Bond Law Review

Volume 24 | Issue 1 Article 7

10-18-2012

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Recommended Citation
O'Leary, Jodie (2012) "Book Review: Negotiating the labyrinth: Disability and the Queensland Justice System by Dan Toombs," *Bond Law Review*: Vol. 24: Iss. 1, Article 7.
Available at: http://epublications.bond.edu.au/blr/vol24/iss1/7

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Keywords
Book Review

This book review is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol24/iss1/7

BOOK REVIEW

NEGOTIATING THE LABYRINTH:

DISABILITY AND THE QUEENSLAND JUSTICE SYSTEM

BY DAN TOOMBS

JODIE O'LEARY*

Dan Toombs, the author of the book *Disability and the Queensland Justice System*, explains his journey as a lawyer new to the field as trying to find his 'way through the labyrinth of disability and criminal law.'[1] His useful book provides a complete guide for practitioners and researchers alike as to how to navigate the complicated Queensland system that purports to protect accused persons who suffer disabilities, particularly focusing on the *Mental Health Act 2000* (Qld).

The way the author came to write the book provides important context. Dan Toombs was a lawyer in Toowoomba, who worked with The Advocacy and Support Centre in the Disability Law Project. In this position he was confronted with large numbers of persons with disabilities who were enmeshed in the criminal justice system.

A turning point in his legal career came upon his meeting with Melisa Avery. Melisa is a middle-aged woman with a significant intellectual impairment. Her IQ is at a level in the lowest one per cent of the population. As explained by her mother (and adult guardian) Colein, in the introduction of the book, Melissa has a penchant for stationery items, such as greeting cards and calendars.[2] Her exposure to the criminal justice system resulted from her shoplifting such items. She would see the duty lawyer in the Magistrates Court, who would inevitably enter pleas of guilty for her to progress to finalisation of the matter. Her criminal history (consisting mostly of summary offences) mounting, Melisa was eventually charged with an indictable offence and represented by someone with the motivation and capacity to seek a more just result.

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1 Dan Toombs, *Disability and the Queensland Justice System* (LawBook Co, 2012) 188.

2 Ibid 8.

Produced by The Berkeley Electronic Press, 2012

As her new lawyer, Dan Toombs referred her mental condition relating to the indictable offence and other summary matters to the Mental Health Court.[3] That Court found,[4] on the strength of a report from a psychiatrist, that although she was not of unsound mind at the time of committing the offences Melisa was permanently unfit to stand trial and had been for some time. Melisa's matters were discontinued and the Court thought it unnecessary to make a forensic order. These findings prompted Toombs to petition the Governor of Queensland for a pardon for Melisa's existing convictions. When the Court of Appeal eventually dealt with the matter,[5] it found that given Melisa's lack of fitness she 'did not enter these guilty pleas in the exercise of free choice. In those circumstances, it would be a miscarriage of justice to allow those findings of guilt to stand.'[6] All 15 convictions were set aside.

In the course of her judgment, sounding almost incredulous in the face of previously documented evidence that those with mental illness or other cognitive disabilities are overrepresented in the criminal justice system,[7] McMurdo P noted:

> It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. ...The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.[8]

Shortly after the decision, Attorney-General Cameron Dick was reported as stating he was taking advice as to the necessary changes to remedy this hiatus.[9] One cannot help but think that Dan Toombs would have been jubilant at such comments, believing that the Court of Appeal decision had provided the catalyst he had cautiously hoped for to spark significant reform for people with disabilities facing the

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3 *Mental Health Act 2000* (Qld) s 257.

4 On a number of occasions.

5 Following the Governor's referral to the Attorney-General and the subsequent referral to the Court of Appeal pursuant to *Criminal Code 1899* (Qld) s 672A.

6 *R v AAM; ex parte A-G* (Qld) [2010] QCA 305, [12].

7 For a readable review of the relevant research, particularly that undertaken in Australia, see Toombs, above n 1, Chapter 2 'Disability and the Queensland Criminal Justice System'.

8 *R v AAM; ex parte A-G* (Qld) [2010] QCA 305, [9].

9 Peter Hardwick, 'Legal Reforms Likely After Ruling', *The Chronicle* (online), 11 November 2010 <http://www.thechronicle.com.au/story/2010/11/11/ruling-may-spark-reforms-legal-system/>.

Queensland criminal justice system.[10] So it is understandable that he felt frustrated when the Government's response was, as described in the book, muted.[11]

The author's frustration filters throughout the book and the subjects of his frustration range variously from the courts (especially the Magistrates), the lawyers, the police and the support services. But this frustration does not equate to blame. Having worked with these professionals closely he often provides explanations one could imagine such professionals might articulate in response to criticism. For example:

> the sheer volume of matters the Magistrates Court must adjudicate, coupled with inadequate time and, at times, inadequate resourcing, inevitably leads to a high pressure environment where identification [of people with disabilities] can be missed.[12]

He casts blame on the system and the law underpinning it. Nevertheless, as someone who has had to work within those laws and get the best results possible for his clients he provides valuable insight. The first chapter explains concisely the terms that pervade this area of the law, mental illness (in its various guises, such as schizophrenia and bipolar affective disorder), intellectual disability and acquired brain impairment. Reading reports from psychiatrists and psychologists about persons with such disabilities means little when a lawyer does not understand these concepts and as such this chapter is valuable.

Chapter 5, 'Considerations for representing a person who may have a disability', offers what could be described as a checklist to lawyers on the ground, from necessary hints in taking instructions and sample questions to ask clients, through to issues relating to bail and ways to access medical information to provide evidence of disability. The book encompasses the procedural path to its full extent. Relevant legislative excerpts, largely from the *Mental Health Act 2000* (Qld), are scattered throughout the text and make up the bulk of Chapter 8 dedicated to the Mental Health Court. Chapter 11 explains relevant appeals for those with disabilities, including appeals against administrative decisions such as involuntary treatment orders, heard in the Mental Health Review Tribunal (MHRT); appeals against MHRT decisions, determined in the Mental Health Court; and those against Mental Health Court decisions, heard in the Court of Appeal.

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[10] He spoke of this hope in a report entitled 'Court of Appeal Recommends Law Reform' in *Latest News* (2012) Queensland Criminal Justice Centre <www.qcjc.com.au/news/view/23/court-of-appeal-recommends-law-form/latest-news>.

[11] Toombs, above n 1, 13.

[12] Toombs, above n 1, 80.

Chapters 6 and 7 are devoted to the two main areas in which disabilities, especially cognitive disabilities,[13] are mostly relevant in criminal law. Chapter 6 concerns the impact of the disability on the person's ability to: understand their charges; plead to the charges; understand the proceedings; and instruct counsel.[14] That is, whether their disability is having an effect at the time of appearing in court. Chapter 7 concerns the impact of the disability on the person's criminal responsibility, namely, whether they were of unsound mind at the time of their offence.

If, however, the person is unsuccessful in raising unsoundness of mind as a defence or is found fit to plead they may eventually face the prospect of a sentence order. As such, Chapter 10 describes relevant issues regarding sentencing people with disabilities.

My one criticism of the book is that there is not enough of it. Reading it, I wanted more. I wanted more detail of the case studies. I wanted to know more about Aaron, Andrew, Bruce, Robyn and other accused persons assisted by the Disability Law Project. As an academic, who no longer practises, reading this book provided a reminder of the human face of the laws that we critique. I wanted more discussion about the problems facing Magistrates and the limits of their powers. But not everyone has the luxury of time that academics have and, after all, I am not really among the target audience. The brevity of this book will be a relief for busy practitioners who need to master the area quickly to provide advice and assistance.

While many of the frustrations Toombs experienced have not abated in the Queensland system and the significant reform he had hoped for has not yet eventuated, the author should feel safe in the knowledge that persons with disabilities have greatly benefited from his work (and that of others dedicated to this area) and will continue to do so by virtue of the contribution this book will make to increasing the knowledge of the legal profession in this important area.

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[13] This phrase is used here to refer to mental illness, intellectual impairment and acquired brain injury.

[14] The expanded version of fitness criteria were articulated definitively in *R v Presser* [1958] VR 45.