BOOK REVIEWS

Freedom in Australia by ENID CAMPBELL, LL.B. (Hons.), B.Ec. (Tas.), Ph.D. (Duke); Sir Isaac Isaacs Professor of Law, Monash University and HARRY WHITMORE, LL.B. (Syd.), LL.M. (Yale); Professor and Dean of the Law School, University of New South Wales. (Sydney University Press, 1973, 2nd Edition), pp. i-xi, 1-488. Cloth, $15.00. (ISBN: 0 424 05220 2); Paperback, $10.00. (ISBN: 0 424 06630 0).

It is rumoured that the publication of this book and of its earlier edition have proved an embarrassment to Sydney University Press, used, as it is, to the subsidised publication of volumes such as "Naval Etiquette in Fourteenth Century Italy" or "Crustaceans and Polyps in Norse Mythology". Professors Campbell and Whitmore's book has sold a very considerable number of copies and (it is said) has caused accounting difficulties to the Press by producing an unexpected and substantial profit.

The success of the first edition of this book and the certain success of this edition are no less than well deserved. In general this edition is considerably better than the first. It is, on the subjects with which it deals, comprehensive, accurate and learned. Since it covers a vast field and will no doubt be reviewed in a number of journals, I will attempt here to evaluate its treatment of only two areas; in particular the parts of the book which relate to police, crime, and law enforcement, and the part which relates to the treatment of the sick.

Chapter 2 deals with the police and analyses the legal factors relevant to the structure of police systems. The authors deal with police powers in general, the role of the courts in controlling police activities, certain problems of police interrogation, actions against the police, discretion, police regulations and police accountability. Amongst other suggestions they make, the authors say:

> We see no good reason why standing orders or instructions regarding arrest or interrogation procedures should not be reviewed by the responsible Minister and tabled in Parliament as a matter of course.
>
> This is a proposal of obvious merit.

Chapter 3 is concerned with arrest and the law relevant to that subject. Considering the diverse arrest laws applicable in the various Australian jurisdictions, the authors manage to give a coherent exposition nonetheless. Again, they make certain suggestions about reform in this area which although not original are sensible and clearly argued. Under "Arrest on Suspicion" (page 37) useful reference might perhaps have been made to section 59 of the N.S.W. Summary Offences Act, 1970, a "stop, search and detain" provision showing on its face considerable potential for abuse.

Chapter 4 deals with the problem of bail (perhaps somewhat briefly) but again the authors show their capacity for careful analysis of the available literature and for reducing the relevant arguments to a clear form. Perhaps some reference may have been made to the papers delivered at a seminar on bail which was held by the Institute of Criminology in Sydney Law School in 1969, and published in the proceedings of the Institute of Criminology for that year.

Chapter 5 deals with search and seizure including reference to the relevant common law cases, to Raeburn's excellent article on this subject and to the relevant provisions on eavesdropping and the interception of communications. The authors conclude:

> The impression one gains from comparing the Australian to the United States provisions is that the American law-makers have shown a much more sensitive awareness of the dangers involved in the use of listening devices by law enforcement officers than their Australian counterparts . . .

A recent N.S.W. decision, *R.* v. *Simo Gaica*,[1] bears out this statement. This case indicates that police use of listening devices in N.S.W. is virtually untrammelled, despite the enunciation in the Listening Devices Act (1969) of certain (apparent) restrictions.

Chapter 6 deals with police interrogation and again the authors' capacity to compress a great body of relevant material without losing comprehensibility is evident. By the time this review appears in print no doubt the authors will be aware that in New South Wales a new set of Commissioner's Instructions relating to confessions and interrogation has been promulgated. From my reading of the new Instructions, it appears quite possible that certain of the provisions may bring about the kind of rule conflict situation which occurred in *Sernack* v. *McTavish*[2] (page 60).

Chapter 7 (entitled "The Citizens' Role in Law Enforcement") deals with misprision of felony, police power to demand information, the offences of obstructing or misleading the police and with the obligation on the citizen to assist in arrest.

With regard to the power to demand information the authors point out the position in Western Australia where there is a broad police power to demand a person's name and address, refusal being a criminal offence. The authors refer also the Commonwealth Crimes Act and several other Commonwealth Acts which give powers to demand information.

Perhaps some mention may have been made of powers given to persons *other* than police which override the traditional "right to silence". Various of the State Companies Acts and the N.S.W. Mental Health Act (for example) do this. There are in fact a great number of statutes which empower bureaucrats and officials to demand informa-

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[1] (1974) March-April, Petty Sess. Rev. 1057.
[2] (1970) 15 F.L.R. 381.

tion from persons (refusal being an offence) which powers are in many cases much more substantial than those given to police officers.

Chapter 8 deals with the subject of prosecution and is a thoroughly learned discussion of this very important subject.

One of this reviewer's hobby horses is that there are a number of statutory provisions governing legislation in the area of "white collar" crimes which bar prosecutions for certain corporate offences, certain pollution offences and certain consumer protection matters other than with consent of the relevant Minister. The absence of truly independent prosecutorial discretion in these areas is capable of working serious abuse and injustice.

While Professors Campbell and Whitmore deal closely with the questions of prosecutorial independence they have not considered its relevance in these areas which have hitherto been considered peripheral but which will in the future perhaps be considered more important.

A further point is that under "Judicial Control of Prosecutorial Discretions" (page 111) the authors might have referred to *R.* v. *Soanes*.[3]

In Chapter 9 (entitled "Crime Prevention and the Citizen") the authors deal with "some of the legal devices which have been developed specifically or principally for the purpose of "nipping crime in the bud". They discuss briefly the law of attempt but deal more extensively with legislation concering loitering, vagrancy and consorting. The chapter deals also with the police power to prevent breaches of the peace and the power vested in justices of "binding over".

Chapter 10 is concerned with "Treatment of the Sick". The authors point out the enormous uncertainties surrounding questions of consent in relation to medical treatment. The general explanation for this uncertainty is no doubt the reluctance of members of the medical profession to undertake treatments about which there is the slightest legal doubt, coupled with the reluctance of patients to take legal action against medical practitioners. Case law in this area is therefore light, and commentators are forced to speculate. The speculations of Professors Campbell and Whitmore on consent are soundly based and sensible. For example, on young persons they say (page 211) :

> Where a minor is capable of consenting to treatment, it should not, in our view, be open to his parents or guardian to countermand his consent or to insist that he receive treatment against his will.

Reference could have been made, however, (page 213) to the N.S.W. Minors (Property and Contracts) Act, 1970.

The authors go on to deal with the obligation of the doctor to inform the patient of the risks of a treatment or operation, making appropriate reference to the leading case of *Smith* v. *Auckland Hospital Board*.[4]

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[3] (1948) 32 C.A.R. 136.
[4] [1964] N.Z.L.R. 241, [1965] N.Z.L.R. 191.

One of the few criticisms to be made of thoroughness with which Professors Campbell and Whitmore explore their subject relates to their treatment of abortion (pages 217-218). While making some fairly general comments about controversy in this area, they have made inadequate reference to the extremely important case of *R.* v. *Wald.*[5] In this case the late Judge Levine instructed the jury that social circumstances could be taken into consideration when looking at the question of the woman's mental health. Perhaps at the time the authors were preparing the book, the significance of this particular phrase in Judge Levine's directions to the jury was not apparent, but its practical effect has been to decriminalize medical abortion in N.S.W. An enormous change has taken place over a period of about two years, making the position in N.S.W. even more liberal than in South Australia, and closely approximating, *de facto,* the position in the U.S.A. since *Roe* v. *Wade.*[6]

The authors make a very substantial and authorative study of the law relating to mental illness. Professors Whitmore and Campbell have done more than anyone else in Australia in bringing to the attention of the legal profession the significance of a system of statutes whereunder thousands of persons annually are deprived of their liberty and detained involuntarily. Unquestionably this is an area which Australian lawyers have neglected disgracefully. Although Professors Campbell and Whitmore make no such abrasive criticisms, it seems to this reviewer a grotesque distortion of legal priorities that, while ever willing on ceremonial occasions to mouth platitudes about the rule of law and the protection of liberties, the vast bulk of Australian lawyers direct their time and efforts into areas such as taxation law, company law and conveyancing, regarding the practice of criminal law with collective contempt and almost totally ignoring the situation of the enormous number of persons detained involuntarily, on medical fiat alone, in mental hospitals. As Professors Campbell and Whitmore point out, N.S.W. is the only jurisdiction which provides an automatic legal (magisterial) review of involuntary admissions; even then the patient is almost never legally represented before the magistrate, and the proceedings are unconscionably brief.

This chapter is extremely well researched (although "Kittrick" in footnotes on pages 221 and 229 ought to be "Kittrie"), and the comments the authors make are generally not only technically accurate but sensible and persuasive.

I shall not attempt to detail the other chapters of the book which I have not dealt with in this review, except to say that there is a very comprehensive coverage of virtually all other significant legal areas involving questions of personal freedom. Those parts of the book which I have considered evidence great scholarship coupled with unusual perception of the wider issues involved where law, society and the

[5] (1971) 3 D.C.R. (N.S.W.) 25.
[6] (1973) U.S. Law Week 4213.

individual interact. This book is unquestionably one of the most important Australian legal texts ever published.

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Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law, by GARTH NETTHEIM, Professor of Law, University of New South Wales. (Australia and New Zealand Book Company Pty Ltd, 1973), pp. 1-137. ($4.95. ISBN: 0 85552 012 4.)

Writing of the Queensland Aborigines and Torres Strait Islanders Act of 1965, Charles Rowley concluded a chapter thus: "One can only account for the fact that it has not attracted the attention of the International Commission of Jurists by assuming that Australian lawyers have not yet much interest in legislation for Aborigines". Rowley's judgment was perfectly valid when it was made in 1971 and only marginally less so today — Nettheim's book notwithstanding. When an analysis of the 1939 Act was published by five Queensland reformers in 1958 none of them had a law degree. In South Australia, it needed an historian, Ken Inglis, to unravel the Stuart Case. Before criticizing lawyers for their indifference, and before lawyers start to feel too virtuous about the present state of their professional concern, it is important to recognize the fundamental reason for past neglect. It is not simply because lawyers were reactionary and insensitive. It is because the Law and Aborigines lacked a common denominator: because the latter lacked property. The Law is quantatively dominated by concern with property: its sale and purchase; its theft; its transference; its inheritability. Because most Aborigines were not permitted control even of their labour power they had little to say to the Law, or it to them. If lawyers are now more interested in Aborigines it is for personal reasons, not because the Law itself has changed.

This preamble will stand as a useful introduction to Nettheim's study of the 1971 Aborigines Act and Torres Strait Islanders Act, as several of the flaws in his book stem from the sources outlined above.

Almost apologetically Nettheim begins by announcing that he will be attempting more than a narrow legal analysis by taking into consideration historical, political, factual and philosophical matters regarding what laws ought to be, not just what they are (pages 1-2). But eight pages later in a discussion of black separatism he bows out, claiming that because the issue is political the International Commission of Jurists can contribute little to its resolution. This abnegation is remarkable on two counts. Firstly, it overlooks entirely the charge that assimilation is genocide in terms of the 1946 United Nations definition and therefore very much the concern of the I.C.J. Secondly, it makes nonsense of his opening claims about the necessity for a wider than legalistic approach to the issues of Aboriginal justice. It is surely one

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