theories to the evidence of the New Haven court is constantly assessed. In this way, theoretical issues are tested and retested throughout the book.

With the exception of the difficulties in obtaining sufficient cases to examine the influence of sentencing theories on sentencing practices, *Gender, Crime and Punishment* moves smoothly and coherently from point to point. The only area which could be improved is a minor, stylistic one in the presentation of the statistical information. The tables sometimes merge with the text in a disconcerting fashion, causing some confusion.

On the whole, *Gender, Crime and Punishment* is a clearly written book which makes available information regarding current court practices and contemporary debates in feminist criminological theory. *Gender, Crime and Punishment* should be of interest to practising lawyers and judges, legal theorists and feminist legal interpreters as it neatly shows the value of an interdisciplinary approach to legal studies.

*Emma Hawkes**

The Constitution of the Commonwealth of Australia Annotated

By Richard Lumb and Gabriel Moens
5th Edition, Butterworths, 1995, pp l, 676, $85 (pbk)

There are two ways to organise a text on any area of law based on legislation, including the law of a written constitution. The first is by organising the book by reference to topic and basic doctrines; the second is by organising it as a commentary on the legislation.

The former approach has been more popular in constitutional law in this country for a number of reasons. First, the nature of the Australian Constitution does not lend itself easily to annotation. It is short and expressed in general terms so that the bulk of constitutional law consists of decisions of the courts, especially the High Court, and doctrines which they have developed, rather than the text itself. Many constitutional law doctrines are, in any case, derived from the whole document or at least from a group of provisions, making a commentary on the text difficult to organise. Secondly, the idea of an annotated Constitution reflects a philosophy which is out of favour among

* Cultural and Historical Studies, Griffith University.

constitutional lawyers. This philosophy considers constitutional law sufficiently clear and settled to be usefully set out in the form of a commentary on the text. In literature taking the form of annotated legislation, the opinions of authors are traditionally of secondary importance, giving way to an analysis of the manner in which the text has actually been interpreted. In a subject where it is acceptable to argue that there is no *law*, only opinions, to present a commentary in the form of annotations on the text is, in itself, to adopt a controversial position.

There is, however, room for commentary on the text, room well filled by this book which clearly aims to be definitive. Its ambitions are made clear in the method and the title, *The Constitution of the Commonwealth of Australia Annotated*, which invites comparison with Quick and Garran's classic, *The Annotated Constitution of the Australian Commonwealth*. However, this book is not of the same calibre. First, Quick and Garran were fortunate in that a commentary on the provisions of the Constitution section by section was ideal for their work. They were writing at the date of federation, before judicial exegis of the Constitution had started. The Constitution was adopted after its terms were debated clause by clause in the Conventions of the 1890s so that a clause-by-clause commentary was an ideal way of examining the work of the Conventions and explaining the Conventions' decisions to the Australian people.

Lumb and Moens did not have these advantages. Theirs is a good but flawed book. Some of the problems with it arise from the conception; others from the actions of the authors. The conception—an annotated Constitution—gives rise to problems of structure, because its major aim is to elucidate the interpretation given to particular words and phrases used in the Constitution.

When the first edition of the book appeared in 1974, this approach was consistent with the prevailing methodology in the High Court, where the centralism, literalism and hostility towards implication reminiscent of the approach advocated in the *Engineers* case,[2] which was enjoying a renaissance after being eclipsed in the Dixon Court,[3]

2 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 26 CLR 129.

3 The period from 1965 to 1990 can be seen as the '*Engineers* revival'. The period was characterised, as was the decision in *Engineers* itself, by a coalition between legalists and centralists that led to a reluctance to make implications, especially any implication of limits on the scope of Commonwealth power in favour of the States. The revival affected the Court's approach to characterisation (see *Herald and Weekly Times v Commonwealth* (1966) 115 CLR 418; *Fairfax v Commissioner for Taxation* (1965) 114 CLR 1; *Murphyores v Commonwealth* (1976) 136 CLR 1); the

favoured arguments based on a close analysis of particular words. Since the decision in *Cole v Whitfield*[4] however, the High Court has tended to abandon the literalist and anti-implication stance—if not the centralism—characteristic of the revived *Engineers* approach. It has favoured instead a style which places far more emphasis on balancing what are seen as constitutional policies and values.[5] This balancing requires the Court to decide whether a law is appropriate and adapted to the constitutionally permitted end; if not, and if the law has a disproportionate impact on constitutionally important values, the law may be invalid.[6]

This balancing approach has had the effect of encouraging the Court to rely on broad constitutional principles rather than the text of the Constitution itself as a guide to interpretation. If the implementation of the Constitution requires the balancing of competing values and policies embodied in the Constitution against those underlying the legislation being considered, it is necessary to discover the values and policies in the Constitution. As expected, judges' opinions regarding the values in the Constitution differ, but values which have received some support include federalism, responsible government, representative democracy, the separation of judicial power and, most controversially, equality before the law.[7] In ascertaining the constitutional

interpretation of Commonwealth powers, especially the corporations power and the external affairs power, culminating in the *Tasmanian Dam* case (*Commonwealth v Tasmania* (1983) 158 CLR 1), and in the area of immunities (*Victoria v Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353).

4 (1988) 165 CLR 360.

5 In s 92 of the Constitution, the approach required the Court to balance the protectionist impact of the law against any legitimate goal the law was designed to pursue: *Castlemaine Toobeys v SA* (1990) 169 CLR 146.

6 This test of proportionality has now been used in relation to s 92 (see *Castlemaine Toobeys* case), in characterising laws, especially under the incidentals power (*Davis v Commonwealth* (1988) 166 CLR 79; *Nationwide News v Wills* (1992) 177 CLR 1), and in determining whether a law which imposes restraints on freedom of political speech is in breach of the implied guarantee (*Nationwide News* case; *ACTV v Commonwealth* (1992) 171 CLR 106; *Cunliffe v Commonwealth* (1994) 182 CLR 272; *Theophanous v Herald and Weekly Times* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80; *Langer v Commonwealth* (1996) 134 ALR 400). The proportionality test may be contrasted with the older, formalist approach in which if the end was in power, parliament was free to determine the means to that end: see the dissenting judgment of Dawson J in *Nationwide News*.

7 Federalism has long been used as a source of constitutional doctrines (since *Demdem v Pedder* (1904) 1 CLR 91) and is now recognised in two doctrines designed to protect the States. The doctrines provide that the States have an immunity from discriminatory Commonwealth law (see for example *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192) and from laws which interfere with their essential functioning or autonomy (applied most recently in

impact of these values, the Court is showing a far greater willingness to make implications, implying for example a right to a trial before

the *Education Union* case), as well as in the broader immunity which the Commonwealth has from State law: *Commonwealth v Cigamatic* (1962) 108 CLR 372.

Responsible government is recognised in the Constitution and by the courts without being required by the text. (Perhaps the strongest indication that the principles of responsible government were to apply to the government of the Commonwealth is in s 64 of the Constitution, which requires that Ministers of State be Senators or members of the House of Representatives). This is consistent with the traditional position in that responsible government has always existed as a matter of convention rather than law. However the Courts have relied on responsible government as a guide in interpreting the Constitution. The most famous example is the *Engineers* case, where the Court argued that the adoption of the principles of responsible government made the Australian Constitution so fundamentally different from that of the United States that it was not safe to rely on American precedent. The Court has also appealed to responsible government in interpreting specific sections. The Court, especially Evatt J, relied on the principles of responsible government to justify the decision that s 1, which vests the legislative power of the Commonwealth in the Parliament, and s 61, which vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General, did not require a strict application of the doctrine of separation of powers, so that Parliament could vest the executive with broad but subordinate law making powers: *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73.

The principle of representative democracy, or perhaps more accurately, representative government, find expression in ss 7 and 24 of the Constitution, coupled with some other sections such as ss 8 and 30, which entail direct elections for both Houses of Parliament. The implications which may be drawn from the principle have been the subject of recent controversy in the High Court: see *Nationwide News* case; *ACTV v Commonwealth*; *Theophanous v Herald and Weekly Times*; *Stephens v West Australian Newspapers Ltd*; *McGinty v Western Australia* (1996) 134 ALR 289; *Langer v Commonwealth*.

The principle of the separation of the judicial power from the other powers of government is suggested in s 71 of the Constitution, which vests the judicial power of the Commonwealth in the High Court and other federal courts. By itself, this section does not entail the complete separation of judicial power adopted by the Court. For example, ss 1 and 61 of the Constitution do not entail a complete separation of the legislative and executive powers. However, the Court has deduced from Chapter III of the Constitution and from traditional conceptions about the role of the courts in a federation with a rigid Constitution, that only courts may exercise the judicial power of the Commonwealth and that the courts may exercise nothing but judicial power: *A-G (Commonwealth) v R; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC).

The idea that the Constitution embodies the principle of equality before the law has only been supported by three judges, Deane, Toohey and Gaudron JJ. They argue that the principle is embodied in a number of discrete provisions, such as s 117 which protects Australian citizens from discrimination by a State government on the grounds that they are resident in another State: see their judgments in *Leeth v Commonwealth* (1992) 174 CLR 455.

being convicted of a crime and punished,[8] and a right to freedom of political communication.[9]

A style of constitutional interpretation based on the discovery and elaboration of broad constitutional values does not lend itself to analysis by means of an exegesis of the Constitutional text. Many of the broad principles on which the Court is coming to rely cannot easily be related to particular provisions, because the judges find support for them in more than one provision or in the structure of the Constitution as a whole. As a result, there is an inevitable element of arbitrariness in deciding under which section these principles should be discussed; some are discussed only perfunctorily by Lumb and Moens, or the discussion is scattered throughout the text. Approaches of the High Court in characterising laws under particular heads of power, to give one example, is dealt with in a short introductory chapter. Arguably, this issue would have been better dealt with in greater depth in the discussion of the words 'with respect to' in s 51, since the problem of characterisation is essentially the problem of determining the nature of the connection a law must have with a head of power to qualify as a law 'with respect to' that power.

As reasonable lawyers are likely to disagree about how broad doctrines such as that of characterisation or proportionality relate to the words of particular sections, the book requires a comprehensive index to enable the reader to find where particular principles are discussed. However, the index is poor and not very detailed, making it difficult to find discussion of particular issues. For example, terms such as 'characterisation' and 'proportionality' are not separately indexed, although there is a reference to proportionality under the topic 'incidental powers'. Similarly, it is difficult to find a clear reference in the index to discussion on the scope of the States' immunity from Commonwealth laws. The only reference under the word 'immunity' is to the early doctrine of immunity of instrumentalites and its rejection in the *Engineers* case. There is no reference under the title 'discrimination' to the doctrine that Commonwealth laws cannot discriminate against States, nor any separate reference to the protection given to essential government functions of the States under any separate listing. It is necessary to go to the word 'States' to find a refer-

8 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

9 *Nationwide News* case; *ACTV v Commonwealth; Theophanous v Herald and Weekly Times; Stephens v West Australian Newspapers Ltd; McGinty v Western Australia; Langer v Commonwealth.*

ence to the 'discrimination' or 'essential government function' doctrines. This makes the book difficult to use as a general refence on constitutional law, unless the reader is already familiar with the subject. Perhaps the authors have assumed the major use of the book would be by experts who seek to discover all the references to sections or phrases in the Constitution, rather than students and less expert readers. A far more comprehensive index would make the book more accessible to a wider audience.

These criticisms apart, the book has many virtues. First, its format enables the reader to find not only the decided cases, but also all High Court references and discussion of particular sections and phrases. Secondly, the discussion of most sections is thorough, covering not only the cases but the literature as well. Thirdly, the style is clear and accurate, making the text easy to read and understand. Finally, and desirably in an annotated Constitution, the authors state the law as it is, rather than extending their own views as to what it ought to be. Where the meaning of a section is not clear or has been interpreted in a controversial way, however, the authors set out arguments for and against competing interpretations. Despite its shortcomings, the book is a valuable contribution to Australian constitutional literature, and hopefully there will be many future editions.

*Michael Stokes**

Sex, Power, and Justice: Historical Perspectives on Law in Australia

Edited by Diane Kirkby
Oxford University Press, 1995, pp xxv, 302, $29.95 (pbk)

This collection grew out of Diane Kirkby's long-term interest in 'law as an institution of power and potential social change'. With a 'passion for justice', she is committed to bringing 'a new critical awareness to the study of legal practices, legal knowledge, and legal practitioners, as constituted by, and in, historically-specific circumstances'. Following Carol Smart, Kirkby seeks to reconceptualise the discipline of law in relation to women, the first step being to gain 'historical knowledge of laws' creation and practice'. The essays in-

* M Phil(Oxon) LLB(Tas), Senior Lecturer in Law, University of Tasmania.