who may wish to have a further text book setting out the main cases. The book starts with perhaps the most important aspect of the law of evidence - relevance - and includes a section entitled 'The fact finder's

knowledge of the world', which sets out what juries can take into account when making a decision. There is then a chapter about the basics of trials and appeals, more relevant for students but which provides a quick summary of some of the main issues in a jury trial, and some key sections dealing with appeals in criminal cases. There is then a chapter entitled 'Resolving Factual Uncertainty' which deals with the various burdens and standards of proof.

Chapter 4 is perhaps the next most important chapter as it deals with the laws surrounding the final exclusion of evidence (ie Part 3.11 of the Evidence Act NSW). Chapter 5 is entitled 'Witnesses and Privileges' and deals with competence and compellability of children and spouses as well as all the privileges under the Evidence Act. Chapter 6 is entitled 'The Course of the Trial' and deals with leading questions, reviving memory of witnesses, unfavourable witnesses, cross examination, re examination, reopening cases and arguing a case in reply. There is also a summary of some of the main warnings given by a judge in a criminal trial.

Chapter 7 is also important as it deals with some of the most important sections of the Evidence Act which deal with how documents can be used as evidence and the difference between documents and 'real evidence' ie a witness recollection or a particular item that is relevant.

Chapters 8, 9 and 10 deal with the law of hearsay, opinion evidence and admissions. Again, these are some of the most important sections of the Evidence Act and must be understood by any advocate.

Chapter 11 deals with 'Estoppels and Convictions and Judgments as Evidence'. This of course deals with sections 91-93 of the Evidence Act which are important to understand especially how evidence of judgments and convictions can or cannot be used as evidence.

Chapters 12 and 13 deal with the laws in relation to credibility of a witness and character evidence of an accused. Chapter 14 deals with tendency and coincidence evidence and chapter 15 deals with identification evidence.

As stated above, this book deals with the most important sections of the Evidence Act. The format is easy to follow with a clear analysis of the basic laws, usually followed by a summary of the standard, 'older' more well known cases which have explained the basic principles. However, the author also provides analysis of some more recent cases.

This is a very useful book for practitioners.

By Caroline Dobraszczyk

Criminal Law: Pre-Trial Practice and Procedure

By Michael Francis Lillas | Lillas Legal Publishing Pty Ltd | 2016

This is an excellent book because there are so few like it.

The book provides a very comprehensive summary of many if not all of the issues that may arise before a committal hearing and prior to trial. The author also considers legislation relevant to committals and trials in the various states of Australia and legislation which applies to Commonwealth matters.

I note that although the committal hearing largely doesn't happen any more in NSW, there are a few, and practitioners may need a reminder as to what to do!

Importantly, in relation to committal hearings the author deals with defects in charge sheets, service of the charges, arrest warrants, failure to appear and the particular state law which applies to determine the outcome of the hearing.

The author also deals with the important issue of cross examination at committal hearings which of course is associated with particular rules. The author also deals with the perhaps less controversial issue of costs in committal proceedings and also advocacy at committal and trials. He provides a useful and detailed summary of the law in relation to opening and closing addresses by prosecutors.

Another very interesting and rare issue that the author deals with is witnesses. That is, a prosecutor's duty regarding what witnesses to call, the Crown as a 'model litigant', and the 'Powers of a cross examiner', so this book also provides some important law relevant to advocacy. He also provides useful information about proofing witnesses, preparing a witness generally and for cross examination, and understanding

what 'type' of witness you have or need to deal with.

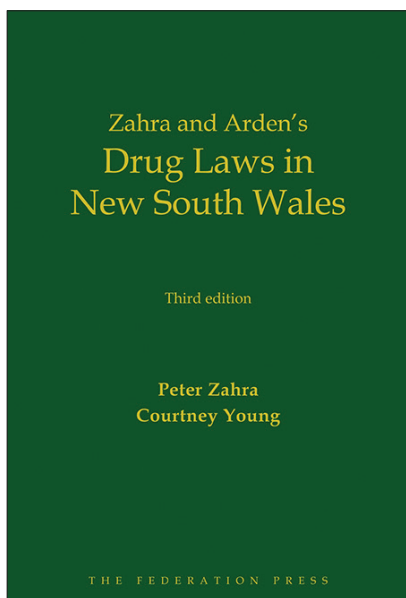
The book also provides the law in relation to many pre trial issues, which now are almost always part of doing a criminal trial. For example, he deals with separate trial applications, disclosure, nolle prosequi, joinder and severance of counts, duplicity, Judge alone trials, amendment of indictments, how many indictments you should have, particulars, demurrer and stay of proceedings. There is also a brief summary of the law relating to 'accessories' and an interesting summary on jury selection.

This book is a very useful addition to any criminal practitioner's library.

By Caroline Dobraszczyk

Zahra and Arden's Drug Laws in NSW

By Peter Zahra & Courtney Young | The Federation Press | 2016



This book, which is now in its third edition, is a very comprehensive account of all the issues that may arise in a drug matter.

The book is appropriately divided into three main sections and it is very easy to find what you are looking for. Part A is entitled 'Substantive offences' and includes all the main laws in relation to drug matters including Commonwealth drug matters. Part B is entitled 'Evidence and Procedure' and includes all the main evidentiary issues that may apply more often in drug matters. Part C is entitled 'Sentencing' and of course deals with the NSW and Commonwealth laws in relation to sentencing in drug matters.

Part A deals with the offences and penalties under the *Drug Misuse and Trafficking Act 1985* (NSW), issues in relation to summary prosecutions, including prosecutions in relation to forging and obtaining by false representation, prescriptions. It also provides an up to date summary of the law in relation to 'possession'. There is then a detailed examination of the law surrounding indictable offences including cultivation, manufacture and production of prohibited drugs, supply and deemed supply. There is then a very useful summary of the law in relation to the admissibility of circumstantial evidence-eg money found in the possession of the accused, evidence of an

BOOK REVIEWS

Zahra and Arden's Drug Laws in New South Wales (The Federation Press, 2016)

accused's wealth and lifestyle, intercepted telephone calls relating to the purchase of drugs, expert evidence on drug 'code' words, the finding of multiple mobile phones and evidence of the possession of firearms. There is also a summary of the penalty provisions relating to NSW drug laws.

The authors then deal quite extensively with the law of Conspiracy, always difficult to deal with in practice, including the relevant state and federal laws as they apply to conspiracy offences. There is then detailed sections dealing with all the Commonwealth

narcotic offences, the main one being importation and offences under the *Poisons and Therapeutic Goods Act 1966* (NSW).

Part B deals with the law of evidence on admissions particularly as they apply in drug matters as well as laws in relation to search, seizure and investigation of drug matters, both in relation to NSW and Commonwealth drug matters. There is also detailed consideration of evidentiary issues in drug prosecutions such as analyst certificates, weighing and sampling of drugs.

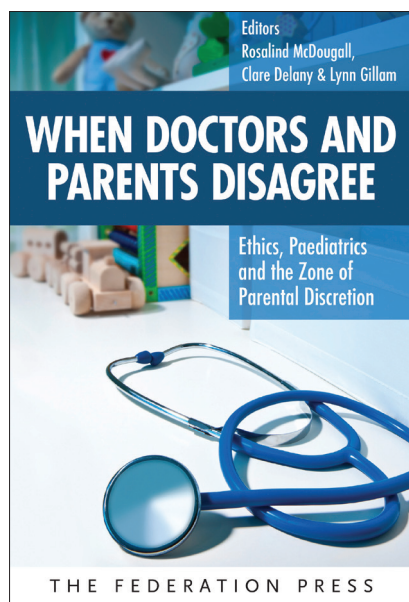
Part C deals with sentencing in both NSW and Commonwealth drug matters and helpfully includes recent NSWCCA decisions.

This is one of the best books in relation to drug matters, which every criminal law practitioner should have.

By Caroline Dobraszczyk

When Doctors and Parents Disagree: Ethics, Paediatrics and the Zone of Parental Discretion

By Rosalind McDougall, Clare Delany & Lynn Gilliam (eds) | The Federation Press | 2016



This small volume contains thirteen articles by medical professionals practising in various paediatric specialties. Its intended audience is the community of medical practitioners generally, and its stated aim is to raise an important ethical issue – in what instances should a medical practitioner override a parent's decision about their child's medical care – and to provide an ethical tool to doctors faced with such situations.

As the title of the book suggests, the editors and authors focus on a concept of the 'zone of parental discretion' acronymised as ZPD throughout the book. Two of the thirteen chapters attempt a definition of the concept, which is probably best described as

being situations of serious disagreement between clinicians and parents with respect to the treatment of a child, in which clinicians can accept parental decisions which they believe to be suboptimal, but which do not likely involve causing harm to the child.

The volume is said to be designed to perform four functions. The first is to provide the reader with an accessible theoretical foundation to be used as a tool for balancing a child's wellbeing with a parent's right to make medical decisions for his or her child. Indeed, the first two chapters of the book helpfully discuss the concept of ZPD in detail in an effort to educate readers about the complexity of that theory.

The second stated function is to provide

When Doctors and Parents Disagree (The Federation Press, 2016)

examples of disagreements between treating doctors and patients, which are subdivided into several categories. The book sets out twenty-six short case studies in which the issue as to whether or not a doctor ought to override a parent's decision with respect to a child's medical care becomes contentious and results in disagreement. For lawyers, likely the most familiar of these situations is that of the Jehovah Witness parents who refuse treatment involving a blood product for their child, in circumstances where that treatment is likely to be life saving.

The third stated function of the book is to critically analyse the above-mentioned scenarios. Each scenario is materially different, and an important distinction is made by the authors about the content and nature of the disagreements, and the possible different responses in each set of circumstances. The disagreement may be about whether or not surgery should be performed, whether or not a (heroic) treatment ought to be commenced, whether or not a diagnostic test ought to be conducted, whether or not an optimal management plan ought to be instituted or the extent of information which ought to be conveyed to parents to ensure compliance with treatment so as to ensure a desired (or desirable) health outcome. It is an understatement to say that the editors present concise factual scenarios to which, like almost all ethical dilemmas, there is no easy or correct answer.

The fourth and final stated function is to contribute to the ethics education of the medical community. In this the editors and authors easily succeed. The

While the book is no doubt useful for those in medical practice, its utility for those in legal practice is less certain.

discussion in the volume contributes much to the emerging literature on ethical practice in the professions generally.

While the book is no doubt useful for those in medical practice, its utility for those in legal practice is less certain. Most lawyers have been trained at law school to recognize ethical issues as they arise in their practice as part of their formal legal education, and in particular as they arise with respect to what are sometimes conflicting duties they owe to their clients and the court. As was suggested to me many years ago by a wise senior counsel, it would be unusual if the average barrister did not encounter an ethical issue that required serious consideration once or twice a year in the course of their everyday practice.

The variety of dilemmas of which the authors write often sound differently in the practice of law. In addition to power under statute, the Supreme Court has inherent *parens patriae* jurisdiction which might be invoked in many of the circumstances described by the authors. As is well known to barristers, a judge sitting in the Protective Division of the Supreme Court of New South Wales is frequently called upon to act as Solomon in situations similar to those that are described in this volume.

As Gzell J succinctly said in *Re Bernard* [2009] NSWSC 11, a case in which *parens patriae* jurisdiction was exercised in a dispute between parents and medical

practitioners about the administration of blood transfusions to a child of Jehovah Witness parents:

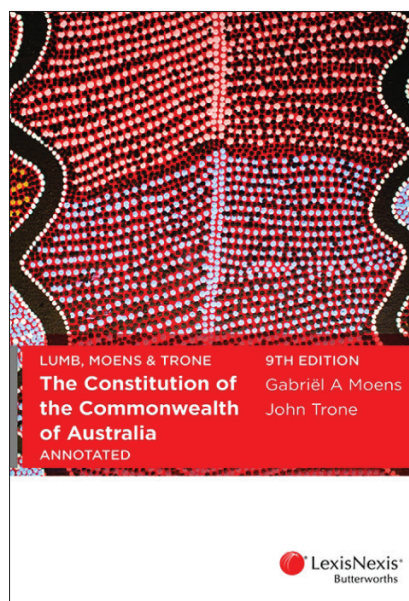
There is ample authority for the proposition that under the *parens patriae* jurisdiction, the court may supplant parental right and authorise hospital staff to perform a transfusion upon a child. What is critical is the welfare and the best interests of the child.

The volume omits to make any mention of the supervisory jurisdiction of the court when there is a deadlock between medical practitioners and parents with respect to medical treatment thought to be in the best interests of a child. It may be that the authors purposefully left out this avenue of ultimate determination, so as to concentrate on the resolution of conflict at the clinical level. This is, of course, understandable, as an approach to the Supreme Court should be made only in exceptional cases. However, perhaps a doctor's formal ethical education ought to include the knowledge that should an intractable dispute occur, the institutional dispute resolution mechanism provided by the courts is available, and will absolve medical practitioners from making decisions in the most difficult and challenging medical contexts where they find it impossible to accede to decisions they perceive to be outside the zone of parental discretion.

By Richard Weinstein

Lumb, Moens & Trone The Constitution of the Commonwealth of Australia Annotated (9th ed)

By G Moens & J Trone | LexisNexis Butterworths | 2016



The authors, Gabriel Moëns and John Trone, did not set out on a grand project to examine the shifting jurisprudence of Constitutional law.

The book, by any measure, is relatively small and compact, weighing in at some 600 odd pages. It is not a heavyweight text on Constitutional jurisprudence and neither is it supposed to be.

It is a neat, annotated explanation of the Commonwealth Constitution. It charts the Constitution section by section and contains relevant commentary and materials. It also contains important High Court decisions up until April 2016.

It is designed for a wide audience (including non-lawyers) however it should not be dismissed as a book reserved for students and non-legal professionals only.

Indeed, the foreword to the eighth edition, written by the Chief Justice Robert French AC, notes that the book is accessible enough to the student or non-specialist practitioner yet it also acts as a useful starting point for a deeper inquiry.

Practitioners will find it useful for its quick and accessible explanations of all the various sections of the Constitution and it may prove useful to those who find themselves in various state and federal tribunals.

Structure

As with the Constitution the book is also divided into 8 Chapters with every corresponding section set out in the relevant chapter.

Each section of the Constitution is set out in a highlighted area followed by commentary and a synopsis of major High Court decisions on the section. Important passages from some High Court decisions are also extracted.

It is not a heavyweight text on Constitutional jurisprudence and neither is it supposed to be.

Well-known sections of the Constitution have more detailed commentary and contain numerous High Court decisions that go into considerable depth. For example, the commentary relating to section 51 is sufficiently detailed to capture the historical development in jurisprudence of important High Court decisions.

The book contains a very helpful introduction that explains and gives further context to the Constitution. These include certain themes such as the federal nature of the Constitution, financial and trade relations, legislative, administrative and judicial corporation, separation of powers, judicial power and Constitutional interpretation.

Further topics (titled 'preliminary issues') are also discussed including the acquisition of sovereignty over Australia,

Australia's Constitutional relations with the United Kingdom, the role of precedent in Constitutional cases and the concept of proportionality.

What is helpful, particularly for those who will use this book as a stepping stone for further research is that the book contains references to important secondary texts that further illuminate a section or issue that is being discussed.

Important decisions in the current edition

The 9th edition contains some important recent decisions to note.

Chapter I (the Parliament) has been considerably revised in light of the decision in *Australian Electoral Commission v Johnston* (2014) 251 CLR 463 where the Court of Disputed Returns declared that the Western Australian Senate election in 2013 as void.

This book also discusses the recent High Court decision of *McCloy v New South Wales* (2015) 325 ALR 15 in which the majority of the court re-formulated the implied freedom of political communication test set out in the decision of *Lange*. McCloy's case resulted in a three stage proportionality test. The text also refers to *Unions NSW v New South Wales* (2013) 252 CLR 530, which was about the implied freedom of communication on governmental and political matters within the context of political donations.

Chapter II (Executive Government) also contains extracts of the decision in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 where the court restricted Commonwealth executive power to contract and spend without parliamentary authorisation.

Chapter III (the Judicature) has been revised to include some important

Lumb, Moens & Trone The Constitution of the Commonwealth of Australia Annotated 9th ed (LexisNexis Butterworths, 2016)

decisions. In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279 the court held that the broadcasting authority (ACMA) did not violate the separation of judicial power doctrine when it determined that a Sydney radio station had engaged in criminal conduct. Readers may remember that this case involved radio hosts prank calling a nurse who tragically committed suicide a few days later.

In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369 the court held

that Commonwealth participation in the detention of asylum seekers (at the Nauru Regional Processing Centre) did not infringe Chapter III.

The decision in *Kuczborski v Queensland* (2014) 254 CLR 51 examined the Constitutional validity of Queensland's 'anti-bikie' laws. Further, the book also discusses the decision in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 where the court upheld a Queensland state law which empowered the Supreme Court to declare that an organisation was criminal organisation based on confidential criminal intelligence.

Conclusion

A small and handy annotator that can be surprisingly detailed in parts.

A very useful first port of call for a student or non-specialist practitioner needing a succinct explanation of a particular provision of the Commonwealth Constitution.

It may also serve well for the more experienced advocate or a diligent junior as a starting point in a long and winding enquiry into the depths of Constitutional law.

Reviewed by Ali Cheema

The Law of Tribunals: Annotated Civil and Administrative Tribunal Act 2013 (NSW)

By John Levingston | The Federation Press | 2016

Tribunals are playing an increasingly visible role in the legal system in Australia. Since the NSW Civil and Administrative Tribunal (NCAT) commenced operations in January 2014, there has been a considerable development of case law on tribunal operations, especially the biggest division in NCAT; the Consumer and Commercial Division. The tribunals operating in other states and at federal level are likewise featuring more frequently in the online law reports.

Moreover, there has been, anecdotally, an increasing awareness within the broader community, at least in NSW, of NCAT and its role within the legal system.

In NSW, NCAT administers the dispute and application processes arising under an increasing amount of legislation. It is far more visible than any of its many predecessors.

This book is an invaluable guide for the busy practitioner. While its emphasis is obviously the NSW legislation, it has a

handy overall cover of the other states and the federal tribunals.

The key to any well-written practice, is a good index, a clear paragraphing system, and a coverage of the major issues likely to confront both the experienced lawyer and the novice. The use of relevant case law, both to refine the nuances of the legislation and to set out clearly its full effect, is also vital. I think this book will be of great assistance to the practitioner.

The index is comprehensive, there is a table of cases, a table of statutes, a comparable table of legislation between the state and the Federal AAT. The Introduction covers a wide range of matters of general principle in tribunals and I personally prefer footnotes at the foot of the page, rather than at the end of the chapter or the end of the book.

While its other features are formidable, the book's real strength is the annotated Civil and Administrative Act NSW. The practitioner should find the treatment

of the Act is comprehensive, the relevant provisions are easy to find and the integration of both the legal principles and case-law are helpful.

Whether the questions asked relate to costs or the procedure between the different divisions, the appellate process or the consequences of a settlement which require orders *ultra vires* the tribunal's powers, the answer is easily found.

The development of case law from the Appeal Panel for NCAT is both dynamic and comprehensive. I expect that in a relatively short time, there will be a need for a second edition of this very handy practice. In the meantime, it should be of great assistance to the practitioners who are required to provide advice to clients on the tribunal, its powers and its processes. It would be a valuable resource in any law library.

Reviewed by Frank Holles