RESOLUTION OF DISPUTES UNDER THE OFFICIAL INFORMATION ACT 1982 by K. J. Keith. Information Authority, Wellington, 1984. 12 pp. (Available free of charge). Reviewed by W. P. L. Lawes.*

Part VI of the Official Information Act 1982 (the OIA) establishes the Information Authority. Section 38 of the Act describes the functions of the Authority. As part of this function the Authority published Occasional Paper (No. 1), written by Professor K. J. Keith, Victoria University of Wellington.

The paper is titled "Resolution of Disputes under the Official Information Act 1982." As the author notes in paragraph 1.1, the method or methods for the resolution of disputes is central to the operation of the legislation and the process of obtaining information generally. The paper analyses the present processes for obtaining information and resolving disputes and considers the way in which the process might be improved.

The first point, and an important one, made in Part II of the paper, is that there is a link between the processes for resolution of disputes and the kind of issues to be resolved. The paper highlights three types of issues that may arise in the way the New Zealand (and Australian and Canadian) legislation is structured. They are, first, classification, i.e. official information simpliciter, personal information or information not winthin the scope of the Act at all. Secondly, disputes over the consequences, i.e. what will be the result of release, what damage, or injury or will be suffered. Thirdly, countervailing criteria — questions of balancing different considerations may give rise to disputes.

The paper identifies three elements to be considered when forming a process for the resolution. They are, first, the decider; second, the basis or ground upon which the decision is to be made; and thirdly, the force of the decision, e.g. recommendatory or binding. The paper then proceeds to analyse very closely the relationship between the issues and the processes. It is only against this background that the question of who plays what part and how in the process can be determined.

It may be useful to illustrate come of the points made in the paper by referring to the first case concerning the OIA to be decided in the High Court, *Thompson* v. *Laking*.[1] The case concerned a man being prosecuted for certain offences who sought to obtain the briefs of evidence of the witnesses for the prosecution from the police. His request was refused. He approached the Ombudsman who reviewed the decision of the police and recommended that the briefs be released. The police then sought review by the High Court of the Ombudsman's report. In his judgment Jeffries J. found a number of errors of law in the report and upheld the decision of the police not to release the briefs of evidence.

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1 Unreported, Wellington Registry, A.487/83, 21 February 1985.

The case raised issues of both categorisation and consequences. The police argued that the briefs were official information simpliciter while the Ombudsman (who chose not to take part in the proceedings, to preserve his independence) had decided that they were personal information. Jeffries J. held that the briefs were personal information. This was a straightforward judicial task of interpreting the statute and determining into which category the briefs fell. The central issue was one of consequence — whether release of the briefs would in terms of section 6(c) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial. Jeffries J. held that release "would be likely" to have that result and found that the Ombudsman had misinterpreted section 6(c) and that his recommendation had thus been based on an error of law. In this part of the judgment there were two elements to the judicial task. First, his Honour interpreted section 6(c). Secondly, he assessed the likely consequences of release. This is a task given to the judge by a combination of a decision as to the process of dispute resolution i.e. giving the court a role, and the structure of the decision itself i.e. classification and assessment of consequences.

The discussion in the paper, which is itself the product of a wider debate, focusses on the first of these two elements — the process of dispute resolution. The major issue is, of course, who should have the final say in case of dispute. However as is noted in para 2.1, "There is an inherent connection between the processes for decision under official information legislation and the criteria for decision", i.e. between both elements identified above. As the paper indicates, some issues, e.g. issues of interpretation, are more easily reviewed and settled by a court than are others, e.g. disputes over consequences and countervailing considerations. *Thompson* v. *Laking* illustrates some of the factors and arguments against leaving the assessment of consequences and countervailing criteria for final determination by the court. The criteria are set out in sections 6, 8 and 9. While they are clear and appear relatively specific, the assessment is not an easy or straightforward task. The different conclusions reached by Jeffries J. and the Ombudsman illustrates that.

In the area of personal information Parliament has decided to give a right, albeit qualified,[2] of access to official information held about an individual applicant. The courts have traditionally been regarded as the final umpires in disputes over rights and, unless replaced by some other appropriate "judicial" body e.g. a tribunal, must make the final decision including the weighing of considerations and countervailing criteria. This conclusion is reflected in the present legislation. As Jeffries J. notes, a refused requester of personal information can go direct to the court for redress.[3]

The inclusion of the Ombudsman in the process of dispute resolution gives an expertise and an independence which are crucial to the working, and more importantly, the validity of the process. There would be few who would argue

2 Part IV of the OIA.
3 An inference that can be drawn from s.34.

that he should now be excluded. The paper recommends that he be retained with his powers unchanged.[4]

Part III of the paper addresses the possible changes that could be made to improve the processes for resolution of disputes. The key point made in para 3.1 is: "The processes in the Act should be such as to ensure that the Crown — officials and ministers — along with the others who operate the legislation do not thwart its principles." The paper discusses the role of the minister and his power of decision and determination. One interesting proposal made in paragraph 3.2 is that the minister should not be able to invoke a statutory reason that has not been raised with the Ombudsman. This is a large restriction on the decision of the minister. If he has had little to do with the earlier parts of the process, as the paper appears to recommend,[5] he will be bound by the reasons of his department and will have to make his decision on that basis. The other recommendations that are made in para 3.2 are that the minister should act jointly or collectively with other ministers when making the decision and that the legislation should make it clear that it is to be supported by a full statement of the grounds i.e. not merely a restatement of the statute.

The final matter that is addressed is the remedy in respect of decisions about the release of official information. The conclusion is that the minister should not have the final say.[6] As is noted, at present the requester can go direct to the court to enforce the right to personal information and can seek to have the decision of the minister in the area of official information simpliciter reviewed under the Common Law. So in a way the minister does not have the final say at present. It is recommended that there should be specific provision for review of the minister's "veto" decision by the Administrative Division of the High Court on the grounds that the minister had acted outside the powers conferred by the Act or that the determination or decision was erroneous in law.

One point made in paragraph 3.13 of the paper is that possibly a third party may want the court to review a decision. The wider point, illustrated by *Thompson* v. *Laking,* is that while it will usually be the case that the requester will seek review of the minister's decision not to release the information there may be other decisions and other occasions on which another party may desire the assistance of the court. It is submitted that it would be beneficial if the legislation contained a provision allowing a person with sufficient interest in a decision to apply to the court for a declaration as to the meaning of a particular provision.

The paper is a concise analysis of the process for resolution of disputes under the OIA. It makes a number of useful points. When Parliament debates, if it ever does, possible changes to the process the Honourable Members would benefit greatly from reading this paper — at least twice.

4 See para. 2.26 of the paper.
5 Paragraph 3.2.
6 See Part IV para. 4.

SIMPLY CRIMINAL by Susan C. Hayes and Robert Hayes. The Law Book Company Limited, Sydney, 19894, xiv + 174 pp. (including table of cases, table of statutes, and index). Price A$18 (limp). Reviewed by Diane Sleek.*

In 1982, the behavioural scientist Susan Hayes and the lawyer Robert Hayes collaborated to produce a wide ranging, comprehensive, and, of necessity, somewhat less than in depth, though still excellent, study of the law and its administration as they relate to mentally retarded persons.[1] Now, these two academics collaborate again to write about mentally retarded persons and the law, but this time they produce a detailed (and comprehensive) study of one area of the law and its administration as they relate to mentally retarded persons. This time, they investigate the criminal justice system's treatment of mentally retarded persons accused of or convicted of the commission of criminal conduct.

The reader need not be either a behavioural scientist or a lawyer to understand the description and evaluation of the criminal justice system and its treatment of mentally retarded persons that are found in *Simply Criminal*. At the same time, the book contains much of use to the behavioural scientist or the lawyer who is interested in the criminal justice system's handling of mentally retarded persons and particularly in ways to reform it. The authors make good use of statistical and other studies without overdoing it. They also cite statutes and cases where appropriate, but manage to avoid turning the book into a primarily legal text. Although the book is basically about the Australian criminal justice system's treatment of mentally retarded people, cites are made to the law and practice of other jurisdictions, including New Zealand, for comparison purposes.

The book starts with two introductory chapters, the first of which concentrates on differentiating between mentally retarded people and mentally ill people and the second of which focusses on the prevalence of and characteristics of mentally retarded criminals. The next six chapters track the various stages of the criminal justice system, from the investigatory stage, which includes the arrest and interrogation of suspected offenders, to the parole stage, which involves the release of convicted offenders into the community after the serving of sentence. In each of these chapters, the authors describe what happens at the relevant stage, point up the special problems the law and practice at that stage cause for mentally retarded persons, and offer solutions to those problems. The book concludes with a chapter bringing together the solutions proposed by the authors in the preceding six chapters.

The thesis of *Simply Criminal* is that the special problems encountered by mentally retarded people who get caught up in the criminal justice system occur because both those who write the law and those who administer it have a tendency to treat mentally retarded persons either as if their intellectual functioning were "normal" or as if they were mentally ill. Thus the solutions put forward by the authors to solve those problems revolve around increasing the ability of justice

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1 Hayes and Hayes, *Mental Retardation: Law, Policy and Administration* (The Law Book Co., Sydney, 1982).

personnel to recognize mental retardation and changing both law and practice to reflect the differences between mental retardation and mental illness. So, for example, they propose that police officers be provided with comprehensive and recurring training on the subject of mental retardation[2] and that those portions of the English Judges' Rules containing special guidelines for the interrogation of mentally retarder persons be adopted in Australia.[3] Likewise, the authors propose that the law be changed so that mentally retarded persons who are unfit to plead and who are unlikely to become so are tried anyway.[4] In addition to their more specific solutions, the authors promote the integration of mentally retarded offenders into the custodial facilities of the regular criminal justice system over the creation of special institutions to deal with mentally retarded criminals, reasoning that improvement of the regular system for everybody involved in it is more likely to work to the benefit of mentally retarded persons than the creation of a separate system for them.[5]

Simply Criminal tackles an area of law that, despite its obvious importance in terms of the social policy it represents and the effects it has on one of the most disadvantaged groups in society, has been largely overlooked. Moreover, it tackles that area well. It accomplishes that most difficult task, especially for a publication aimed at a wide audience, of being complete and specific and yet easily comprehensible. Moreover, despite the book's focus on the Australian criminal justice system, it has much to offer to New Zealand readers, considering that most of the problems found in the Australian system have close counterparts in the New Zealand system and considering that most of the solutions offered by the authors would be as viable and constructive in New Zealand as across the Taman.

CASES ON TORTS by W. L. Morison, C. S. Phegan and C. Sappideen. Law Book Company Limited, Sydney, 6 ed., 1985, xxxii + 1004 pp. (including index and table of cases). Price A$49.50 (limp). Reviewed by W. R. Atkin.*

This book is long and contains many cases. For most law students, the size would be formidable. Teachers of torts would be lucky to use half the material in the usual time allocated. Yet, although the book goes into detail on very many topics, it omits defamation. The reason for this omission is not apparent on the face of the book and it is hard to imagine that Australians are less likely to use defamatory language and less likely to take defamation proceedings than New Zealanders. This reviewer would see defamation as a necessary and enjoyable part of any torts course.

The book follows a pattern of authors' commentary, verbatim extracts of cases (indicated by a black line down the margin — except for the last page, page 961), then notes. The commentary is often substantial, though not always as

2 Pages 30-31.
3 Pages 35, 38-39.
4 Pages 62-63.
5 Pages 140-141, 166-167.

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illuminating as it might be. For instance, in introducing the duty of care in negligence on page 212, no hint is given of the current dominance of the *Anns* principle. The notes ask questions about the preceding case but more often than not develop new points and cite and quote further cases. Hypothetical problems for applying the rule in the major case are not included.

Some New Zealand materials are used. Accident compensation is discussed briefly at pages 36-37 but needs to be up-dated in the light of the new Accident Compensation Act 1982. *Takaro Properties Ltd.* v. *Rowling*[1] is cited on page 131 but not for the main interest in the case, i.e. the application of *Anns* to the exercise of ministerial powers. The New Zealand Court of Appeal has been quite advanced and imaginative in the modern development of negligence and it is assumed that such cases as *Allied Finance and Investments Ltd.* v. *Haddow*,[2] *Gartside* v. *Sheffield, Young & Ellis*[3] (the reversed High Court decision is cited on page 310) and *Meates* v. *Attorney-General*[4] did not reach the authors in time to be included.

THE AUSTRALIAN SOCIAL WORKER AND THE LAW by Frank Bates, J. B. Blackwood, A. P. Davidson, K. F. Mackie. The Law Book Company Limited, Sydney, 2 ed., 1985. 280 + xiv pp. (including index and table of cases). Price A$19.50 (limp). Reviewed by W. R. Atkin.*

It is often thought that lawyers and social workers see the world differently. Professor McClean has stated that "[i]f a generalisation can be risked, the lawyer can be said to think more in terms of rights, duties and remedies; the social worker of needs and relationships".[1] Andrew Phillips concludes an article by asserting that "social workers share with the general public much distrust of lawyers. The position is made much worse by the basic clash of objectives".[2] The clash surfaces very strongly in the area of child protection, currently the subject of public revision and debate.[3] Social workers would advocate the pre-eminence of the welfare of the child as the touchstone for determining state intervention in child abuse cases. Technicalities and procedural hurdles should be minimised. Lawyers, on the other hand, would argue that because state intervention is such a serious matter affecting the rights of the child and the parents it should only occur after proper proof has been presented and all sides have had an opportunity to present their views to an independent judicial officer. Benevolent paternalism should be checked by "due process".

The apparent tension between lawyers and social workers is unfortunate. Ulti-

1 [1978] 2 N.Z.L.R. 314.
2 [1983] N.Z.L.R. 22.
3 [1983] N.Z.L.R. 37.
4 [1983] N.Z.L.R. 308.

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1 *The Legal Context of Social Work* (Butterworths, London, 1975) 2.
2 "Social Work and the Delivery of Legal Services" (1979) 42 M.L.R. 29,40.
3 Department of Social Welfare *Review of Children and Young Persons Legislation Public Discussion Paper* (Wellington, 1984).

mately both should have the same common goal — the resolution of disputes, the happiness and safety of people (though it must be admitted that any idealism on the part of the legal profession is clouded by the fact that lawyers are in business and make money from their clients' problems, whereas social workers will usually be on a fixed salary). Increasingly lawyers are realising that they ignore at their peril the skills and views of other professions. This is especially true in areas like family law but lawyers generally need a better appreciation of the social worker's perspective. By the same token, social workers need to understand the legal mind and method and have a basic grasp of the legal process.

The book under review goes some way to giving social workers a good general source of information about the law. The substantive law covered is wide — crime, the family, children, consumer protection, landlord and tenant, social welfare, legal services and minority groups, and employment. In any course designed to teach law to social workers, only a selection of these topics could hope to be adequately covered and others, such as the legislative process, may want to be added. However, much of the book is of limited value to New Zealand readers because New Zealand legislation differs so markedly from Australian statutes. Perhaps the most useful chapter for New Zealanders is the first "Law and the Social Workers: Some Preliminary Observations". The discussion of the potential liability of social workers in negligence and defamation is especially interesting, as is the important question of the extent to which a duty of confidentiality affects social workers.

STUDYING LAW by Christopher Enright. Branxton Press, Sydney, 1983, xxxiv + 415 pp. including eight appendices, bibliography and index. Reviewed by A. H. Angelo.*

Unlike most introductory texts for law students this book does not concern itself primarily with the nature of law and its operation in society (though it does have a chapter on law) but is rather a reference tool for the student researcher and is concerned principally with finding and using legal materials and with research and writing method.

The text is a useful and most readable one. It claims to be Australasian in coverage and in fact does very well on the New Zealand as well as the Australian side. It is perhaps inevitably less good in respect of the exotica[1] of New Zealand than of Australia. It is the sort of book that the established researcher or law writer could usefully have to hand on his or her desk. Heaviest use is, however, likely to be from those who are about to undertake their first piece of major law research. In the New Zealand context this would probably be the student who is about to prepare the first piece of writing in an Honours programme. There is much of a basic technical nature to assist those working on opinions and essays and also clear documentation and advice on many of the difficulties that law teachers see their students confronting on a day to day basis. Reading practices,

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1 Ross Dependency, and Tokelau Law.

notetaking, study conditions, work habits, all are dealt with in this book in immediately useful ways. In the pages on Study-Personal Factors[2] comment is made on matters such as lack of confidence, dented self-image, self-knowledge, self-discipline — a propos of which tip (3) is: "If necessary challenge yourself to find something interesting in the work". And:

> Finally, it is important to be aware of the very positive and enjoyable aspects of study. Even if your course is not interesting and your teachers are not stimulating, nevertheless learning is still an exciting and exhilarating process, so enjoy it. Take pride in your achievement and relish the friends and acquaintances you make in the process.

This book is dated October 1982. Inevitably in a text of this kind constitutional changes and updating processes are likely quickly to affect the accuracy or the completeness of the data presented. Two instances where the data presented in this book has been affected in such a way involve the Cocos Islands act of self-determination and the statute reprint programme of Norfolk Island.

This is an enjoyable and useful book. It is one that will be recommended to students in this faculty.

AN INTRODUCTION TO LAW by Derham, Maher and Waller. Fourth edition, Law Book Company Limited, Sydney, 1983, x + 210 pp. including index. Price cloth A$19.50, limp A$11.50. Reviewed by A. H. Angelo.*

This text, first published in 1966, is something of a classic among introductory texts to law in this part of the world. It is presented as a pre-course book for first-year law students and as an introduction to law for laymen. It is the result of extensive use with those beginning law studies and while by no means a simple text it is clear and self-explanatory.

It is considerably denser than its 200 pages and slim paperback format would suggest. It deals in order with "The Institutions of the Law", "The Law Itself", "The Fashioning of the Law" and, in the Appendix, with "Using the Law Library".

Though the book is Australian (and in particular Victorian) in origin it is as its title suggests an introduction to law in the Common Law world in the general sense without any specific tying to an Australian system. It is therefore a text of value in the context of New Zealand legal education and one which though not prescribed for first-year law students in this faculty (in fact there is at present no such text) is a book that would fit admirably with the first-year legal system course as it is presently taught and has been taught for some twenty years. The text shows great depth and breadth of experience and the picture presented of the law in its common garb is particularly clear. Therefore the text would also be useful for a foreign lawyer who required an introduction to

2 Pages 226-267.

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the Common Law system. For those interested in data on the Australian court systems the text is interesting because it provides up-to-date commentary on the most recent developments on the Australian scene.

This is clearly not a book in which the reader would expect to find extensive cross reference to other books and elaborate bibliographies. However, at one or two points the existing balance of references was found a little difficult to follow. For instance, at page 53 reference is made to *The Faces of Justice* by Sybille Bedford, yet in the discussion in chapter 3 on the legal profession there is no reference, footnote or otherwise to the excellent text *Lawyers.*[1] Were any book on the profession to be mentioned *Lawyers* would have seemed the obvious candidate. New Zealand earns a mention at one or two points to exemplify a matter in the Common Law system. In the road injury compensation comments, the New Zealand Criminal Injury Compensation Act 1963 is mentioned and at another point section 5(j) of the Acts Interpretation Act 1924 is referred to in passing. Given these two references, and especially the former, it seems a little odd that there is no reference in the text to the Accident Compensation Act 1982 and its 1972 forerunner.

This text is an excellent one. It is clearly presented, and written in an easy style. At one or two points only does it show its 1966 origin and the effects of textual editing. The text is most suitable for anybody who wants to take a reasonably sophisticated look at the way a legal system operates and, in the case of the Common Law, why it is the way it is. Over the years I have used earlier editions of this text and have recommended it to students. I will have no hesitation in continuing to do so in respect of this latest edition.

CASES AND MATERIALS ON THE LEGAL PROCESS by Maher, Waller and Derham. Fourth edition (eds. Pose and Smith), Law Book Company Limited, Sydney, 1984, xxxiv + 603 pp. Price cloth A$39.50, limp A$29.50. Reviewed by A. H. Angelo.*

The cases and materials provide an excellent companion volume to *An Introduction to Law.* It provides a well integrated text for familiarising "students with the institutions and sources of law" and "to develop in them the essential skills of legal analysis and research". The book, however, is unlikely to have direct use in New Zealand law schools because of its rather greater Australian orientation than *An Introduction to Law* and, certainly in respect of the law courses for first-year students at Victoria University of Wellington, because of coverage (e.g. its consideration of the development of various areas of tort). Here the emphasis in recent years has been on concentration rather than coverage.

1 Disney et al. *Lawyers* (Law Book Co., Sydney, 1977).

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OUR LEGAL SYSTEM by D. J. Gifford and Kenneth H. Gifford. Second edition, Law Book Co. Ltd., Sydney, 1983, xvii + 293 pp. including index. Reviewed by A. H. Angelo.*

The first 122 pages of this book are devoted to general material relating to the legal system. In this case it is presented under two main headings — "The Making of Law in Australia", and "The Court System".

The particular contribution of this text is in its consideration of how the law applies "in those particular circumstances encountered by the ordinary members of the community". It deals with that under the subject headings "The Motorcar and the Law", "Consumer Protection", "Environment Law", "Family Law", "The Law Relating to Children" and concludes with a part on "The Limitations of our Legal System". Under each of those headings the evolution of the relevant law, the facts upon which its operation is based and the features that control its present development are discussed. The discussion is in a direct and generally assertive style and one that makes the material readily accessible to the lay reader. In the general overview given of the topics there is much data of historical and current interest.

The text is likely to be most useful for persons concerned with the impact of law in society generally. Lawyers or students in law faculties are most likely to want books that deal with topics at greater length. Members of the public and students in courses which have a law subject component will, however, find the book of value.

Concern is directed primarily to the Australian legal system but the discussion on the specific topics has a general relevance which does not preclude New Zealand use. It is, however, likely that the New Zealand reader may be heard to emit groans of anguish when reading the page or two of comment on the Woodhouse proposal for Australia — whether that would result from Kiwi bias or insight would have to be determined by some non-antipodean reader.

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