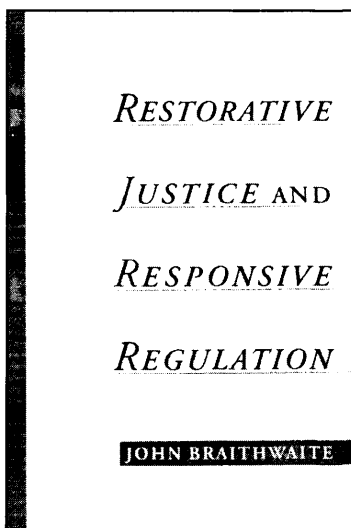


Reviews

***Restorative Justice and Responsive Regulation* by John Braithwaite, Oxford University Press, New York, 2002; pp314; \$58.95**



John Braithwaite, Professor of Law in the Research School of Social Sciences at the Australian National University, has written extensively on restorative justice, including in the criminal context, and on responsive regulation in the business context.

This book is not the first time he has drawn these two concepts together, but it does present a comprehensive and developed statement of his research and theories on the integration and application of these strategies to move towards better outcomes for individuals and communities.

Victim-offender mediation, family group conferences and whole school anti-bullying programs are examples of restorative justice at work. These processes aim to give those affected by an injustice an opportunity to be heard within a framework designed to heal and restore rather than punish.

In the past Professor Braithwaite's responsive regulation work has focussed largely on the business environment. The key concept here is identifying problems

and trying to solve them as an alternative to imposing penalties. His work in this area was a significant resource for the Australian Law Reform Commission during its inquiry into civil and administrative penalties. As a member of the Advisory Committee to the inquiry, Professor Braithwaite made a valuable contribution to the development of the Commission's report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95).

The book currently under review brings together his theories of restorative justice and responsive regulation and applies this integrated theory in a range of regulatory environments as diverse as the promotion of sustainable economic development and international peacekeeping. Restorative justice is placed at the bottom of the responsive regulation pyramid. This means that the less costly and less coercive options for encouraging regulatory compliance are tried first. If these are not successful, the regulator escalates up the pyramid to more coercive methods of deterrence such as penalties and finally to methods which incapacitate the actor such as suspension or revocation of a licence to operate.

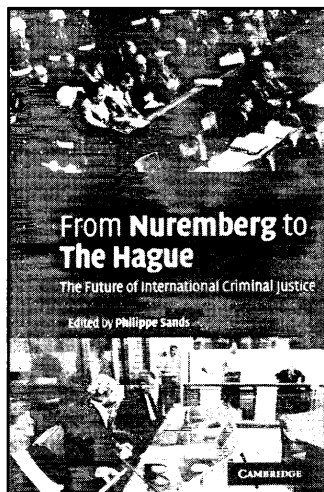
The writing style is clear and at times lyrical—the localism of the restorative movement makes it to justice what jazz is to music. He finds a good balance between content dealing with historical context, theory, empirical evidence and practice. The text includes boxed inserts setting out specific illustrative examples of the theories discussed. While the information contained in these boxes is generally of interest, the physical placement of the boxes can be distracting.

Professor Braithwaite is passionate about his subject without being uncritically evangelical. In discussing restorative justice and responsive regulation he notes

their potential dangers, weaknesses and limits. The real strength of this book, however, is the strong links he draws between restorative justice and responsive regulation and the forces that drive and motivate human beings. While his ideal world in which 'the forces of law are listening, fair and therefore legitimate' seems like an utopian dream, it is not hard to be convinced that the mechanisms he champions do have a valuable place in regulating society's ills.

— Carolyn Adams

***From Nuremberg to The Hague: The Future of International Criminal Justice* by Philippe Sands (Ed), Cambridge University Press, April 2003; pp206; \$49.95**



From Nuremberg to The Hague is a collection of essays that examine the evolution of international criminal justice from its post-Second World War origins at Nuremberg through to the proliferation of courts and tribunals with international criminal law jurisdictions based at

The Hague and Arusha, and the International Criminal Court (ICC).

The first essay 'The Nuremberg trials: international law in the making' by Richard Overy provides a fascinating account of the establishment and operation of the Nuremberg trials. This paper raises a number of political issues that are echoed throughout the collection:

- What is the purpose of international criminal justice?

- What form should international criminal justice take?
- What law should apply? For example, French lawyers were opposed to the Nuremberg Tribunal being based on Anglo-Saxon common law rather than Roman law.
- How are defendants chosen? The choice of defendant at Nuremberg was the product of a great many different strands of political argument.
- How are charges framed? The difficulty in Nuremberg was to define crimes that could be applied to the defendants, few of whom could be shown beyond any reasonable doubt to have directly ordered or perpetrated particular crimes. This raised the complexity of proving 'conspiracy'.
- How does international criminal justice interact with the principle of state sovereignty?
- How can the notion of retrospective justice be justified? At Nuremberg, the crimes of which the defendants stood accused were not regarded as crimes when they were committed.

The second essay, by Andrew Clapham, explores three concepts that are central to the issues raised in this collection: complexity, complicity and complementarity. 'Complexity' refers to the difficulty caused by the vague nature of crimes tried by earlier tribunals. Clapham also discusses the notion of 'complicity'—why such a concept is needed, and how those concerned with violations of human rights are using the concept today. The paper concludes with a discussion of the ICC and the concept of 'complementarity'—the idea that priority must be given to trials for international crimes at the national level, rather than the international level.

The third paper 'After Pinochet: the role of national courts' by Philippe Sands continues to examine the notion of complementarity, and asks, which courts—national or international—are best suited to exercise jurisdiction over individuals accused of crimes against humanity, war crimes and genocide. The primacy accorded to national courts under the ICC statute has not been the governing principle for other international courts. For example, the statutes

establishing the International Criminal Tribunals for Rwanda and the former Yugoslavia recognise the concurrent jurisdiction of national courts, while the Constitution of the Nuremberg Tribunal was silent on its relationship with national courts.

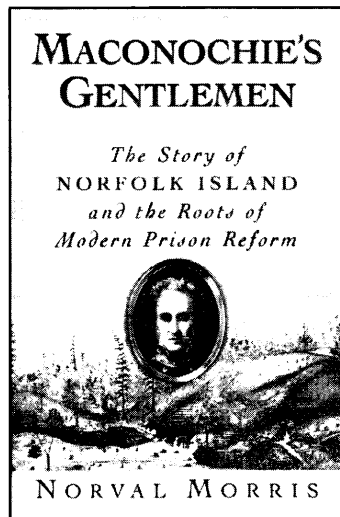
'The drafting of the Rome Statute' by James Crawford looks at the work of the UN International Law Commission in preparing the Draft Statute of the ICC and the transformation of that draft into the final statute as it emerged at Rome in 1998. Not surprisingly many of the issues involved in establishing the ICC are similar to those faced by the originators of the Nuremberg Tribunal.

The final paper by Cherie Booth, 'Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda', addresses the prospects of the ICC in terms of its legitimacy and credibility, function, and as a truly international 'institution'. In this paper, Booth raises an issue of particular relevance to this edition of *Reform*—the appointment of women to the ICC. She argues that to be effective, legitimate and credible, the Court requires representation of the principal legal systems, appropriate geographical representation, and an appropriate gender balance.

This excellent and thought-provoking book celebrates the many positive developments in the international criminal justice system over the past 50 years. However, at a time when the United States argues for immunity from prosecution by the ICC, these essays also remind us that the creation of war crimes trials, and their successes and failures, have always reflected the diplomatic concerns of the time and the struggle amongst political leaders to determine the future order.

— Jonathan Dobinson

***Maconochie's Gentlemen:
The Story of Norfolk
Island and the Roots of
Modern Prison Reform* by
Norval Morris, Oxford Uni-
versity Press (USA), 2002;
pp240; \$45.00**



In *Maconochie's Gentlemen*, author Norval Morris asks why law-abiding citizens should care about prison systems and the conditions under which offenders are incarcerated. Morris suggests that the treatment of a convicted criminal is a measure of a civilised society

'The beginning of an answer is to be found in the fact that the criminal justice system exercises the greatest power that the state can legally exercise against its citizens. Consequently a prison regime defines the razor edge between power and freedom, authority and autonomy.'

Maconochie's Gentlemen is the story of Alexander Maconochie and his work to change the brutal convict settlement on Norfolk Island into a model of civilised prison reform. In telling Maconochie's story, Morris seeks to cast light on the present day American penal system.

In 1840 Norfolk Island was home to the worst criminals in the colony. Norfolk was the prison of last resort, where a convict was sent after they had offended more than once. The convicts worked in shackles, had unhygienic, overcrowded sleeping and living quarters and vicious beatings by guards were commonplace.

Maconochie was a retired naval captain who requested his transfer to Norfolk. Over the four years he was commandant of the prison colony, he instituted a series of reforms directed at rehabilitation and empowerment of the 2,000 prisoners on the island. Morris writes that Maconochie started with a firm premise that 'banishment to Norfolk was punishment enough. Subjecting the prisoners to further torment would only render them more bitter and broken'.

Maconochie's methods were based on his own 'marks system' of rewarding good behaviour. The system, on which Maconochie wrote extensively, was based on the following elements:

- prison sentences should be of indeterminate length, based on 'work and behaviour' rather than 'time';
- marks were to be allotted for good work and behaviour, the accumulation of which would ultimately reduce a sentence;
- progress or regress in marks will be known by the prisoner;
- increasing autonomy is given to the prisoner as marks increase;
- convict groups should work together, with the incentive that more marks can be earned as a group than as individuals;
- optional and voluntary additional cell work should be available to allow a prisoner to earn more marks;
- release procedures should be graduated, including supervised settlement back in the community, leading to eventual freedom.

Central to the system was restoring a sense of personal autonomy and dignity. During his period of leadership, Maconochie brought musical instruments to the prison, established a library with books read to illiterate prisoners, permitted the use of eating utensils and allowed gardens to be planted. His system of rewards for marks earned also included offering increased privacy for prisoners.

Despite Norfolk becoming a peaceful settlement over this time, and many of the prisoners (known as 'Maconochie's Gentlemen') being settled into the community, Maconochie's methods were questioned by authorities back in England and he was sent back there in 1844 where he continued to advocate for prison reform.

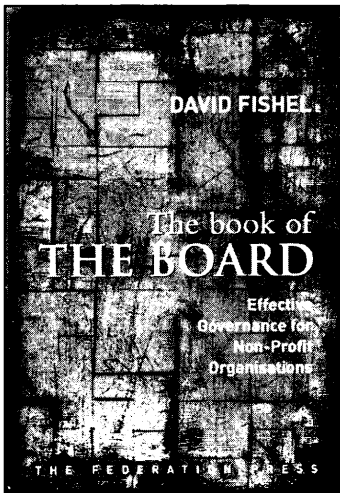
For most of the book, Morris tells Maconochie's story as a novel through his three major characters: Maconochie, his daughter Mary Ann and a convict. This device works well, and through the different voices Norris effectively captures some of the conflicts inherent in his approach to prison reform. When Mary Ann falls in love with a convict, Maconochie must confront his own prejudices and the limitations of his views on rehabilitation.

In the final sections of the book, Morris briefly outlines the remainder of Maconochie's life and discusses modern American correctional practice. He is highly critical of the current system of incarceration, in particular zero tolerance policies and the creation of isolated, super-max prisons to house the 'worst of the worst' in lock-down conditions. Morris argues that the main public debate on incarceration—whether deterrence or rehabilitation is the more powerful technique for crime reduction—'remains shatteringly superficial and does not seriously address either the social utility of incarceration or the rights of the individuals who are imprisoned'.

Splitting the book into two styles is risky and there is a slight jarring between the fiction and the academic debate that follows. However, in both sections, *Maconochie's Gentlemen* is a fascinating story. As Australian governments continue to bow to pressure to lock criminals up and throw away the key, this book serves as a reminder of our long history as a penal colony, and the basis of early prison reform.

— Kate Connors

***The Book of The Board:
Effective Governance for
Non-Profit Organisations*
by David Fishel, The Federa-
tion Press, Sydney, 2003; pp
289; \$49.95**



David Fishel, together with seven specialist contributors, has written the first comprehensive work for board members and other senior management of non-profit organisations in Australia and New Zealand.

The Book of the Board: Effective Gov-

ernance for Non-Profit Organisations is particularly valuable because board members of non-profit organisations are drawn from a diverse range of backgrounds, experience and training and frequently take up such positions with little training or materials to guide them. While it is directed at governance of non-profit organisations, there is much in *The Book of the Board* to assist neophyte members of boards of statutory corporations.

The legal environment in which non-profit organisations operate is increasingly complex, and the fact that an organisation does not seek to make a profit does not excuse the board from its management, monitoring and compliance roles. However, texts aimed at directors of profit-making companies often emphasise the duties of the board in the context of the long-term profitability of the company, a concept that may be unhelpful for members of non-profit organisations. Non-profit organisations also face issues that are not a feature of most corporations such as the need to raise funds through donations, the use of a significant number of volunteers and, potentially, a board with little business experience.

The book reprints an extract from a work by Nathan Garber dealing with models of governance. He identifies five different models. These are the advisory board, patron, cooperative, management team and police board models. As Garber notes, the advisory board model is often chosen where the CEO is the founder of the organisation and needs some additional skills and credibility that might come from the board. However, as Garber also notes the 'hands-off' approach of such boards may expose members to liability if the board fails to put into place sufficient accountability mechanisms. Patron boards may provide even less influence over the organisation than the advisory board model, but can be useful to establish credibility where there is also a governing board.

The cooperative model, where members seek to manage using a democratic, collective approach, is also the most difficult one to maintain because it requires compromise, which may be difficult if members hold strong ideological views, and there may be difficulty in implementing effective accountability structures. The management team model was for many years the dominant model for non-profit organisations. The structure of the board and its committees may reflect the administrative structure of the organisation itself. Such boards are characterised by a high degree of involvement in the management and administration of the organisation but can run the risk of seeking to micro-manage the organisation and failing to distinguish between governance and management roles. The risks of this approach led to the development and growing popularity of the final model: the policy board model, drawn from the influential writing of John Carver. In this model, boards establish guiding principles and policies; delegate responsibility and authority to the relevant staff of the organisation; monitor compliance; and ensure appropriate accountability by both the board and the staff.

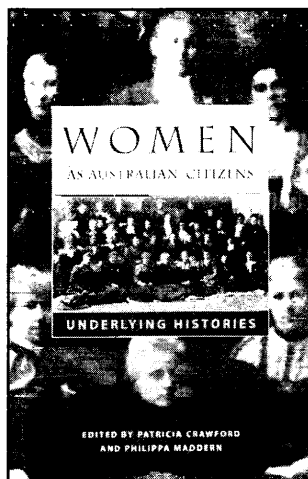
The book provides an outline of the responsibilities of the board and their processes including meetings, strategic planning and the relationship between the CEO and the board. There is a section of resources: 16 short chapters of checklists covering a range of matters from recruitment of a CEO; insurance; conflict of interest; volunteers; training; discipline; and performance. While these checklists would be no substitute for pro-

fessional advice where needed, nor even for careful deliberation, they do provide members with an outline of matters they might consider as part of their overall monitoring functions. The final chapter provides useful lists of further reading and helpful websites.

Fishel and his contributors enliven their material with case studies and interviews with heads of a number of non-profit organisations in Australia and New Zealand, putting issues in a real-life context and providing real world examples. The *Book of the Board* has much to offer anyone who finds him or herself taking part in the running of a non-profit organisation.

— Anne Finlay

***Women As Australian Citizens: Underlying Histories* edited by Patricia Crawford and Philippa Maddern, Melbourne University Press 2001; pp 296; \$32.95**



The title of the book suggests that its focus is on the citizenship experiences of women in Australia. However, only the last three chapters, which are particularly engaging, focussing on women in colonial Australia, feminism and racism in 20th century Australia and the citizenship experi-

ences of migrant women in Australia, deal with the Australian context.

A large portion of the book is directed to placing the Australian experience of citizenship in a very broad-ranging historical context, which is ambitious in its breadth, stretching back to the Middle Ages and the early modern period. St Augustine's and Thomas Aquinas' theories on the origins of household and

political order in Adam and Eve's fall from Eden are addressed, as are Aristotelian theories on the origins of the normative citizen. The book explores 'underlying histories' with a view to addressing the reasons surrounding the vast inequities of citizenship including those between men and women, white and Indigenous persons, and British and non-British migrants. While the historical exploration serves a purpose in demonstrating that exclusion has been a core aspect of citizenship since its inception, the book's consideration of the historical context is disproportionate to its attention to the vast array of citizenship experiences of women in Australia.

A key theme of the book is the historically exclusionary nature of citizenship based on race, gender, social class, property, religion, marital status and language. The book presents an alternative to writings on citizenship that assume that the normative citizen is male and that citizenship merely entails voting and other formal political rights. The editors restate citizenship in broad terms and explore the concept of 'subterranean' citizenship—the ways in which women, despite their exclusions, have enacted their own alternative versions of citizenship by participating in philanthropic, social, religious, and educational ventures as well as matters of public concern such as the anti-slavery campaigns.

In dealing with the exclusionary nature of citizenship, the book clearly demonstrates the role that women have played in excluding other women from citizenship. Women, because of race or class, can be the oppressors as well as the oppressed. The exploration of ethnicity as a potent axis of exclusion is incisive. Consideration is given to Aboriginal women's criticism of white Australian feminists who failed to realise that race, rather than gender, was the most significant factor in their exclusion from citizenship. The divergent treatment given to white, non-European and Indigenous women in relation to motherhood is also explored. Asian and Indigenous women were barred from receiving the maternity allowance, and while the government actively intervened to deny motherhood to Indigenous women, white women were encouraged to 'breed up' the supply of white Australian citizens. The book raises the pertinent question of whether it is meaningful to talk about 'women' when they are divided by many

differences, principally along race and class structures that influence their respective access to political rights.

The book acknowledges the role of English as a language of exclusion and states that it seeks to counter the trend of Australian feminist research that unwittingly places Anglo women at the centre. However, the chapter on Anglo-centralism in multicultural Australia deals with only three migrant groups: the Italians, the Vietnamese and the Yugoslavs. By omitting consideration of the experiences of women living in Australia from a broader range of migrant backgrounds the book commits a form of exclusion, which is disappointing given that one of its key themes is the historically exclusionary nature of citizenship. The chapter dealing with migrant women could have also benefited from a consideration of the treatment of refugee women in Australia, including the limited citizenship rights afforded to those granted a temporary protection visa.

With a view to modelling a more equal and more inclusive citizenship for the 21st century, the editors conclude that the 'idea implicit in constructions of citizenship from Aristotle to the 1990s—that full citizenship entails governing or protecting other less-than-complete citizens has long outstayed its welcome'. They state that the way forward lies in recognising diversity and difference, and striving for a more egalitarian society where citizenship is based on mutual care, rather than protection.

— Isabella Cosenza

ADVERTISE in **Reform**

***Reform* captures a diverse, informed national audience that includes policy-makers, academics, tertiary & secondary students and community based organisations, as well as legal professionals.**

Rates available on request.

Contact:
The Editor, *Reform*
GPO Box 3708
Sydney NSW 2001
Ph: (02) 8238 6333
Fax: (02) 8238 6363
E-mail: reform@alrc.gov.au