BOOK REVIEWS

AUCKLAND LAW SCHOOL CENTENARY LECTURES, Legal Research Foundation Inc, Auckland, 1983. 103 pp. New Zealand price $17.50.

In 1883, Judge H.G. Seth-Smith was appointed Auckland University's first lecturer in law. In the early days most teachers and students were part-time; the first full-time lecturer was not appointed until 1911, and the first professor (R.M.Algie) not until 1920. It was only in the mid-1960s that the change from part-time to full-time was substantially complete. The Law School now has more than 100 staff and 900 students.

Course content has changed too. By 1926 most of today's core subjects were compulsory, but so too were Latin, Jurisprudence and Roman Law. There was no choice of subjects at all until 1967.

One hundred years after Judge Seth-Smith first conducted law classes in his chambers at the District Court House, the Auckland Law School commemorated its centenary with a series of five lectures, now published in this book.

The first lecture, given by Professor L.C.B. Gower, is "The Academic Lawyer's Contribution to Legal Development." One could be forgiven for suspecting that an address so titled was obviously geared for the occasion, and of no lasting value. But such a suspicion would be wrong. Gower admits he had never really thought about this topic until asked to speak on it. This is probably typical of most lawyers, practising and academic: their discourse is generally confined to the well-worn diversion of debating the practitioner's charge that the academics are failing to turn out competent apprentices.

Now, however, Gower has risen above that partisan dispute, and shown his customary ability to make order of confusion. Academic lawyers, he says, should make three main contributions to the development of the law: teaching, legal literature, and law reform. Teaching is the most important, and has two aspects: lawyers must be taught the law (so as to administer the legal system — their "plumber" rôle); and they must be taught critically (so as to ensure the legal system develops to meet changing needs — their "Periclean" rôle).

Gower remarks that legal academics in the United Kingdom are better

at nurturing the legal plumber than inspiring the rarer Pericles. Of course he is too polite to say so, but the same is true of Auckland. But *that* may be a contribution of the employing practitioner, who wants a plumber, not a Pericles.

Gower's analysis is clear, stimulating, and entertaining; it shows that academic lawyers make various and important contributions to legal development. But he understates their impact. Firstly, he neglects the facts that academic lawyers are a recent phenomenon (hence this Centenary, this book, this lecture) and that their contribution is growing fast. Secondly he takes the institution of law as something given (namely, substantive rules and a system of administering them), and he portrays academic lawyers as contributing to this institution by merely improving on the practitioners' performance of existing functions. This is too modest, for the advent of law schools has added to the institution of law an entirely new function — namely, sustained and systematic self-consciousness. This is a radical change.

The second and third lectures both deal with the timeless conceptual puzzles of the criminal law. Professor John Smith examines the question: can you be convicted of attempting to commit an impossible crime? He discusses such examples as a man having sexual intercourse with a girl he believes to be 13 — a criminal intention — when in fact she is 18; and someone shooting at a tree stump believing it to be his deadly enemy. Most of us are tempted, from time to time, to wrestle with such problems; here, Professor Smith treats us to a masterly display of how it can be done.

Professor Julius Stone was Dean of Auckland Law School from 1939 until 1942. His address on "Madness and Guilt" looks at new ideas on the old free-will/determinism debate. The social sciences aim at causal explanations of human behaviour, but such explanations are irreconcilable with the notion of freedom of choice upon which we have traditionally based criminal responsibility. Professor Stone surveys a range of theories and demonstrates, in his own words, that "playing with words aggravates already difficult problems."

Both the fourth and fifth lectures are by Judges. The Hon Mr Justice Wallace draws on his experience as a Judge of the High Court and as Chairman of the Equal Opportunities Commission to deliver a thorough discourse on "The Respective Roles of Courts and Tribunals and the Growth of Judicial Discretion." He suggests two important reforms. The first is that a suitably qualified lay person sit as an additional member of the Court in complex civil cases. The Judge is very persuasive. He leaves one wondering how it can possibly have come about that cases of "real technical complexity" are heard by judges who profess no special expertise.

His second recommendation is that in civil cases the ordinary courts adopt certain procedures at present confined to ad hoc tribunals. The theme here is increased efficiency, and to this end the learned Judge advocates, *inter alia*, powers to relax the rules of evidence and to dispense with strict proof. He asserts these changes can be made without "adversely affecting" the system, but, with respect, he is not entirely convincing. He concedes that, given his reforms, justice would depend on the "sensible exercise" of the powers. But to concede this is to miss the point of procedural safeguards — namely, that a system of justice must assume the fallibility of its personnel.

The final lecture, entitled "The Judge in Today's Society", is by Sir Owen Woodhouse, President of the Court of Appeal. The Judge pronounces on matters of high constitutional importance. He warns that too much power is concentrated in the Cabinet, and he suggests as an antidote more power to the Judges.

Not surprisingly, Sir Owen begins with administrative law. Modern society has seen a vast increase in legislation. This in turn has inevitably led to an increased demand for adjudication, which the Government has met by creating a multiplicity of ad hoc tribunals. This in itself is good: the tribunals save money and unnecessary formality, and afford more specialized adjudicators.

The problem is that the tribunals, like the Prerogative Courts of the 17th century, encroach on the jurisdiction of the ordinary courts. Sir Owen's stance is heartening. He asserts that the jurisdiction of the ordinary courts is likely to "absorb" the jurisdiction of important tribunals "as the requirement of fairness is given more frequent and direct attention."

It is worth noting that other members of the Court of Appeal have expressed similar views. A recent combined judgment of Cooke, McMullin and Ongley JJ contained this statement:

> "Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights." (*NZ Road Transport etc Workers v NZ Road Carriers Industrial Union of Employers* [1982] 1 NZLR 374, 390)

However, putting the tribunals in their place is only the beginning of the solution. Even if the judicial function were entirely restored to the courts, Leviathan would still be left unbridled. So long as the doctrine of the supremacy of Parliament is regarded as law, the legislative function subsumes the judicial, and the "rule of law" can mean no more than that Cabinet can disregard decisions of the courts only after it has legislated its way round them. The Clyde Dam legislation is a case in point.

Sir Owen faces this problem squarely, and comes down in favour of a written constitution. He says the concentration of power in the

Executive shows no sign of abating, and he points to

> "the striking fact that with the one exception of Israel we alone among the Western democracies are prepared to entrust the great responsibilities of government to a unicameral parliament while relying on unwritten, ill-defined constitutional arrangements."

But for how much longer? Even the British state, the original Leviathan, has harnassed itself to EEC law; and Israel too is on the verge of adopting a written constitution.

The doctrine of supremacy of Parliament was born of the victory of the House of Commons over the Stuarts, and given wings by Dicey. It has gone from strength to strength ever since, and seems to know no limits. Let us hope that, as Sir Owen has urged, the question of a written constitution will be given "the early bipartisan consideration which it most surely deserves."

The fourth and fifth lectures are particularly interesting for their shared theme: the discretionary powers of judges are waxing, and the rigidity of the law is waning. Mr Justice Wallace says the growth of judicial discretion has "accelerated immensely in the modern era" so that it is now "the most striking feature of modern judicial work." He demonstrates his case by reference to the law of contract — for in recent years even this bastion of black letter law has been structurally refashioned by a number of statutes giving very broad discretionary powers. The Contractual Mistakes Act 1977, for example, provides that "the Court shall have a discretion to make such orders as it thinks just." The Judge asserts strict rules are unworkable, and suggests:

> "if one had any advice to give to an advocate beginning his career today, it would be to concentrate on identifying and proving the relevant facts. Of course the legal framework for the action must be established, but, in most instances, it is the facts which determine the outcome."

Sir Owen Woodhouse, too, addresses the law of contract, but he concentrates on case-law rather than statute. He advocates a flexible approach to *stare decisis*, and warns we may be

> "witnessing opening moves in a mortal attack upon the evidential requirement of consideration as support for an agreement not under seal."

It is significant that both Judges see increased judicial discretion as based upon the search for "fairness". Perhaps the law, in cycles through history, periodically becomes so inflexible that it is unjust; and then justice is reborn by another name. For what is "fairness" but equity? What is equity but justice? And what is justice but the end of law?

As remarked by the late Dean, Professor Northey, in his Foreword, the volume comprising these five lectures covers a wide range of topics. What is more, the diversity of subject-matter is enriched by the

contributors' contrasting perspectives and styles of analysis. This book is a centenary monument of which the Law School can be proud.

— *Michael Littlewood.*

TOWARDS MENTAL HEALTH REFORM. The Report of the Legal Information Service/Mental Health Foundation Task Force on Revision of Mental Health Legislation. Mental Health Foundation of New Zealand, Auckland, 1983. viii and 414 and (appendices) 73 pp. New Zealand price $20.00.

Mental health care is a topic to which our society has traditionally attached an unfortunate stigma. It has always been under-funded and badly publicized; the shadows of Victorian lunatic asylums still loom large. Recent events, culminating in the Oakley Inquiry, have led to a wave of public interest and criticism. The wave is now subsiding but the problems remain. Early in 1983, the Legal Information Service and the Mental Health Foundation of New Zealand (both independent non-profit organizations) combined to establish a Task Force to examine these problems and suggest solutions. The Report of the Task Force is now published under the title *Towards Mental Health Law Reform.*

The Report comes at an appropriate time: mental health law is currently under review in the Departments of Health and Justice, and a new Act is likely. It was the hope of the Task Force:

> "... that this report [would] form the basis of a wide-ranging, inter-disciplinary discussion of the future of mental health legislation in N.Z.; and that this discussion [would] lead to greater concern for and protection of the rights and needs of mentally disordered persons." (p vi)

They also aimed to produce a report accessible to lay persons.

The Report provides a comprehensive coverage of the law concerning mental health in New Zealand. It sets out the law and practices as they are today under the Mental Health Act 1969, analyses and explains the problems, and considers pertinent overseas legislation. This comparative approach leads to the Task Force's legislative recommendations. Detailed consideration is given to the Mental Health Act 1983 (UK) which is used as a measure of the viability of some of the reforms proposed.

The Report examines in some detail the current provisions governing informal and formal patients. Major reforms are envisaged, such as the setting up of a multi-disciplinary Mental Health Review Tribunal to oversee the system. This is dealt with specifically in Part VI

and references to it occur throughout. The suggested Tribunal would be comprised of five members: a lawyer, a psychiatrist, a mental health professional who is not a physician, and two lay persons. The Report provides a detailed blue-print for the powers, duties, and procedures of the Tribunal. The creation of ad hoc tribunals does not necessarily solve problems, but in this case the Report makes a new tribunal sound like a good idea.

The Task Force also urge that committed patients' cases be reviewed frequently; that the "dangerousness to others" criterion for committal be tightened; and that the noncommitted patient's status be clarified to ensure its voluntary nature. They discuss the use of committal to prevent suicide, but recommend against it. A central theme of the Report is that:

> "the criteria governing both informal and compulsory admission should include the requirement that no patient is to be admitted to a psychiatric hospital unless it represents 'the least restrictive adequate treatment setting appropriate to the patient, having regard to the reason for the admission.'" (p 117)

Another important recommendation is for the enactment of a code of patients' rights. This would clarify and radically improve the position of committed patients. They should have a right to treatment, and hospitals a corresponding duty to provide it; and patients should have a general right to refuse treatment.

The Task Force would also like to see the "special patient" classification revised. "Special patients" are those brought into the mental health system under the Criminal Justice Act 1954. It is the Task Force's submission that psychiatric hospitals should not be used simply to detain dangerous offenders, and that regardless of a person's offending pattern, he should not be in hospital unless for treatment. Furthermore, a person should not be compulsorily transferred from gaol to hospital unless his condition satisfies the requirements for civil committal. As special patients can be detained more or less at the whim of the Minister of Justice, periodic reviews are suggested.

Of particular interest to lawyers will be the chapters on representation and advocacy. The problem under the present system is that:

> "the vast majority of committed patients are detained, lose control of the management of their property, and the right to consent [sic] to treatment, without ever having access to legal advice." (p 342)

The Report discusses the particular need of the mentally ill for effective legal representation, and suggests how it can be met. The Task Force also recommend that a patients' advocacy service be established. Its function would be to assist in the enforcement of patients' rights, and in the resolution of their grievances. Its personnel should be

specially trained to achieve these aims using mediation and conciliation where possible.

Finally, the Report contains some useful and interesting appendices. These include common forms relating to committal proceedings and ECT, and the new "seclusion" (solitary confinement) rules developed by Oakley Hospital in the aftermath of the Inquiry.

A possible criticism is that the Task Force did not draft a model Act for mental health law in New Zealand. Perhaps that is asking too much. The Report is well written and realises its authors' hopes of being accessible to lay persons. It is thoroughly recommended as a thought-provoking document and an invaluable text. The proposals it contains are sweeping and likely to prove controversial. But they are the result of lengthy consideration by a team of medical and legal experts working together and are endorsed by both. It will be interesting to see how the Legislature responds.

— *Kathryn Davenport.*

A PRACTICAL INTRODUCTION TO COPYRIGHT, by Gavin McFarlane. London. McGraw Hill Book Company UK Ltd, 1982. xiv and 232 and (index) 3 pp. New Zealand price $47.88.

Recent developments in the technology of audio-visual reproduction, enabling the large-scale copying of books, films, records and the like, have placed increasing pressure on the law of copyright. The gap between technology and legislation is particularly acute in New Zealand and the United Kingdom for in both jurisdictions the existing copyright legislation is more than twenty years old.

Mr McFarlane addresses this problem from his position as an experienced lawyer in the data-processing and entertainment industries in the United Kingdom. It is his view that a crisis point is approaching where those industries which rely on copyright to protect their products will no longer be prepared or able to maintain production in the face of wholesale "pirating" and consequent loss of potential profits. We might plausibly extend McFarlane's thesis and ask whether artists themselves will be less willing to create, given diminished returns for their efforts.

McFarlane comments on the threat posed to the television and film industries by the advent of the home video recorder, and also on that posed to the publishing industry by increasing illegal photocopying and the technologically plausible, if as yet unrealised, placing of entire books on the data banks of national and international computer retrieval systems.

The book, then, advocates reform. A good deal of McFarlane's comments in this respect are drawn from, or made in response to, the recommendations of the Whitford Committee, established to report on the reform of Intellectual Property Law in the United Kingdom. Their report was published in 1977. McFarlane's reference to this Committee is particularly germane, given that its recommendations form the basis of major reforms currently under consideration in the United Kingdom. Similar reforms are being examined in New Zealand. Relevant aspects of the Committee's report are both presented and evaluated by McFarlane, generally in a critical vein. At times he suggests going further than the Committee recommends. He maintains, for instance, that any new legislation must give express copyright protection to computer software whereas the Committee had suggested that current legislation be construed to cover this material.

Some of the details discussed in McFarlane's book (regarding, for instance, "collecting societies" in the United Kingdom, and the implications of the EEC) are clearly of limited relevance in New Zealand. But the general principles of copyright which are examined are readily applicable in this country. The New Zealand Copyright Act 1962 is based on and almost identical to the United Kingdom Copyright Act of 1956. As long as the book is treated with the same care as any "UK text" — that is, with the knowledge that some provisions may differ — then its genesis presents little difficulty. While designed for use in the United Kingdom as a reference work for those dealing with copyright in the course of their daily business, McFarlane's book seems capable of fulfilling a similar role in New Zealand. Furthermore, it clearly has value in this country as a student text, or as an introduction to the theory and application of copyright for any interested person. The book appears to have the advantage of allowing students to familiarise themselves with the topic without wading through more specialised, but inessential material in the process. This directness is enhanced by the layout, which is uncluttered and allows quick and convenient reference to specific topics.

Generally this book lives up to its title, presenting a pragmatic but comprehensive introduction to the principles and application of copyright. Whether read for its value as an introductory text, or for its interesting discussion of topical issues, the book succeeds in conveying a basic understanding of the law of copyright in both its theoretical and practical aspects, making the reader aware at the same time that copyright is no longer a legal backwater.

— *Derek Simpson.*