Book reviews

INDUSTRIAL DESIGN LAW IN AUSTRALIA AND NEW ZEALAND by K. K. Puri, Butterworths Pty Limited, Sydney 1986, xxv and 230 pp. (including index). Reviewed by C. F. Finlayson.*

In a paper given at a seminar on intellectual property law in Australia and New Zealand in 1985, the R. Hon. Mr kJustice Somers, a member of the New Zealand Court of Appeal, was required to give an overview of recent developments in New Zealand intellectual property law. He began his examination with the law of industrial design, making these comments:[1]

> Industrial design provides a good beginning; the subject is important, existing New Zealand law probably gives a wider scope to industrial copyright than that of any other country, and the present law is about to be changed by legislation.

The aim of this book is to discuss the divergent approaches to the protection of industrial designs in both Australia and New Zealand. In recent years there has been much discussion on the convergence of Australian and New Zealand law in many areas — see for example the New Zealand Trade Practices legislation which is modelled on the Trade Practices Act 1974 (Australia), and the development of the High Court Rules in New Zealand which have similarities to the developments in Australian jurisdictions some years earlier.

The present law in New Zealand is governed by the Designs Act 1953, which is modelled on the Registered Designs Act 1949 (U.K.), and follows a patent approach with respect to the protection of designs. In New Zealand it is also possible to have protection under the Copyright Act 1962. This cumulative system of protection can be distinguished from the Australian system which excludes copyright for design.

The comparison between Australian and New Zealand law is not extensive, nor is it designed to be. The scope of the book is to discuss Australian law, and highlight the salient features of designs legislation in New Zealand where New Zealand law differs from its Australian counterpart.

The author of this book, Dr. K. K. Puri of the Law Faculty of Victoria University of Wellington is well known for his work in this important field of intellectual and industrial kproperty. He is respected by his students and colleagues as a very fine university lecturer who has the ability to present his subject in an interesting and simple

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1 *Intellectual Property Law in Australia and New Zealand* (Legal Research Foundation Inc., Auckland, 1985) 211.

manner, without in any way being superficial or glossing over difficult points of law. Dr. Puri's skill as a writer and a teacher is clearly exemplified by this work. Two comments in that regard may be made at once.

The first is on clarity. This text is a very clear presentation of a complex subject. In his preface, Dr. Puri says:

> The technical nature of the law of designs has made it difficult to write this book in plain English, but I have tried to present these complex matters in clear non-legal and non-technical language. At the same time, I have done my best to write a book that is accurate.

The clarity of presentation is commendable. The author leads the reader into the subject with an interesting and useful chapter on the role of design in modern society, then gives an overview of relevant legislation in both countries. Particular reference is made to recent changes in Australia brought about by the Designs Amendment Act 1981 which gives effect to the major recommendations of the committee chaired by Mr Justice Franki. In addition, there are useful chapters on the introduction to international protection of designs, and the relationship between copyright and design.

The second point that may be made about this book is its practicality. It is accepted that the subject-matter of the text is complex. Yet the text is not an unreadable and remote treatise but is rather designed for students and practitioners. The practitioner for example will find certain features of this text of great use in his or her every day practice. References are given to contact addresses and telephone numbers for designs offices in the State capitals of Australia, and information on the place for applications to be registered with the Commissioner of Designs in New Zealand. Chapter 5 provides an extensive discussion of the powers of registrars. There is a summary of the relevant cases in both jurisdictions, and as with other books in this series[2] the first half of the book contains commentary, with the latter part contining the relevant legislation and regulations. There is an excellent index for te commentary, and also one for the Acts and regulations.

The author praises the new Australian designs legislation which he says is not difficult to understand, has been carefully put together, is well adapted for its intended pruposes, and is tailored to fit the special requirements of industrial design. He says that the new law will bring about increased productivity and economic cultural benefits to the Australian people. It will be interesting to see whether any future reform of designs law in New Zealand results in the adoption of a system similar to the existing Australian rgime. It is anomalous that the two legal systems should have such a differing philosophy on designs legislation, with one country opting for complete duality of protection under both copyright and designs law, while the other country expressly excludes industrial designs from copyright protection. It would seem that any reform in New Zealand should consider very seriously the adoption of the Australian regime

2 E.g. Bannon *Australian Patent Law* (Butterworths, Sydney 1984); Bannon *Passing Off, Trade Deception, Trade Marks* (Butterworths, Sydney, 1985).

given the increasing contacts between these two countries and the inappropriateness of having two differing systems on both sides of the Tasman.

The author does not attempt to offer any suggestions for comprehensive law reform in New Zealand, and this is disappointing given his expertise in this area.

Dr. Puri has written a very readable and comprehensive text which traces the development of designs protection law in Australia and New Zealand, and provides a very accurate and clear overview of the current state of the law in both countries.

LABOUR LAW AND INDUSTRIAL RELATIONS IN GREAT BRITAIN by B. A. Hepple and S. Fredman. Kluwer, Deventer, 1986, 300 pp.; "Great Britain" in *International Encyclopaedia for Labour Law and Industrial Relations,* R. Blanpain (ed.), Kluwer, Deventer, Suppl. 63 (March 1986), 295 pp. Reviewed by Martin Vranken.*

In the 1970's Professor R. Blanpain (Catholic University of Leuven, Belgium) wanted to respond to an ever-increasing need for comprehensive, up-to-date and readily available information on labour law and industrial relations in other countries. Currently, he is editor-in-chief of the *International Encyclopaedia for Labour Law and Industrial Relations.* Well over 40 national monographs have been published already and are available for consultation in the libraries of most leading universities throughout the world.[1]

Blanpain's *Encyclopaedia* has now grown into a voluminous *chef d'oeuvre* of 13 volumes, each ideally comprising three monographs. The emphasis in the *Encyclopaedia* is not merely on the law governing labour relations but, to the greatest extent possible, basic factual information about each country and information about the practical functioning of labour relations are also provided. This is crucial, especially with respect to a system such as the British which is known for its traditional (relative) absence of labour legislation in the areas of collective bargaining and institutionalised workers' participation. Briefly, the *Encyclopaedia,* apart from constituting a most valuable aid in comparative research, can be said to provide useful information to the international business community and the international trade union movement alike; its relevance reaches beyond merely satisfying academic curiosity.[2]

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1 The limited purchasing power of the average interested individual has been met by the publisher in that the most widely used monographs are now also for sale separately. Hence the moderately cheap paperback edition (UK£17.95 excluding delivery charges and VAT) of *Labour Law and Industrial Relations in Great Britain.*

2 The contents of the *Encyclopaedia* includes 7 international monographs on, among other things, Guidelines for Multinational Enterprises (by Blanpain et al), the International Trade Union Movement (by Windmuller, Professor at Cornell University), International Employers' Organisations (by Oechslin and Retournard of the International Organisation of Employers, respectively the National Council of French Employers), and International Labour Law (by Valticos, Assistant Director-General of the I.L.O. and Professor at the University of Geneva). More recently, 2 further volumes on International Labour Law have

The monograph on Great Britain is limited in geographic scope to England, Wales and Scotland; Northern Ireland and the Republic of Ireland are the subject of separate monographs. Moreover, only the rules of the English Common Law are described and, in general, not any special features of Scottish law.[3] The book itself has three major parts: I Introduction (58 pp.), II The Individual Employment Relationship (116 pp.) and, III Collective Labour Law (66 pp.).

The introductory part outlines some of the general features of Britain, then gives an overview of basic definitions and notions, some historical background notes, and most importantly, a chapter on the role of the government. The sources of labour law are identified and a brief note on conflicts of law is included. Part II, on the individual employment relationship, could logically have been expected to succeed Part III on collective labour law. The latter constitutes the so-called *macro* level of labour law and industrial relations and largely predetermines the scope as well as the content of the individual employment contract. This organisational feature may be the result of the *Encyclopaedia's* standard format rather than Hepple's deliberate choice, since the other national monographs are ordered along the same lines. The internal order of discussion in Part II itself makes perfect sense. Successively, issues of contract formation, contents, suspension and termination of the individual employment relationship are covered. The chapter on "Rights and Duties of the Parties," especially, reveals remarkable similarities to the New Zealand situation. Noteworthy also is a discussion of the concept of job security and its limitations due to the requirement of employment continuity. This requirement imposes a minimum qualifying period of service as a prerequisite for coverage by the employment protection legislation. The period of 6 months of seniority, applicable initially, was increased to one year in 1979 and doubled again in 1985. Hepple rightly concludes that the present British legislation regarding job protection is "less extensive than that found elsewhere in Europe, and law and practice is in some respects below the standards in the I.L.O. Termination of Employment Convention 1982 (which the U.K. government has not ratified)".[4] The

been added under the headings "Codex" and "Case law". The national monographs (volumes 2 to 10) are each some 200 printed pages or more and aim at covering every aspect of labour law and industrial relations in the private sector with the explicit exclusion of social security (welfare law). As the names cited above may already have indicated, the team of contributors is of an impressively high standard. Since the publication of the *Encyclopaedia* is in a loose-leaf format, the need for regular updating in this area of the law is, theoretically at least, adequately provided for. The latest initiative has been to further supplement the national monographs by also making available, in a separate volume ("Legislation"), the most important labour legislation in each country. As of the beginning of 1987, selected labour statutes and regulations in Poland and New Zealand have been published. From this it can fairly be inferred that the *Encyclopaedia* is still "alive and well". Now it is to be hoped that Kluwer will be able to keep up with the thus (yet again) increased pressure of timely publications.

3 The main author, B. A. Hepple, is currently Professor of English Law at the University of London (University College). He is also the founding editor of the Industrial Law Journal as well as chief editor of the *International Encyclopaedia of Comparative Law,* volume XV of which is devoted to Labour Law.

4 *"Great Britain"*, p. 142.

Part on collective labour law is devoted to such items as the (positive and, very important in Europe, negative) freedom of association, organisational structure of trade unions and employers' organisations, and internal union rules. While some 30 pages were taken to discuss job security (in Part III) and to give a description of the collective bargaining process alike, no less than 20 pages on collective bargaining deal with the law of industrial warfare. This strengthens a conflict-based perception of the British industrial relations system which is not unlike the New Zealand system in this respect.

Kluwer announces the book as being "essential introductory reading for students of labour law and industrial relations" and as providing "a useful guide to trade unionists, personnel managers and the general reader who wish to understand the framework of legal intervention in industrial relations". This does not imply that members of the New Zealand legal community should lightly dismiss it. Though the immediate practical usefulness of comparative study in the area of labour law and industrial relations may be questioned, the significance of studying the British system in particular is twofold. First, and most importantly, the study of labour law and industrial relations in Britain may enhance understanding of the New Zealand system itself, both in an historical and contemporary perspective. As Hepple points out, the British experience provides a key to the full understanding of the origins of the systems in other parts of the English-speaking world. This argument has special validity with respect to New Zealand. After all, Britain is where it all began. But the reason for studying the British system is not purely historical. For as long as the autonomy of industrial law from other areas of law is not fully recognised in New Zealand, the pervasive influence of the Common Law (including the English contribution to this) will remain. This is particularly crucial in the area of individual employment law. A recent example is the quotation from Lord Denning by Cooke J. in the New Zealand Court of Appeal to the effect that "it is the duty of the employer to be good and considerate to his servants".[5] Cooke J. made this statement with respect to constructive dismissal, an idea which goes back to the early 1970's but the detailed principles of which have been judicially expounded, both in New Zealand and in the U.K., only in the last few years.[6] The continuing relevance of the Common Law applies also, though to a lesser extent, to the regulation of collective labour relations. The 1986 Labour Relations Bill, for instance, by explicitly giving exclusive jurisdiction to the Labour Court regarding civil action in tort as related to industrial action, confirms the contemporary importance of the Common Law for the New Zealand scene of (collective) industrial relations. In short, because a major source of the Common Law is still English law, and because the Common Law is still the object of constant change, it remains crucial to be familiar with its ever evolving principles.

Secondly, comparative study in general and the study of the British system in particular may also offer guidance when contemplating development of the law in New Zealand. Once again, Britain is where it all began. Even though New Zealand's

5 *Auckland Shop Employees Union* v. *Woolworths (NZ) Ltd* [1985] 2 NZLR 327.
6 A. Szakats "Constructive Dismissal: Employer's Duty to be Good and Considerate" (1985) Ind. Law Bull. 78.

industrial legislation, arguably from the very outset,[7] may prove often to have constituted a reaction against particular deficiencies of British industrial regulation, it never took place in a complete vacuum nor did such reaction ever imply a complete rejection of the British system. An explicit example of where English law still assists in the development of New Zealand law may be the notion of unjustifiable dismissal in the Industrial Relations Act 1973. As the term "unjustifiable" is not statutorily defined, the Arbitration Court had, with the assistance of counsel to develop its own guidelines for this new concept. In *Boswell* v. *Wellington Regional Hydatids Control Authority*[8] the court did so by referring to the definition of unfair dismissal in *Turner* v. *Wadham Stringer Commercials (Portsmouth),*[9] a decision of the (former) National Industrial Relations Court in the United Kingdom which had been cited in argument by counsel for the respondent.

The knowledge of other legal systems can only enrich the law reform debate in New Zealand, and Great Britain has still a role to play in this, regardless of whether the debate takes place by way of arguing or deciding cases in court or by means of submissions to Parliamentary Select Committees.

CRIME AND THE COURTS IN ENGLAND 1600-1800 by J. M. Beattie. Princeton University Press, Princeton, N.J., 1986 xvii + 663 pages, including Appendix, Index and Bibliography. Reviewed by R. P. Boast.*

An important turning-point in historical studies was the publication in 1975 of *Albion's Fatal Tree,*[1] a collection of essays on crime and society in eighteenth-century England written from a generally Marxist standpoint by a group of English, Canadian and American scholars. Previously crime and the criminal justice system had been largely ignored by social and political historians and the field had been left to academic lawyers like Sir Leon Radzinowicz. Today the history of crime and the criminal courts is a well-established field, and the literature has burgeoned remarkably to include a number of specialised studies, several collections of essays and a profusion of articles. Much of this literature has borrowed heavily from Douglas Hay's important essay in *Albion's Fatal Tree* entitled 'Property, Authority and the Criminal Law' which put forward a novel and stimulating explanation of the nature and purposes of criminal justice in the eighteenth century.

Now, with the publication of J. M. Beattie's *Crime and the Courts in England 1660-1800* we have for the first time a full-scale monograph on the subject of the

7 Cf. Industrial Conciliation and Arbitration Act 1894.
8 (1977) Ind. Ct. 141.
9 (1974) I. C. R. 277.
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1 Douglas Hay *et al., Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975).

eighteenth-century criminal justice system. The author, professor of history at the University of Toronto, has earlier published a number of useful articles on aspects of his theme, but his book contains much new material and, building on the work of J. H. Langbein and others, usefully compresses nearly all that is known about the criminal justice system of the eighteenth century within one volume. Unquestionably Professor Beattie's book is a fundamental treatment which is now required reading for anyone seriously interested in the history of crime and criminal justice or in eighteenth-century social history. The book's particular strength is the detailed quantitative evidence which the author provides to support his conclusions, based in turn on a thorough study of the quarter session rolls for Surrey and Susex and on the home circuit assize records. Beattie deals in detail with patterns of prosecution during the period, with changes in criminal procedure and in the patterns and techniques of punishment. Of particular interest to those interested in methodological problems is his extended discussion of the extent to which it is legitimate to deduce changes in the crime rate from court records. Beattie believes that increases in prosecutions during the eighteenth century do reflect real fluctuations in crime rates, which tended to soar when Britain was at peace and decline during wartime.

The author links this wealth of detail to a truly stimulating and novel argument, which is that the catalyst for changes to 18th-century trial procedure and especially to methods of punishment was the extension of transportation after the enactment of the Transportation Act of 1717 (4 Geo. I. c.II). This key statute was brought in by a nervous Whig administration which was uncertain of its own position, apprehensive about Jacobite uprisings, and morbidly anxious about crime and disorder. The author traces in detail how this secondary punishment of transportation for non-capital offenders and for pardoned capital offenders — always a sizeable percentage — became a crucial ingredient of the system. Indeed, eighteenth century criminal justice could not have continued in its old form for so long without the option of transportation to North America being available to judges and magistrates. All the more acute, then, was the crisis of the 1770's and 1780's, when the option of transportation across the Atlantic became suddenly unavailable with the outbreak of the American Revolution —although Beattie is careful to point out that resistance to receiving convicts had been building for a long time in the American Colonies, and that for a number of reasons transportation was becoming widely perceived as unsuitable well before the outbreak of the American war. The desperate problems of overcrowding in cramped and noisome county jails and houses of correction led to the adoption of the short-term solution of confining convicts to even more noisome hulks moored in the River Thames under the doubtful supervision of private contractors. Problems worsened with the end of American war with the usual upturn in the crime rate typical of the end of a major war. The high mortality rate on the hulks and public apprehension about large numbers of criminals being confined so close to London led in turn, with remarkable rapidity, to new solutions. One was transportation to the far side of the planet, to newly-discovered

Botany Bay.[2] The other, and ultimately more significant, development was the use of imprisonment as a punishment in itself, a judicial practice born of necessity leading to the enactment of the Penitentiary Act of 1779 (19 Geo III, c.74) and ultimately to the birth of the modern prison. Imprisonment grew out of the special needs of the English criminal justice system, and its relation to the supposed "discipline" necessary for the Industrial Revolution and exemplified in schools, workhouses and factories was only accidental. Beattie also argues that support for a conception of criminal punishment involving moral reformation is found at the beginning of the eighteenth century. In searching for the origins of the prison, therefore, explanations are needed "that do not depend on the immediate influence of enlightenment rationality or the social consequences of the Industrial Revolution".[3] Rather, the prison was both the product of deep-seated continuities and a response to a particular crisis.

The inevitable question which arises with the publication of Beattie's new book is the extent to which it confirms the explanation of the purposes of the English criminal justice system put forward by Douglas Hay in *Albion's Fatal Tree*. Hay has argued that the upholders of the eighteenth century criminal justice system were concerned only marginally or at best secondarily with controlling crime. The principal function of the system rather was to preserve and enhance order and deference in the interests of the ruling class. This was achieved in part with the constant opportunities the system gave to propertied men to exercise discretions at every level of the criminal process — whether to prosecute (all prosecutions being privately brought in an age when nothing resembling a modern police force existed), convict or recommend the pardon of offenders after conviction. Gentlemen made up the grand juries and petty juries at the Assizes; they made up the quarter sessions grand and petty juries, and additionally in their capacity as Justices of the Peace formed the bench of magistrates at quarter sessions and exercised in their individual capacity summary jurisdiction under a host of statutes. As a character witness, the word of a gentleman could mean the difference between a hanging and an acquittal. Hay links these discretions both with a description of the law's importance as a legitimising force in the eighteenth century and with a Foucault-style emphasis on the ritual and theatre of the criminal courts to present a compelling picture of a criminal justice system which operated to preserve government and authority in a decentralised age.

Aspects of Hay's picture are accepted by Professor Beattie. He agrees that the ritual and theatre of criminal trial and punishment was very important: clearly, such things as the pillory were quite consciously theatrical. He does suggest, almost as an aside, that

2 See generally J. H. Langbein "The Criminal Trial before the Lawyers" (1978) 45 U. Chicago L.R. 263; "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources" (1983) 50 U. Chicago L.R. 1.

3 Beattie's explanation of transportation to Australia as the response to a specific penal crisis is paralleled by the work of Antipodean scholars who are increasingly sceptical about the supposed "strategic" reasons for Pitt's government's decision to found a penal colony at Botany Bay: see e.g. David Mackay, *A Place of Exile: The European Settlement of New South Wales* (1985).

the solemnity and majesty of the criminal courts can be somewhat exaggerated by modern commentators: trials were rapid, legal representation was unusual, courtrooms were typically crowded and noisy rather than dignified and awe-inspiring. Nor does Professor Beattie quarrel with the emphasis put by historians such as Hay and E. P. Thompson on the use of the law as a legitimising ideology. Other aspects of Hay's argument, however, are indirectly called in question.

Hay's explanation was founded on what he saw as a paradox: if the harsh eighteenth-century criminal law was so inadequate as a means of repressing crime, which seemed (as all contemporaries agreed) to proliferate despite the ever-increasing number of offences punishable by death, why was the system persisted with for so long? "If property was so important", writes Hay, "and reform of the criminal law would help to protect it, why did gentlemen not embrace reform?"[4] They did not, Hay answers, because crime control was irrelevant: the system had quite different purposes. Beattie argues, however, that Hay's paradox does not exist: there is no "problem" which needs to be explained. What protests were made against dismantling the old system were "essentially perfunctory and the struggle short-lived . . . . It is striking how rapid and decisive the rejection of the old system was once the issue was fully engaged".[5] Parliamentary opposition to changes to the old criminal law was not centred in the House of Commons, the great bastion of the gentry, but in the House of Lords where it was led not by landowners but by the Lord Chief Justice and the Lord Chancellor who wished to preserve the wide judicial discretions afforded by the old system. Their views, as leaders of the legal profession, carried considerable weight. It was not until the unprecedented increase in crime and social unrest at the end of the Napoleonic wars that this source of opposition was finally overcome.

An import aspect of Hay's argument was his emphasis on the class composition of juries. Jurors, like prosecutors, Hay claims, were propertied men: for the poor cottager facing a charge of theft the notion of trial by one's peers was a cruel farce. Beattie, however, presents a much more complicated picture about which it is difficult to generalise. Certainly the grand jury at the Assizes was dominated by the gentlemen of the county, but the petty juries at the Assizes tended to be drawn from social groups rather lower down the social scale — still men of property, but often from well outside the ranks of what would normally be regarded as constituting the "ruling class". Assize petty jurors, Beattie finds, were solid "middling men" — glaziers, coopers, tanners, shopkeepers, blacksmiths — and were townsmen for the most part, being drawn from a suitable panel in the Assize town. At quarter sessions (where, of course, gentlemen made up the bench) jurors could often come from places quite low down the social scale. Indeed the unsuitability of quarter sessions jurors was a frequent source of complaint. Nor is it the case that prosecutors were necessarily drawn from the ruling class. "The trials at quarter sessions and assizes did not range the rich on one side and the poor on the other".[5] Often relatively poor men would go to extraordinary lengths to track down

4 Page 432.

5 Douglas Hay, "Property, Authority and the Criminal Law" in Douglas Hay *et al.*, *Albion's Fatal Tree: Crime an Society in Eighteenth-Century England* (1975), 24.

those who had robbed or stolen from them and bring prosecutions. The courts were not inaccessible to the poor and the law rested on a broad consensus.[6]

> It is important that we do not overemphasize the remoteness of magistrates or the courts to the ordinary man in the eighteenth century or assume and exaggerate his inarticulateness. Englishmen at all levels shared a powerful awareness of the rights and liberties they had inherited from the struggles of the seventeenth century and that were guaranteed by the constitution and the common law in the eighteenth. The rights of free-born Englishmen were frequently invoked, particularly freedom from arbitrary arrest and the right to be tried by a jury. It seems implausible that such rights would have been so widely celebrated had ordinary men thought of the courts as fundamentally closed to their interests an as oppressive institutions. It seems on the contrary that the English courts were accessible to the ordinary man (though of course the costs of prosecution, even after the legislation allowing the courts to repay most of them, must obviously have discouraged many from bringing a case) and that the criminal law relating to the mainstream property offences of burglary, robbery, and larceny rested on values widely shared throughout the society.

Quite separate from the composition of juries and the place of poor men in the courts is the question of the actual exercise of the discretions. Beattie follows Hay in emphasising the extraordinary range of discretions the system afforded, but the evidence he provides indicates that the factors governing the day-to-day operation of discretions were settled and well-recognised by all participants in the process, and thus not related in any direct way to the maintenance of class control. Key factors included the offender's age, his previous convictions and the reliability and trustworthiness of character witnesses. Today, the role of the character witness in sentencing has been replaced by the Probation Service, which, however, has a very similar function. Otherwise the way in which an eighteenth-century court went about its sentencing function differs very little from contemporary practice: mitigating factors, then and now, were obvious and common-sense. It cannot be disputed that the contemporary legal system does reinforce and impose majoritarian values but the ways in which this is achieved are various and complex. The same appears to be true of the eighteenth century.

Nevertheless, it would be rash to conclude that the last word in this particular historiographical debate has been said. Much still remains to be learnt about the eighteenth-century criminal justice system. Few counties have been investigated with the depth and care that Beattie has devoted to Surrey and Sussex. The author himself, in the last chapter of his book, suggests a tantalising new theme which needs to be followed up — the difficulty of generalising in the same way about the counties and about London. Beattie's work is based on Assize records, mainly indictments, and in a sense is history from "above". Popular attitudes are not the author's theme, and for a fully rounded picture of crime and the courts in the eighteenth century *Albion's Fatal Tree* and the later work of Hay, E. P. Thompson, Peter Linebaugh and others are still essential reading. As far as the eighteenth-century criminal justice system is concerned, historians of crime and the criminal law writing from "above" and social historians writing from below have yet to find a common discourse. Be that as it may, all of those with an interest in the field are immeasurably in Professor Beattie's debt.

6 Beattie, *op.cit.*, page 632.

ETHICAL AND LEGAL ISSUES IN GUARDIANSHIP OPTIONS FOR INTELLECTUALLY DISADVANTED PEOPLE by T. Carney and P. Singer. Human Rights Commission Monograph Series No. 2. Australia Government Publishing Service, Canberra, 1986, 124 + vii pp. Price A$14.95. Reviewed by W. R. Atkin.*

Interest in the development of the law affecting people with intellectual handicap has increased recently. Often a group which has been neglected and discriminated against, these people are now being seen as entitled to full human dignity, possessing in the words of the 1971 United Nations' Declaration on the Rights of Mentally Retarted Persons, "to the maximum degree of feasibility, the same rights as other human beings".

In 1986 in New Zealand, two Bills were introduced to Parliament which affect these people. One amends the Education Act 1964 and is designed to ensure to the greatest extent possible equal schooling opportunities. The other is the Protection of Personal and Property Rights Bill, which is a major measure replacing the Aged and Infirm Persons Protection Act 1912 and Part VII of the Mental Health Act 1969. This Bill covers other people as well as those with intellectual handicap and strong promoters of the legislation have been community organisations which support such people. The Bill places the management of property on a new basis, introducing the principles of "the least restrictive intervention" and of enabling and encouraging people subject to management to use what abilities they do have or may develop. Cutting out brand new territory for New Zealand statute law are provisions dealing with an individual's personal care and welfare and giving the courts power to appoint an adult guardian, if such a substitute decision-maker is deemed essential. Another area of law reform which is being advanced in a number of quarters is the modification of anti-discrimination laws by including "intellectual (and physical) disability" as protected categories. According to Mr P. Neilson M.P. on the introduction of the Protection of Personal and Property Rights Bill, "[p]erhaps only the human rights legislation needs to be extended to cover people with disabilities, and, then the troika of concerns . . . will have been met".[1] To this could be added the anti-discrimination article in the draft Bill of Rights, should such a Bill proceed.[2]

Given the background of law reform in New Zealand, it is most timely that Carney and Singer, experts from the Faculty of Law, Centre for Human Bioethics, Monash University, should produce a valuable monograph on the subject, under the auspices of the Australian Human Rights Commission. The monograph is an excellent source of information and ideas for anyone monitoring the current reforms. It sets out clearly and

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1 N.Z. Parliamentary debates, 1986, Part 29 p. 5977.

2 Article 12.

concisely the present and proposed laws in all the Australian jurisdictions and it evaluates these against the standards of the United Nations' Declaration, mentioned above.

Perhaps more significantly, the writers set out the major theoretical models for law reform — the legalistic or substituted judgment model, the welfare model and the parent-child or developmental model — and assesses their advantages and disadvantages. The fundamental issue is put very well as follows:[3]

> There are two broad competing goals in caring for and assisting intellectually disadvantaged people. On the one hand, society would like to maximise their freedom as individuals. On the other hand, society feels that it must adequately protect their welfare.

By the end of the study, under the heading "Choosing the Best Model", it is stated that "[t]he interrelatedness of freedom and welfare suggests that it would be wrong to select a model of guardianship based too exclusively on one of these values"[4] but in the end, it is concluded that the legalistic model, with a strict standard for judicial intervention and attention to procedural safeguards, is more likely than the other models to protect basic civil rights.[5] This theoretical analysis can but be enormously useful in assisting the appropriate formulation of new laws and policy.

The monograph is highly recommended as a valuable exploration of the subject, well worth careful study.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE 1980s: PROBLEMS AND PROSPECTS edited by Michael Taggart, Oxford University Press, Auckland (in association with the Legal Research Foundation Inc.) 1986 xx + 208 pp. (including Table of Legislation, Table of Cases and Index). New Zealand price $50 (student price $30) (hard cover). Reviewed by D.C. Hodgson*

This work comprises a compilation of the proceedings of a conference of the same title held at the University of Auckland in February 1986. In addition to the eight papers presented at the conference, the attractively bound volume includes a foreword by Lord Wilberforce, an introduction by Professor John Smillie of the University of Otago Faculty of Law, and an article written after the conference by Michael Taggart of the University of Auckland Faculty of Law.

There are two main themes which thread together most of the papers. The first is whether the trend towards increasing judicial control of the Executive has "shot its bolt" such that the time is now ripe for movement in the direction of restraint. The papers contain a lively contrast of approach to the proper scope of judicial review

3 Page 3.
4 Page 115.
5 Page 117.

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ranging from sanguine assessments of the efficacy of judicial controls over administrative action to a cautious judicial deferral to the administration in policy matters. The second theme throws up for consideration whether there should now be more to Commonwealth administrative law than judicial review in the search for administrative justice. It is desirable, for example, that the reactive approach to judicial review whereby unlawful administrative action is quashed, be complemented (indeed overshadowed) by a preventive or pro-active approach designed to secure good administration in the first place?

Sir Robin Cooke, President of the New Zealand Court of Appeal, favours "more direct and more candid formulations of principle" and accordingly suggests that the decision-maker should be required to act "in accordance with law, fairly and reasonably."[1] This is rendered necessary by the variable and difficult subject-matter of administrative law and the spent utility of "arcane concepts, in the nature of catchwords or half truths".[2] Sir Robin affirms that the requirement of fairness should not be confined to purely procedural matters.[3] In advocating the judicial development of broad flexible principles of judicial review, Sir Robin is making the case for extending the judicial review function beyond the traditional preoccupation with "legality".[4] As Professor Smillie observes, "The relatively new and open-ended character of the fairness concept makes it a very potent vehicle for judicial assessment of the procedural *and substantive* justice of . . . governmental . . . decision-making processes."[5]

The views contained in the paper presented by Sir Gerard Brennan, Justice of the High Court of Australia, provide an interesting counterpoise to those of Sir Robin Cooke. Judges must be cautious in adjusting the boundary between judicial review and executive freedom since "there are limits to judicial activism".[6] Were judicial activism to outstrip community consensus, public confidence in the legal system would be undermined.[7] Catchwords such as "illegality", "irrationality" and "procedural impropriety" are too broad for practical use in hard cases;[8] rather, the judical method must be restrained by respect for precedent and continuity of doctrine in the field of judicial review. Moreover, the courts have neither the capacity nor the procedures to adequately review the wider policy issues and community interests.[9] Mr Mario Bouchard, former Co-ordinator of the Canadian Law Reform Commission's Administrative Law Project, also subscribes to deference to specialist administrators by generalist judges in the area of "polycentric" policy issues.

1 Page 5.
2 Idem.
3 In *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130, 149, His Honour remarked obiter that "Fairness need not be treated as confined to procedural matters."
4 Cf. the judgment of Lord Brightman in *Chief Constable of the North Wales Police* v. *Evans* [1982] 3 All E.R. 141.
5 Page xiii. Emphasis added.
6 Page 21.
7 Page 22.
8 Page 34. See the judgment of Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.
9 Page 20.

In the spirit of more robust legal controls on administrative action, Mr Justice Michael Kirby, President of the New South Wales Court of Appeal, argues in his paper for the judicial imposition on decision-makers of a general duty to provide reasons for their decisions.[10] Dr G.D.S. Taylor, Legal Counsel to the New Zealand Ombudsmen, would improve upon the present system of judicial review through legislative initiatives designed to produce an "integrated system of administrative law". Such initiatives would include a statutory renovation of judicial review grounds and multi-level appellate review. Professor D.G.T. Williams, Rouse Ball Professor of Law in the University of Cambridge, addresses the perennial problem of the justiciability of administrative decisions, while the second of Michael Taggart's two papers addresses that of the practical consequences to litigants and third parties of a curial finding that an administrative act is invalid. To round out this scholarly and erudite collection, Dr G.P. Barton's paper considers the scope of a citizen's right to compensation for loss sustained as a result of invalid government action.

This book is a worthy contribution to the New Zealand — indeed, the Commonwealth — administrative law literature. It will be especially helpful to judges and academic, government and practising public lawyers in its monitoring of trends over the last decade or so, and in its friendly and thoughtful debate over the working out of the balance between the judicial protection of individual rights and the pursuit of collective public interests. Perhaps most importantly, it adds useful dialogue to the evolving administrative law dialectic.

10 See the decision of the New South Wales Court of Appeal in *Osmond* v. *Public Service Board of New South Wales* [1984] 3 N.S.W.L.R. 447 where the majority of the Court (including the learned President) held that the Board was obliged in Common Law to give reasons for decision. The High Court of Australia unanimously overturned this decision in *Public Service Board of New South Wales* v. *Osmond* (1986) 63 A.L.R. 559, which Michael Taggart critically analyses and laments in a postcript to the volume under review.