Reviews

Family law in Australia Fifth Edition by HA Finlay, RJ Bailey Harris & MFA Otlowski, Butterworths 1997; pp608; $89.00

The aims of this book, as stated by the authors, are to strike a proper balance between theory and practice, to place the explanation of family law rules in an historical and social context, and to stimulate discussion on future directions of reform.

The book achieves these aims succinctly and well. It contains core information about Australian family law in a comprehensive but readable form. There is concise case and statutory analysis and the book covers the following expected elements in any family law textbook:

- the history of Australian family law;
- formation of marriage;
- annulment and dissolution;
- family support;
- property distribution;
- children and parents; and
- adoption.

However, the book has the added benefit of informed discussion on special issues such as violence and abuse, the regulation of artificial conception and non-litigious dispute resolution. It also deals in some depth with the *Family Law Reform Act 1995* (Cth) and contains an Appendix which discusses *B and B* ((1997) FLC 92-755), the first major Full Family Court decision since the introduction of that Act.

The book is excellent in pulling together reform developments and proposals in family law and suggesting further avenues for change. This includes work done by the ALRC and the Family Law Council. It also has a very helpful reference base for those who wish to do further reading.

The book would be invaluable for students and policy makers in family law. It also would be extremely useful for practitioners in relation to substantive family law, but it is not intended to be a guide to family law practice and procedure and could not serve that purpose.

- Michael Barnett

Feminism and Criminology by Ngaire Naffine, Allen & Unwin 1997; pp192; $24.95

Ngaire Naffine's latest book provides a clear, interesting and feminist perspective on criminology. The book is divided into two parts. The first offers a feminist history of criminology from the 19th century to the present day. Naffine's main complaint is:

> *"Feminism is either reduced to, or conflated with, the study of women and crime, implicitly a minor branch of the discipline of criminology. Feminism in its more ambitious and influential mode is not employed in the study of men, which is the central business of criminology."*

Naffine observes that this has resulted in the "study of men as non-gendered subjects and the specialty is the study of women as gendered beings". This, in turn, has meant criminologists have failed to pursue the 'man question' - that is: What is it about men that makes them commit crime and why do women offend less than men?

The second part of the book is brilliant. It considers the difficult task of effecting change. Naffine looks specifically at rape and crime fiction. She powerfully demonstrates, by analysing legal texts on rape, how male accounts of rape are a product of male imagination rather than women's experiences. Naffine then considers how feminist crime writers, such as Patricia Cornwell and Sara Paretsky, are reversing the existing roles assigned to men and women in relation to crime, therefore allowing the audience to experience both sexes differently. Citing Drucilla Cornell, Naffine discusses how the feminist crime writer is creating new fictions divergent from man-made fictions which impacts on the reality of 'woman'. Naffine writes that it is "fiction which alters our perceptions of the real".

This book is well written, thoroughly researched and very entertaining. It is a significant contribution to a different way of looking at crime.

- Miiko Kumar

Citizens without rights - Aborigines and Australian Citizenship by John Chesterman and Brian Galligan, Cambridge University Press 1997; pp284; $90.00 (hardback) $29.95 (paperback)

The concept of being an Australian citizen may seem unremarkable to many people, but then those who have enjoyed the benefits of citizenship tend to take it for granted. This book traces the history of the exclusion of Indigenous people from meaningful citizenship rights, from the mid 19th century through to the present day.

There are two key themes that run through this book. One is that having an understanding of the exclusion of Aborigines from citizenship rights is not just a prerequisite for reconciliation - it is vital to understanding what it means to be an Australian citizen per se. The authors demonstrate that throughout our history the concept of Australian citizenship has been defined negatively - by excluding Indigenous people. They argue that this denial of rights has rendered the concept of citizenship in Australia an empty shell.

A second theme is the important - indeed central - role played by administrators and bureaucrats at each level of government in the denial of basic citizenship rights. As the authors note, the "sheer amount of legislative ingenuity and administrative effort that went into devising and maintaining these discriminatory regimes is truly astonishing".

The book also challenges perceptions on indigenous rights to citizenship, by demonstrating that the 1967 referendum was not a legal watershed in the recognition of citizenship rights, coming after most jurisdictions had begun to remove the restrictions on citizenship rights, and that the impetus for change came not from the government, but from international pressure, public opinion and decisions of the High Court.

The book ends on a cautious note, with concerns that since the 1970s the recognition of Indigenous people's basic citizenship rights has been used against them in the search for the legal recognition of their Indigenous rights - most notably to land and self-determination. Chesterman and Galligan bring to life the full extent of Australia's shameful past and the book ought to teach us valuable lessons for the future. The authors note that the relationship between Indigenous and non-Indigenous Australians may well be the thing that is most remembered about our history in centuries to come. It remains to be seen whether we are about to enter the next millennium continuing to perpetrate wrongs against Indigenous Australians.

- Darren Dick

To Constitute a Nation - A Cultural History of Australia's Constitution by Helen Irving - Cambridge University Press 1997; pp264; $49.95

Helen Irving sets out to tell a series of tales - cultural, social, economic, technological and political - in an attempt to answer the question: What was the cause of Federation? She tries to let her readers understand how in the last half of the 19th century the various processes of colonial development worked together to produce a unique 'fit' by 1901 with none in isolation being the single cause.

This task is approached by tracing the national and federal influences and consequences within the otherwise evolving social, economic and political agendas.

Helen Irving asks the question: Why did the Federation occur when it did and not before? Her conclusion emerges after elaborating the efforts made to identify who were the people of Australia and what values and models of government were appropriate in the colonies. The judgments made and the "surreal optimism" at the end of the century worked, she says, together although fin de siecle was not the cause of Federation, it acted as a catalyst for what was precipitated.

The chemistry at work combined elements of the modernising processes present in all 'Western' nations at the time; disillusionment with the old constitutional relations within the Empire; and confidence in local ability to create a new and superior outcome. The last two decades of the 19th century were truly a 'Utopian moment'.

Helen Irving's tale is written in a straightforward, simple and compelling style: very readable indeed. The book has relevant notes, a useful selected bibliography and is well indexed.

For the Australian constitutional lawyer, political scientist and historian it is compulsory reading. All those delegates to the Constitutional Convention should have read it too.

But the appeal and value is much wider.

Perhaps it may be a vain hope that all Australians will know and understand their federal constitution before they are asked to vote in the 'Australian Republic' referendum. They may just be tempted to undertake the study if they first were to settle down on a rainy Sunday to Helen's tale.

- Alan Rose

Fault in Homicide: Towards a Schematic Approach to the Fault Elements for Murder and Involuntary Manslaughter in England, Australia and India by Stanley Yeo: The Federation Press in association with the Institute of Criminology, University of Sydney 1997; pp312; $75.00

In an extremely thorough and well researched work, the distinguished academic Professor Stanley Yeo looks closely at the concept of fault in homicide in Australia and England. The premise which he advocates is that the existing system lacks certainty and also makes it easier to convict people for homicide than in other jurisdictions.

The author uses the Indian system as a shining example and concludes the book by preparing a model set of provisions which reflects this example. Professor Yeo makes the point that the offences of murder and manslaughter should be reserved for the worst categories of moral culpability and the extent to which this does not happen in Australia represents a throwback to less humane times. Such a contention is of course a value judgment and if this was the only basis for the book it would be better left as a sociological, philosophical treatise.

Professor Yeo does go further , however, and in so doing develops a criticism raised by the Law Reform Commission of Victoria (Report 40, 1991), that case by case responses to categories of homicide over a long period of time may lead to anomalies and complexities. A schematic approach is recommended which increases the categories of unlawful killing and runs it in tandem with a greater range of penalties. Subjective bases of fault are also introduced. The suggested model is clearer, says Professor Yeo, reflects a greater range of moral culpability and is consequently fairer.

To be convicted of murder in New South Wales the mental element required is either:

(i) intent to kill
(ii) intent to inflict really serious bodily injury
(iii) reckless indifference to human life.

The first is a clear concept and one not difficult for juries to understand. The second involves a judgment by 12 members of the community as to what 'really serious bodily injury' means. Again, it is a concept that juries generally have little difficulty with. Professor Yeo contends that to convict a person of murder on the basis of (ii) 'can only be done by effectively presuming that he/she intended to kill'. In fact, that is exactly what does not happen. Juries are able to convict for murder on the basis of an intent to inflict grievous bodily harm, not on an intent to kill. Certainly this is a lesser degree of moral culpability, but it is taken into account by the judge in his/her fact finding on sentencing. If it is the lower intent the sentence will reflect accordingly. As to reckless indifference, it is now a higher hurdle than (ii) and is appropriately included.

It might be argued at least as cogently, that to increase the range of mental elements available in homicide is to complicate a system that works well in practice. The gradations in moral culpability, where they exist, will be appropriately reflected by the sentencing judge.

Whatever the validity of such an argument, the book is an outstanding work of legal research of great interest to academics and students in criminal law. For practitioners and judges in homicide law it provides a necessary stimulus to look at a system that has not significantly changed for a long time.

- Christopher Maxwell, QC