

BOOK REVIEW

Children and the Law in Australia

Geoff Monahan and Lisa Young (editors)

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This is the book for which I have waited decades.

I INTRODUCTION

In their preface the editors state that '*Children and the Law in Australia* is aimed at providing a comprehensive and thought provoking coverage of the ways in which the law and children interact'. They add that the book was born out of their shared concern about the lack of a suitable book that would assist in and inspire further research and scholarship. They also wished to produce a resource that would assist students, teachers, practitioners, law-makers, judges and the community to better understand the legal problems faced by Australia's young and to better support the delivery of legal services to children. Noting that the intersections between children and the law are many and varied, they said

[w]e agreed it was important to cover a wide range of topics so that readers could choose what interested them, while at the same time providing the wider community with a rich resource. For that reason, we also decided it was essential to create an edited volume that could draw on the expertise of specialists in each of the relevant areas. Consequently, we have brought together a range of expert authors in both public and private law, and from the social sciences, to achieve our goal.

The book is designed to outline key features of the relevant law in each area and to identify where the current debates lie for each of the chosen topics. Later in the preface it is noted that there is 'much work' still to be done in terms of research, analysis and discussion of the ways in which Australian law impacts on and interacts with children and young people. Interestingly, the contributors to the book have agreed to donate their royalties 'to support the creation of a scholarly journal dealing with children and the law in Australia' which will be published by LexisNexis and freely available online. The journal is said to be currently under development.

This review aims to provide an overview of the text and to discuss in a little more detail some of those chapters or aspects of chapters of particular relevance to those working in educational environments, advising those who do or conducting research into such activities. The reviewer's perspective is that of a solicitor who acts for teacher unions and teachers in the delivery of legal services across a wide range of aspects of the impact of law on schools. The reviewer also acts from time to time for tertiary staff in matters relating to their employment.

II ORGANISATION OF BOOK

Part 1, 'Introduction', provides overviews of children and the law, the development of children's rights, the child in utero and ex utero, the developing child, child maltreatment, child poverty and homelessness and how the law 'constructs' young adults.

Part 2, 'Public Law Issues', deals with criminal responsibility, juvenile justice, protection from abuse and neglect, immigration and citizenship, health, housing and social security, care and education of preschool children, school education and indigenous children.

Part 3, 'Children and Private-Law', deals with family law, adoption, medical treatment, contractual liability, tortious liability and wills and estates.

Part 4, 'Children in Court', discusses child witnesses and legal representation of children.

A Part 1

The authors state in their Preface that Chapters 1 to 7 are 'introductory', and designed to 'set the context' for the following 'specific' topics. Readers with an interest in the extent to which the law confers rights (or may in future) on children, as distinct from adults close to them, will be rewarded by a close reading of Chapters 1 and 2. Chapter 3, whilst of little direct relevance to education, sketches out well the law's struggles with the interests of unborn children and their parents. Chapter 4, by an educational psychologist, is well outside this reviewer's competence, but its analysis of contemporary developmental science should operate as an 'updater', and stimulus to reflection. Chapters 5 and 6 sketch the landscape in relation to child maltreatment, poverty, homelessness, and consequent exploitation.

Chapter 7 entitled 'The Child, the Young Person and the Law' should stimulate valuable reflection by those who have responsibility for senior students in high schools and/or for tertiary students. As Alistair Nicholson, the former Chief Justice of the Family Court of Australia, states in his foreword, this chapter highlights the 'inadequate and contradictory treatment of young people as distinct from children in our community'.

The chapter commences with the question of why we need to distinguish between young people and children. They observe that the legal status of young people is influenced by the fact that they occupy 'an awkward social and legal space' in which they can be characterised as children in need of protection or as adults who should be expected to accept the legal responsibilities of adults. Their intention is to consider some snapshots of the interface of young people and the law and speculate on what factors constitute the young person as a problematic legal subject. The chapter discusses the various ways that young persons, as distinct from children, are perceived and categorised in particular situations, and the conflicts between the different ways that they are categorised, and then applies this analysis to the operation of a curfew in the inner city area of Perth. The conclusion of the authors is that the tenuous legal status of young people makes them vulnerable to social marginalisation and denies them the opportunity to enjoy responsible freedom.

Whilst this chapter deals with the law as applied in the wider community, the analysis is of interest when reflecting upon the ways in which educational institutions often relate towards such young persons.

B Part 2

The initial chapters are about the criminal responsibility of children, and young people and juvenile justice. Chapter 8 refers in particular to the exclusion of children under the prescribed age (usually 10 years) from criminal liability and the principles upon which courts determine whether older children ought to be held criminally liable. Chapter 9 deals with the rationale, processes and sentencing principles in the juvenile justice system (where young people are the defendants). At pages 201 – 202 it also deals with restorative justice, a concept increasingly relied upon in educational settings as a response to wrong-doing by students. These chapters are useful background for educators.

Chapter 10, entitled ‘Protecting Children from Abuse and Neglect’, relates to a topic of increasing practical significance for educators. This chapter gives an appropriate and comprehensive overview of a complex topic which is difficult to summarise. For educators, it has relevance to abuse within educational institutions and also to responses by educational institutions and their employees to suspicion or knowledge of abuse elsewhere. The author identifies three issues, prevention, detection and response. Given the constraints, the chapter aims to introduce some of the key areas of legal regulation and to identify some of the most urgent questions facing those with responsibilities in this area. It deals with the legislative context of child protection (much more broadly than merely in respect of education), the social context, the introduction of employment screening (of particular relevance to educators), family law issues, mandatory reporting laws (of great relevance to contemporary educators) and describes the child protection systems. The author notes that, in addition to imposing obligations on persons having information which ought to be reported, it is common also to legislate protection for persons who give reports in good faith (a matter of considerable relevance to educators). An important point noted by the author which is often not acknowledged in discussions of this topic is that, in addition to statutory mandatory reporting (and employer policies requiring reporting), the common law of negligence remains directly relevant to failures by educators to react in a reasonable way once they have knowledge of possible harm or abuse. At page 225, under the heading ‘Difficulties for Reporters’ there is a useful discussion which resonates with this reviewer’s experience, namely that the use of broad, vague terms does create difficulties for persons upon whom obligations are imposed. This chapter is a particularly valuable one for readers of this journal. It is strong on historical and social contexts, the tension between various conflicting considerations and articulating unresolved policy issues (see pages 229 – 230 and pages 232 – 234).

Chapters 11, 12 and 15 deal with children and immigration and citizenship law, health, housing and social security and indigenous children and contemporary child welfare. These chapters are useful background for educators dealing with students whose lives are influenced or perhaps even dominated by circumstances falling within the scope of these chapters.

There are two chapters within this part directly focusing on education. The first is chapter 13 ‘Care and Education of Preschool Children’. The author commences by noting the importance to life opportunities of the early childhood years and distinguishes between the two categories of preschool education and long day care, noting that the latter is a subset of the broader category, childcare. This chapter contains some interesting statistical analysis of the patterns of usage in both preschool and long day care. The author notes the great variation across the country in the delivery of access to preschool programs and at page 281 notes that one of the ironies of early childhood education is that while studies of the benefits are often based on cohorts of disadvantaged children (of various types), these children in Australia are the least likely to access preschool and that the most likely to attend are those from higher socioeconomic groups, arguably

those least in need of that assistance. In discussing long day care, considerable reference is made to the growth of privatisation and for-profit provision. There is a useful analysis of the nature of the system of regulation. This is a very informative chapter, particularly for those with an interest in early childhood development and education.

Chapter 14, entitled 'School Education', by Des Butler and Ben Mathews of Queensland University of Technology Law School, is limited to twenty-six pages. Accordingly, the objective of the chapter is to provide insights into selected areas that are significant legally and of particular relevance to children's education as well as to teachers and schools. They chose to focus on the liability of schools to students in negligence and on issues regarding the disciplining of students. Discussion of liability and negligence runs for ten pages and deals with duty of care, standard of care, causation, defences (particularly contributory negligence) and vicarious liability. The discussion includes acknowledgement of the growing importance of psychiatric injury, failure to report abuse and bullying (including cyber bullying) and acknowledgement in the section on vicarious liability about the difficulties involved in attributing liability to the employer where the employee is engaged in criminal behaviour. This reviewer was enormously impressed by the five page discussion of standard of care. It is a masterly summary, helpful in terms of its analysis of principle but also very practical. The authors work out from basic principles to identification of practical steps for educational staff to minimise the risk of injury.

After a summary of some of the statutory provisions relating to the right and obligation to attend school, the chapter then deals in some detail with disciplinary responses to student misconduct. This section includes an informative summary of some of the research on student - student bullying, perhaps one of the greatest areas of concern at the moment (extending, of course, to cyber bullying). There is a clear summary of the different sources of schools' disciplinary powers (and later under suspension and expulsion from school). These are important jumping-off points for educational decision makers identifying their powers and duties in these circumstances. It is pleasing to see a discussion of physical contact commencing not with corporal punishment, but with other areas such as the legitimate comfort and support phenomenon and the legitimate use of physical restraint for disciplinary purposes. Given the many misunderstandings of the (very sensible) law on this topic, this reviewer would have appreciated an introduction to this topic dealing with the underlying concepts before turning to the specific areas discussed. The very brief discussion of discrimination can do no more than identify the basic principles and alert readers to the need for great care when engaged in decision-making on issues involving student disability.

C Part 3

Chapters 16, 17 and 18 on children and family law, adoption of local children and medical treatment are useful summaries of the law, in particular the principles for resolving parenting disputes which are well summarised at pages 363 – 374. Chapter 18 on medical treatment deals with those principles of the law which relate specifically to children, in particular issues of consent, including the capacity of adults to consent in a legally effective manner to medical treatment for children.

Chapter 19 deals with the contractual liability of children and young people. Whilst much of it relates to these citizens as consumers or as employees, there is a useful discussion at pages 458 – 461 of the principles relating to the contractual capacity of young people. This is particularly relevant where either a school or a contractor to whom the conduct of a school activity has been

outsourced seeks (almost certainly unsuccessfully) to contract with children on a basis exempting the school or the contractor from consequences of negligence.

Chapter 20 deals with the tortious liability of children and young people. This involves both negligence and intentional torts such as assault or trespass. There is a fairly substantial discussion of the difficult area of contributory negligence, which includes analysis of schoolyard cases. Perhaps the most practical aspect of this chapter for educators is the clear articulation of the principle that as a general rule parents are not legally liable for their children's wrongdoing unless there is actual participation or encouragement by them or actual negligence by them.

D Part 4

Chapter 22 opens with a description of the various types of cases in which children frequently appear as witnesses and an introduction of some of the difficult issues increasingly being grappled with by researchers and legal reformers. The author deals at appropriate length with the background, namely the traditional high level of distrust of children's evidence, and then turns to the reliability of child witnesses, the difficulties facing child witnesses, and recent reforms in Australia designed to assist child witnesses. On each of these topics there is now, both within Australia and elsewhere, a substantial literature based on social science research. Conclusions of importance emerge from these studies in respect of memory, suggestibility, fact/fantasy and understanding of a duty to tell the truth. The research strongly suggests that the reliability of child witnesses is closely related to the quality of questioning and emphasises the importance of calm, objective, open-minded questioning and age-appropriate language. All of these lessons are relevant, not only to those conducting litigation in the courts, but to educational institution staffs receiving or investigating complaints from students. It seems to this reviewer that it would be of assistance for educational staff to be given clear and simple instructions about how to listen to students making a complaint which might turn out to be a serious legally significant matter, the manner in which questions should be asked and the importance of accurate recording of what is said. The quality of the reception and recording of an initial report or complaint from a student may have a vital role to play in subsequent legal proceedings. The research reported on in this chapter reinforces the reviewer's perception that it is surprising that we have so little commitment as a community to fast-tracking cases in which children are to appear as witnesses, especially in cases where they allege they have been harmed.

Chapter 23 deals with legal representation of children and describes the present situation and likely future developments, particularly in the context of family law, care and protection law and criminal law proceedings where children are the alleged perpetrators. There is a valuable discussion of the question of whether lawyers should act under the 'direct instructions' model (where they act, as they do with adults, on the basis of instructions) or whether they should act independently of the client on a 'best interests' basis. There is clearly a tension between the best interests principle and the participation principle and some of these difficulties and their contemporary significance are well drawn out in this chapter.

III CONCLUSION

The editors have achieved the objectives set out at the beginning of this review. Many of the topics involve difficult and contentious issues, and it is admirable that this text has dealt so well with historical and social contexts, policy issues, tensions between competing (desirable) objectives or principles, as well as describing the present situation and likely future developments.

It is also helpful that there is a sensitivity in many of the chapters to the special vulnerability of disadvantaged children and to the need to examine carefully whether systems and principles which may work well for the more privileged need additional resourcing or modification to meet the needs of the more vulnerable children amongst us.

Although, necessarily, each chapter can only touch very briefly on issues of interest to specialists in that particular area, it is valuable for all of us to observe our special interests placed in a broader context. This work achieves that admirably.

Andrew Knott
Macrossans Lawyers