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**The newsletter of the Francis Forbes Society for Australian Legal History**

**History reports itself**

In 1954, Sir Winston Churchill was reported to have said that it is better to jaw-jaw than to war-war. Halstead Press recently published [Whatever it Takes – The Price of Power, The Cost of Creativity](http://www.abbeys.com.au/book/whatever-it-takes-the-price-of-power-the-cost-of-creativity.do). Written by Sydney barrister Peter Deakin SC, it is two prosopographies. The first is of leaders, heroic yet also unafraid to use their power to inflict suffering and death. The second is of artistic geniuses whose misery was the price of maintaining their creativity.

The book is a timely reminder that law-law, just like jaw-jaw and war-war, is no immovable right. Napoleon created it while running a dictatorship. The lawyer Lincoln suspended it while waging a great battles of the ages. It may be that we who have the great privilege of living in a free and strong state are apt to forget not the supremacy of law but its ephemerality.

Philosopher John Gray has a quite different outlook on the source of morals and ethics from Deakin, Both reflect compellingly on the continuing relevance of Machiavelli. [Here](https://www.newstatesman.com/politics/2013/07/what-machiavelli-knew) is Gray writing with his usual pungency on Machiavelli and the law:

*The law these liberals venerate isn’t a free-standing institution towering majestically above the chaos of human conflict. Instead – and this is where the Florentine diplomat and historian Niccolò Machiavelli (1469-1527) comes in – modern law is an artefact of state power. Probably nothing is more important for the protection of freedom than the independence of the judiciary from the executive; but this independence (which can never be complete) is possible only when the state is strong and secure. Western governments blunder around the world gibbering about human rights; but there can be no rights without the rule of law and no rule of law in a fractured or failed state, which is the usual result of western sponsored regime change. In many cases geopolitical calculations may lie behind the decision to intervene; yet it is a fantasy about the nature of rights that is the public rationale, and there is every sign that our leaders take the fantasy for real.*

**David Ash, editor**

**The Society’s 2018 Plunkett Lecture**

**The Attorney General of New South Wales, the Hon Mark Speakman SC MP, delivered the 2018 Plunkett Lecture on Monday, 29 October 2018 in Sydney**. The tensions within the concept – the idea of a prerogative in a democratic society and the role of a discretion of mercy beside a determination of punishment – were discussed.

The Attorney foreshadowed and it is apt to set out, some movement by his government on this important and often-misunderstood tool in the executive armoury. On 9 November, the Attorney issued a press release:

*DELIVERING TRANSPARENCY TO MERCY DECISIONS*

*The use of an ancient power to pardon offenders for their crimes will be made more transparent, Attorney General Mark Speakman announced today.*

*The Royal prerogative of mercy has been exercised by monarchs for almost a millennium, mostly in secret.*

*“Such secrecy might have been appropriate under Edward the Confessor in the eleventh century, but in modern-day NSW it’s time to lift the veil of mystery. If passed, new legislation, to be introduced by the end of this year, will make NSW the first jurisdiction in Australia to regularly share these details with the community,” Mr Speakman said.*

*“The Royal prerogative of mercy is exercised in favour of offenders only in extraordinary cases. But it’s important that the Government maintains a process that properly balances the principles of open justice with any need to protect the privacy of individuals.”*

*In NSW the Attorney General makes recommendations to the Governor on whether an application for exercise of the Royal prerogative should be granted. Successful applications could result in a pardon, a reduced sentence or change in punishment.*

*In cases where mercy is granted, the reform will enable the Attorney General to publish a document that summarises mercy petitions, including:*

*• the petitioner’s name;*

*• general information about the nature of the offence;*

*• the outcome of the application; and*

*• brief reasons for the decision.*

*The document to be published on the Department of Justice website will also provide limited information about failed mercy petitions.*

*The Attorney General will maintain discretion to refuse to release information about petitions and their outcomes.*

*“For example, it wouldn’t be appropriate to publish details that would jeopardise the safety of a petitioner, prejudice an investigation or prosecution of an offence or reveal the identity of a police informant,” Mr Speakman said.*

*Prior to the final outcome of the petition, the Attorney General will also have a discretion to invite any registered victims of an offence to have their say on the petition.*

*The changes will also apply to applications made to the Governor for review of conviction or sentence under section 76 of the Crimes (Appeal and Review) Act 2001.*

**Recent books**

**The Federation Press has published the second of Greg Woods’ extraordinary overview of the history of criminal law in NSW. This volume covers the early years of statehood, through two searing wars and the great depression. A** [review](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2014/02/G-D-Woods-A-History-of-Criminal-Law-in-New-South-Wales-vol-2.docx) **is available on the Society’s website. Details of how to order the book from the publisher are** [here](http://www.federationpress.com.au/bookstore/book.asp?isbn=9781760021931)**.**

**The Federation Press has also published the last of Dr JM Bennett’s series of the lives of Australian chief justices, Sir Francis Villeneuve Smith, third chief justice of Tasmania. A last and also a first, as the book is co-written by Dr Bennett’s successor, Ronald C Solomon. A fine segue as part of a grand tradition. Details of how to order the book from the publisher are** [here](http://www.federationpress.com.au/bookstore/book.asp?isbn=9781760022037)**.**

**A list of non-practice published works by members of the NSW Bar**

This is a fascinating account of the many contributions to Australian literary life made by NSW barristers. The [list](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2014/02/List-of-non-practice-published-works-by-members-of-the-NSW-bar.pdf) is alphabetical by author and includes man well known barristers, including CEW Bean, HV Evatt, Ian Barker QC and many others.

**Membership**

For information on how to become a member of the Society, please go to its [membership page](http://www.forbessociety.org.au/?page_id=1119).