BOOK REVIEWS

J. C. SMITH & BRIAN HOGAN, *Criminal Law: Cases & Materials*

Butterworths, 1975, $30.00 (Casebound), $20.00 (Limp)

In the preface to this work, the authors state that, 'our object in producing this book is to provide materials on the substantive law of crime suitable for teaching the subject by the case method'. For students reading criminal law in a common law jurisdiction there are undoubted advantages and benefits from a case-book which fulfils the authors' stated aim. But how useful is such a case-book to the student studying the criminal law in this State, constrained as we are by the Tasmanian Criminal Code?

The book is conventional in that, like most of the other case-books in this area, it is devoted almost exclusively to the substantive law of crime. Apart from one or two minor exceptions — see particularly a piece by the late Peter Brett on the *Psychology of Provocation* (p. 369) — there is little reference to criminal procedure, evidence or criminology. The authors in fact make no apology for this format save to comment in the preface that, 'we are firmly persuaded that the criminal law as such is always a subject of current social reform, that it is a vital part of the education of the student of law and that it has endless fascination for both teacher and student.' With these sentiments I express complete agreement.

The book deals first with the 'General Principles of Criminal Responsibility' and follows with a detailed treatment of the more important substantive offences, which contains no surprises. The book is easy to read, the print-size large enough and the overall lay-out attractive. One point of criticism may be that the size, depth and colour intensity of the type change on occasions and, while detailed references to articles and notes are usually provided, there are some important omissions in this respect, e.g. at p. 42 the citation is simply, 'Devlin, J., *Statutory Offences*'. A welcome aspect is the inclusion of numerous questions, notes, statements of opinion by the authors, and extracts from articles in addition to the cases. There is also frequent reference to the authors' well-regarded textbook, *Criminal Law*. While purchase of both books by students may well be financially prohibitive, many of them will soon discover that the answers to the questions posed in the case-book are often to be found in the textbook. In line with most modern case-books, particularly the American publications, this work contains numerous questions, usually inserted at the end of each chapter or at the

conclusion of a case, which are thought-provoking and instructive. In themselves the questions are a distinct teaching aid; they demand that the student thinks for himself and in the reviewer's opinion provide an ongoing method of self-assessment. An annoying, if minor flaw- is that usually questions are followed by notes. However, sometimes this is reversed (p. 116), or notes and questions are presented contiguously (pp. 129-130), and occasionally questions become problems (p. 181).

In the difficult task of selecting cases the authors have in the main chosen wisely, having included a selective sample of the more important cases which illustrate the area, rather than trying to 'cover the field' and be comprehensive on a particular topic. Thus a number of early English cases are omitted and replaced by short notes or by cross-references to the authors' textbook. The additional space allows the inclusion of longer extracts often enabling the student to extract and assemble the relevant facts from the judgments, rather than having them set out at the beginning of each case, which is the way of Smith & Hogan's main competitor in the field, Elliott & Wood, *Case Book on Criminal Law*. However, like many English case-books, textbooks and even judgments of the English courts, one notices a reluctance to include or even refer to some very important and stimulating Commonwealth material. A number of the better known Australian cases have of course been included, e.g., *Papadimtropoulos* (fraud vitiating consent in rape), *Proudman* v. *Dayman* (mens rea — statutory offences) and *Reynhoudt* (mistake of fact). However, there are some serious omissions. The decision of the Privy Council in *Parker* [1964] A.C. 1369 (provocation) and the New Zealand Court of Appeal's decision in *Cottle* [1958] N.Z.L.R. 999 (sane and insane automatism). But perhaps the most puzzling omission is the decision of the Victorian Supreme Court in *Hayward* [1971] V.R. 755. In *Lipman* [1969] 3 All E.R. 410 (S. & H. p. 208), the Court of Appeal disposed of Lipman's appeal against his conviction for manslaughter by stating (p. 410) that 'when the killing results from an unlawful act of the accused no specific intent has to be proved to convict of manslaughter, and self-induced intoxication is accordingly no defence'. In *Hayward*, Crockett J. refused to follow *Lipman* and held that, where death results from an unlawful act of the accused, the Crown must show that the act causing death was conscious and voluntary. Self-induced intoxication rendering the act involuntary could be a defence. In view of this clear conflict between two courts applying the common law it is surprising that the authors have not thought it appropriate to include the latter decision, particularly in view of the trenchant criticism that followed *Lipman*; see particularly *Orchard* [1970] Crim. L. R. 132, 211. *Hayward's* case clearly offers a different point of view as to whether self-induced intoxication can give rise to a successful plea of automatism. If one of the aims of a case-book is to encourage students to argue concepts and to stimulate a comparative approach, rather than merely to learn *the* law, then *Hayward's* case surely war-

ranted inclusion.[1] It would be disappointing to think that the reason for the omission was the fact that it was a decision of a single judge of the Antipodes. It is pleasing to note that 'voluntariness' is dealt with as it should be in the context of automatism and insanity, rather than as an adjunct of a discussion of the *actus reus*. As the authors point out (p. 7), 'the cases in which voluntariness was in issue are so inextricably bound up with the McNaughten Rules, which govern the defence of insanity, that they can be properly understood only in the light of those rules'.

To return to the question posed initially: how useful is this work to the student reading criminal law in a jurisdiction where the criminal law is embodied in a Code? The answer surely would be hardly at all, if the Code were self-sufficient. However, resort to the Common Law by judges in Tasmania has been found necessary on many occasions in the past, e.g., in *Martin* (mistake), *McCallum* (manslaughter) and more recently in *Ingram* (rape). The development of the Common Law cannot be ignored. It provided the source and origin of many of the crimes in the Code and has been used to interpret a Code provision when it is of a 'technical or doubtful' nature. As a guide to judicial interpretation the Common Law has rarely been seen as restrictive. Rather as Burbury C.J. said in *Murray* [1962] Tas. S. R. 170 at 172: 'the truth is that a general principle of criminal responsibility, although expressed in statutory form in a Code, is nevertheless a flexible and dynamic concept. And once it appears that a provision of the Code only attempts to express a pre-existing established principle, its interpretation and its application to a particular set of facts cannot be undertaken without recourse to its Common Law matrix. A study of such cases as *Callaghan* (1952) 87 C.L.R. 115, *Vallance and Brennan* (1936) 55 C.L.R. 253, itself shows that basic principles of criminal responsibility firmly established before the introduction of a Code play an important and sometimes dominant part in judicial reasoning in its interpretation, in order to keep criminal responsibility under a Code in conformity with basic concepts'. (See also Windeyer J. in *Vallance* (1961) 708 C.L.R. 56 at 76).

The history and development of English criminal law cannot be ignored by Australian students, but whether Smith and Hogan's casebook provides the best way of understanding that development must largely be a matter of individual choice. The work clearly offers a comprehensive, contemporary and instructive view of the criminal law in its Common Law (albeit decidedly English) setting, and in the reviewer's opinion it is the most impressive of the case-books currently available.

John Blackwood

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1 The House of Lords have now decided in *Majewski* [1976] 2 W.L.R. 623 that *Lipman* was rightly decided. *Hayward* can no longer be regarded as relevant to the English situation, but at the time of publication was clearly important.

K. F. O'LEARY and A. E. HOGAN
Principles of Practice and Procedure
Butterworths, 1976.

G. NASH

Civil Procedure — Cases and Text

The Law Book Company Limited, 1976, (Cloth $27.50), Paper ($19.50)

It is a common experience for the legal profession in Australia to find that two major publishing houses issue texts on the same subject virtually contemporaneously. In this respect, 1976 was no different to many other years, for the two texts under review were published within a few weeks of each other. However, in this particular instance the approaches of the authors are so different that most will find no difficulty in choosing between them. While each will serve certain purposes more effectively than the other, many will find sufficient merit in each to purchase both. Publication of *Principles of Practice and Procedure* also marks a new advance in legal publishing in Australia for the authors are responsible for the conduct of the Legal Workshop at the Australian National University, and this is the first volume produced within a Workshop climate to be published for the profession at large.

As the practitioner responsible for presentation of the other pioneering Legal Practice Course, I particularly welcome its publication for it provides an excellent text with which to introduce Tasmanian law graduates to legal procedure. The text reflects clearly the experience of the authors in communicating the basic, clear and, hopefully, certain principles which are the foundations of procedure. No text expounding the law or procedure of any particular jurisdiction is suited for direct application in any other. From the point of view of a Tasmanian student, each text fails to deal with the particular rules of procedure obtaining in Tasmania, although in so far as each text deals with the principles of procedure, those principles are as deeply entrenched in the Rules of the Supreme Court of Tasmania as they are in any other jurisdiction.

One difference between the two texts is that *Principles of Practice and Procedure* is based on the recently updated procedures of the Supreme Court of New South Wales, whereas *Civil Procedure* is based upon the procedure of the Supreme Court of Victoria. While Victorian procedure remains more closely related to that obtaining in Tasmania, one can only envy those in New South Wales who are no longer troubled about such questions as, whether proceedings should be instituted by Writ of Summons; Notice of Motion; Petition; Originating Summons; and so on. In assessing any exposition of the law of procedure, the vital question must be to ask how clearly the text explains the principles of pleading.

One test is to consider how clearly the distinction between common and money counts and other pleadings is explained; or, as it was put in this jurisdiction under the rules of past years, between 'specially endorsed' and 'generally endorsed' writs. In this area, as in all others, the authors of *Principles* have, like good pleaders, made their points clearly, briefly and in separate paragraphs. I commend them. My expectation is that generations of students will come to a like view.

The style of Professor Nash stands in sharp contrast. Overall, his text presents questions rather than answers. If read alone it will be of little benefit to a student seeking to grasp the elementary principles of practice and procedure. Professor Nash no doubt rejects, as I do, the view that any student should attempt to master the learning required of him by confining his study to any one text. However, one must recognise that while the basic principles of practice and procedure seem to be self-evident to the experienced practitioner, most students have tremendous difficulty in perceiving those principles when they are immersed in the detailed rules of any Supreme Court. I suspect that Professor Nash has cast the book with the intention of posing questions which will stimulate the mind of the student so that, aided by his lecturer's classroom exposition and his own research, the student will develop a deeper understanding and appreciation of the subject. Indeed, in some ways the text reads as if it were transcribed from the tape of a dynamic classroom lecture, punctuated at frequent intervals with questions designed to keep awake students tempted by, or unresisting to, sleep.

If Procedure is to continue to be taught in some Law Schools outside the context of its practical application (whether simulated in a legal practice course environment or concurrently experienced in a professional office), I believe there is probably no better way for the teacher to present his material. Thus, Professor Nash's text will offer a valuable aid to his fellow teachers, and to their students.

Peter M. Roach *

* Director of the Legal Practice Course, Tasmanian College of Advanced Education.

C. G. WEERAMANTRY
The Law in Crisis:— Bridges of Understanding

Capemoss (London) 1975. $10.00.

Attempting to describe and justify the law as an institution is an arduous task, especially when writing for a lay audience. As a result, though handyman's guides to the law on particular topics are quite common, books which attempt to tell the layman about the role of law in social life, and about the problems which it faces, are rare. It is easy

to see why. The topic is so huge that it can become unmanageable. First, it is necessary to point out the scope of the law. The average layman knows of the criminal law, of the police, the courts. He knows that he can make a will and enter into contracts. But he probably does not realize that the criminal law, the law of contracts and of wills, in fact all that we tend to think of as law is only a tiny fraction of the whole. For law is the main instrument of government policy. We talk of the government's pursuing certain policies and forget that such policies are implemented by being embodied in laws. It was law that established Medibank, and it is by law that the scheme will be changed. People are even being thrown out of work by the exercise of legal powers given to the government; the power to increase unemployment in order to control inflation by cutting government spending and by limiting the money supply, is a power given by law. Second, a critique of the law as an institution is needed. There are many questions the layman may want to ask about the law. Is it just? Is it adapting to change? What protection should the law give to the individual? How can the law at the same time be the main instrument of government and be the protector of the citizen against arbitrary government? Finally, how can the citizen make the law responsive to his wishes? The author of a general book on the law must attempt to answer most of these questions. In doing so he is faced with a problem. If the book is to be serious, it must be more than a collection of anecdotes; if it is to be read, it must be less than an encyclopedia. Prof. C. G. Weeramantry has given us little more than a collection of anecdotes. He fell into this trap because he did not have a clear idea of why he was writing the book. It is a pity that the book has no unifying theme, because it contains a wealth of information and it is full of interesting ideas which are suggested, only to be put aside in favour of another short story.

Prof. Weeramantry did not intend that the book be a mere collection of anecdotes. Two ideas recur throughout the book but neither is developed sufficiently to provide a unifying theme. First, Prof. Weeramantry believes that the law faces a crisis. Second, he believes that that crisis may be avoided, at least in part, if the layman is taught about the law and its role in society.

Though he believes that the law is in crisis, Prof. Weeramantry has no clear idea of what the crisis is. In Part II of Chapter 2, *The Irreducible Minimum*, he lists a number of problems which face the law. Some of the problems which he lists involve challenges to the law itself. For example, he writes of the problems of civil disobedience by individuals and of the deliberate flouting of the law by organized bodies, such as trade unions and multi-national companies, which believe that they are powerful enough to get away with it. Other problems he deals with are not peculiarly legal problems. Rather, they are a threat to our whole civilisation. We face destruction from pollution, over-population and insufficient food, to name a few of the more general threats Prof. Weera-

mantry lists. They are not mentioned as evidence of a legal crisis. Instead Prof. Weeramantry believes that the law has a role to play in solving them. I am not sure what that role could be. If governments move to solve the pollution, food and population crises, they shall implement their policies through the law. However, in that case, the important thing to do is to get governments to change their policies; the law will follow. But that does not mean that the law has a special role to play in finding answers to these problems, nor does it justify mentioning the problems in a book about the law. And Prof. Weeramantry does not mention these general threats to civilisation in order to suggest what would be the best way to use the law in order to solve them. Nor does he argue that the law, meaning the judges and the courts, should deliberately provide a lead to the government in these areas by amending the law in order to protect the environment or to ensure a more equitable distribution of resources across the earth. These general threats to civilisation are just listed, why I do not know.

They are listed along with a number of other considerations as reasons for encouraging laymen to learn more about the law. Of course, laymen should be encouraged to learn about the law. If they do learn about it, perhaps they will be able to use existing laws to pressure institutions such as governments, and companies into meeting the threats of pollution, over-population and food shortages. And Prof. Weeramantry provides many other good reasons for learning about the law, ranging from self-interest to the need for people to realise that the law has been and is a great civilising influence. As he is aware of so many good reasons for learning about the law, Prof. Weeramantry is not sure what he should teach us. The idea that laymen need to learn about the law could have unified this book if Prof. Weeramantry had had a clear idea of what laymen need to know. But seeing so many good reasons for knowing about the law, Prof. Weeramantry is indiscriminate in what he tells us.

Because of the anecdotal nature of the book, it has short comments on the same problems scattered throughout its pages. First, Prof. Weeramantry has much to say about the relationship between law and justice, though its fragmentary nature makes his views hard to define. Second, he is worried by the urgent need to bring science and technology under the control of the law, and by doubts that it may not be possible to do so. There is much that is interesting on both topics scattered throughout the book, but often Prof. Weeramantry does little more than outline the problems.

The discussion of justice is marred by the assumption that the moral problems posed by the existence of law are well known, and do not need to be spelt out. The law has always been closely connected with justice, but the basis on which the courts work is not obviously just. Courts hear disputes between parties and force their decisions on the losing

party. When is it fair to force a person to settle a dispute in a way which involves a sacrifice of his interests? First it is fair if the case is settled by an arbitrator and both parties agree to accept his decision. In that case, the parties are bound by the agreement and may be forced to accept the decision no matter what it is. However, a judge is not an arbitrator. The parties do not appear in court by consent; one party is usually compelled to attend at the suit of the other. Hence there is no agreement to accept the court's decision; the power of the court to enforce it must be justified in some other way. Under what other circumstances is forcible intervention in a dispute justified? The most obvious case is to ensure that the parties receive what they are entitled to. I may use some force to protect what belongs to me, and I may ask others to help me. Similarly, the law is justified in intervening to ensure that people receive what they are entitled to.

Once we realise that the law is justified in using force to protect people's entitlements but may not be justified in using it in other situations, we can throw a lot of light on many of the problems that Prof. Weeramantry raises. He deals at considerable length with the uncertainty of much of the law and explains why it is difficult to make it more certain. But he does not show that the demand for certainty is in essence a demand for justice. If the law is just when it gives us what we are entitled to, clear laws are morally desirable because they enable us to work out our entitlements. The demand for certainty is a demand for justice. It is not, as Jerome Frank thought, a childish craving for an authoritative father figure. However, at the same time as one requirement of justice pushes us towards certainty, towards the rigours of the law, other principles of justice impel us towards the just decision in the particular case, towards equity. We are caught between two conflicting demands of justice. First, justice requires that the law be certain, so that we can work out what our rights and duties are. Second, it is unjust to allow rules of law to be applied rigidly so that they deny to people what they could reasonably claim to be entitled to under community ideas of fairness. The doctrine of precedent can be justified as a compromise between doing justice in the particular case and giving to each person what he is entitled to on the basis of past decisions. The fine distinctions which judges draw should not always be derided as rationalisations behind which the real reasons for the decision lurk. Many distinctions are rationalisations. However, often they are genuine attempts to show that what justice requires in the particular case is consistent with the body of authority as a whole.

Today, there is growing scepticism about the ability of the law to administer impartial justice. Many lawyers and jurists believe that ultimately court cases are decided by the preferences of the judge. When asked what the law is, we cannot tell a person what he is entitled to; we can only make tentative predictions about what the judge will do. If the sceptic is correct, if the courts are incapable of protecting entitle-

ments, but decide cases in an essentially arbitrary manner, the law is faced with a moral dilemma. Unable to give people what belongs to them, the courts must seek some other moral justification for compelling parties to accept their decisions. Prof. Weeramantry is aware of the scepticism about the courts' ability to do justice, but ignores the moral problems it raises, perhaps because academics are so used to the idea that judges legislate in hard cases that they no longer worry about the morality of imposing liability on people after the event. But the layman is likely to be shocked by the suggestion that the courts are involved in retroactive legislation in hard cases. If anything will bring the law into contempt, it is the repeated, unworried, assertion by lawyers that judges have the power to declare acts unlawful after they have been done. As Prof. Weeramantry is worried that the law is falling into disrepute, it surprises me that he passes over this issue. After all, the law has been a civilising influence for thousands of years only because men thought it was capable of doing justice. If that belief evaporates, the law will be seen as an instrument of oppression.

Prof. Weeramantry's other major concern is with the challenge to the rule of law posed by technology. So many new ways of manipulating individuals, of discovering facts about the way they live and of storing and collating information have been developed, that if a concerted effort were made to destroy the freedom of the individual, very little in his life would remain free from the control of others. At the same time, new areas of the environment are being brought under the control of man. Our dominion is being extended into space and to the sea-bed. Laws are needed to regulate activity in these fields. Prof. Weeramantry lists some of the problems involved, but as could be expected in a book of this sort, he does little more than sketch the occasional solution.

All in all, this book is a disappointment. A layman would learn many interesting facts about the law from it, but it would not give him an overall picture of the law as an institution. It is too anecdotal in form for that. Prof. Weeramantry has fallen into one of the many traps which the professional man faces when writing for the layman. Concerned not to bore the layman with science, he fails to make a sustained analysis of any one problem. In trying to be the generalist, he has talked about nothing in particular.

M. D. Stokes

COMMONWEALTH EMPLOYEES COMPENSATION TRIBUNAL

At a sitting of the Compensation Tribunal in Brisbane it was announced that costs in matters before the Tribunal in Queensland would be taxed in accordance with the scale prescribed for the District Court.

The *Compensation (Australian Government Employees) Act* 1971 requires the Commonwealth to bear its own costs in proceedings before the Tribunal. A successful applicant may recover his costs from the Commonwealth.

The Act provides that appeals from decisions of the Commissioner for Employees Compensation may be taken either to the Compensation Tribunal or to a prescribed court.

When an applicant to the Tribunal is not represented the Commonwealth similarly is not represented legally.

In accordance with the policy of the Act to give applicants equal opportunity of presenting their cases to the Tribunal or the Courts the Tribunal would hold hearings outside Hobart to meet the convenience of the parties.

The address of the Tribunal is:—

Clerk to the Compensation Tribunal
P.O. Box 260
WODEN A.C.T. 2606
Phone Canberra 822 599

BOOKS RECEIVED

Barrett, R. & Mannix, E. F.: *Principles of Income Taxation*, Butterworths, 1975, $10.50.

Bates, Frank: *Principles of Evidence*, Law Book Company, 1976. $11.50 (casebound), $7.50 (limp).

Commonwealth Law Reports, Index-Digest to volumes 1-127, 1903-1972, Law Book Company, 1976. $47.50.

Federal Law Reports, Consolidated Index to volumes 1-21, 1957-1973, Law Book Company, n.d. $45.00.

Hambly, A. D. & A. Goldring, J. L.: *Australian Lawyers and Social Change*, Law Book Company, 1976. $17.50.

Hardingham, I. J. & Baxt, R.: *Discretionary Trusts*, Butterworths, 1976. $15.00.

Heydon, J. D.: *Cases and Materials on Evidence*, Butterworths, 1975. $24.00 (casebound), $14.00 (limp).

Horsley, M. G.: *Law and Administration of Associations in Australia*, Butterworths, 1976. $12.50.

Lane, P. H.: *Digest of Australian Constitutional Cases*, Law Book Company, 1976. $21.00 (casebound), $17.00 (limp).

Mason, H. H.: *Casebook on Australian Company Law* (2nd ed.), Butterworths, 1976. $10.00.

Mason, H. H., Dixon, J. & Priddle, L. G.: *Case Companion to Ryan's Income Tax Manual*, Law Book Company, 1976. $15.50 (casebound), $10.50 (limp).

Meagher, R. P., Gummow, W. M. C. & Lehane, J. R. F.: *Equity: Doctrines and Remedies*, Butterworths, 1975. $30.00 (casebound), $25.00 (limp).

Scott, Russell: *Prices Justification in Australia*, Butterworths, 1976. Approx. $12.00.

Sweeney, C. A. & Telfer, J. H.: *Revenue Law in Australia*, Butterworths, 1976. $15.00.

Wynes, W. A.: *Legislative, Executive and Judicial Powers in Australia* (5th ed.), Law Book Company, 1976. $34.50 (casebound), $24,50 (limp).

Inclusion in this section does not preclude review in a subsequent issue.