

# reform

A regular bulletin of law reform news, views and information  
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## Processing Law Reform : Senate Breakthrough

"Oh Lord, grant that we may not despise our  
rulers; and grant, Oh Lord, that they may  
not act so we can't help it"

*Lyman Beecher, c.1850*

Australia stands at the brink of a major breakthrough in Parliamentary processing of law reform reports. The history of action on law reform proposals in every country is pretty poor. The subject is just not interesting enough to the average politician. It is too technical, boring or it is likely to be a "hot potato". There are no votes in law reform, so it is said. In political terms Disraeli put the problem succinctly :

"A majority is always the best repartee"

In the last year or so, there has been an increase in interest in law reform in Australia. Opening the Second Symposium on Law and Justice in the A.C.T. in March 1977, Federal Attorney-General Ellicott put it this way :

"What we are seeing in this country today is that law reform is being taken into the living rooms of the nation, by television and by other means. We are all becoming involved in it."

The quickening of interest in law reform amongst the general community is now reflected in the Australian Parliament. In a development which may have very important implications for practical law reform in Australia, the Australian Senate on 21 April resolved to refer certain matters to the Standing Committee on Constitutional and Legal Affairs.

The Chairman of the Senate Committee is Senator Alan Missen of Victoria. Other members include Senator J.N. Button (Victoria), Senator F.M. Chaney (W.A.), Senator D.M. Devitt (Tas.) and Senator James McClelland (N.S.W.). Senator Missen, who holds the degree of LL.M. from Melbourne University practised as a barrister and solicitor from 1953 until his election to the Senate in 1974. Senator McClelland held a number of portfolios in the second Whitlam Administration. The Committee has been described in the press as one of the Senate's "powerful" committees. It took a leading part in consideration of the Family Law Bill in 1974. Other matters that have been considered by the Committee include the abolition of the death penalty, administrative review, national compensation and the amendment of the Constitution to provide a retiring age for Commonwealth judges. The recent Constitutional amendment, adopting the principle of fixed retirement for federal judges, was undoubtedly given impetus by the Committee's report.

Now the Committee has taken up a number of themes mentioned by the Australian Law Reform Commission in its first two *Annual Reports*. These reports drew the attention of the Australian Parliament to some of the endemic problems of law reform in this country. Too often the "pigeon-hole" has been all that awaited law reform reports. Judicial suggestions for law reform did not even get that far. A tremendous amount of time, energy and writing are devoted to proposals for reform

of the law. Most of these proposals just disappear into the ether. In 1976 in *Deputy Commissioner for Taxation v. Roma Industries* Bowen C.J. reminded us that in 1922 the High Court had described a section of the Tax Act as "unjust and even baleful". Yet the provision remained unreformed for more than 50 years.

Forgetting the "volunteered" suggestions for law reform put forward by legal writers, newspapers and ordinary citizens, the record for translating law reform proposals advanced by Commissions and Committees in Australia is nothing to boast of. The list was included in the A.L.R.C. *Annual Report* 1976, p.11. It was repeated in [1977] *Reform* 13. It shows that fewer than half of the 647 law reform agency reports since 1916 have been followed by legislation of any kind. The time has come for something to be done about this. Fortunately the A.L.R.C. appeal has attracted the interest of the Senate and its Committee.

In April 1976 the Senate resolved that all Annual Reports of Government Authorities should be referred to an appropriate committee for scrutiny. That is how the A.L.R.C. Annual Report got before Senator Missen and his colleagues. In a report to the Senate in April 1977 on outstanding references, the Committee analysed the A.L.R.C. Annual Report. It drew attention to two matters in particular:

- \* Problems associated with the implementation of law reform
- \* Co-operation between law reform agencies, of which there are now eleven in Australia.

Dealing with the processing of law reform proposals and implementing them where appropriate, the Committee was quite blunt :

"It is the opinion of the Committee that the *responsibility* for ensuring that law reform is undertaken is clearly that of the Parliament. The Committee commends the Law Reform Commission for seeking ways to ensure that its proposals for law reform are processed. ... It is incumbent on the Parliament to seek out and find ways to ensure that proposals for law reform, from whatever source, are processed. This Committee believes that this would be an appropriate matter for further inquiry by this Committee".

The Committee also reviewed the delay in finding funds for the A.L.R.C. *Australian Law Reform Digest*. The aim of this work is to collect in a book, tied in to the system of the *Australian Digest*, all proposals for law reform put forward by Australian agencies. The object of the exercise is to cut down on duplicated work, promote uniform approaches where appropriate and collect suggestions so that they do not simply disappear but remain about to haunt indifferent public servants and legislators. The Senate Committee endorsed the importance and need for the Digest and recommended that the Government should provide funds sufficient to enable it to be published and updated at regular intervals.

The matter did not stop there. On 21 April the Senate resolved to refer three matters to the Committee on Constitutional and Legal Affairs. They are these :

Processing Law Reform Proposals.

To inquire into :

- (a) *Methods of ensuring that proposals for law reform by the (Australian) Law Reform Commission are implemented or are otherwise processed;*
- (b) *the adequacy of existing machinery for the collection and assessment of proposals for law reform put forward by judges, commissions, committees and organisations or individuals; and*
- (c) *the effectiveness of existing machinery for co-ordination of the work of the various law reform agencies in Australia.*

The A.L.R.C. has now sent a report to the Committee and it is expected that the Chairman and Commissioners will give oral testimony later in the year. Certainly, something must be done to establish regular machinery to make sure proposals for law reform are properly considered, one way or the other. Federal Attorney-General Ellicott has often said that there is no point in establishing law reform bodies and spending public funds if the recommendations are then ignored. He condemned

this as mere "window-dressing" which could not be justified. In fact, all of the reports produced by the A.L.R.C. have been dealt with promptly. The report on *Alcohol, Drugs and Driving* has now been approved by the Legislative Assembly of the Capital Territory on the recommendation of the Minister for the Capital Territory, Mr. Staley. The substance of the Commission's report on *Criminal Investigation* has now been accepted by the Government and is contained in the *Criminal Investigation Bill 1977*, which is presently being considered by Federal Parliament. The report on *Complaints Against Police* is being reconsidered following the decision not to proceed with the proposed Australia Police. The two Annual Reports of the A.L.R.C. have also obviously sparked the interest of the Senate Standing Committee on Constitutional and Legal Affairs. The question of Parliamentary and Party machinery remains. Sir Anthony Mason suggested in 1975 that Parliament might delegate legislative powers to L.R.C.s (1975) 49 *A.L.J.* 572. Even if this procedure is not accepted, the introduction of regular and fairly automatic scrutiny by a bipartisan committee may be the way to avoid those pigeon-holes. The Senate Committee's inquiry will be followed closely by law reformers throughout Australia and in all parts of the world.

## Aboriginal Tribal Laws: Inquiry Begins

"Decisions based on facts, arguments on the rules of law, impartiality of the bench and so on are essentially notions which belong to the common law but they do not represent the *only* concepts of law".

Mary Daunton-Fear & A. Freiberg,  
*"Gum-Tree" Justice*, 1976.

On the lawns outside the Aboriginal Legal Service in Alice Springs, the A.L.R.C. inquiry into Aboriginal Customary Law got off to a start on 13 June 1977. The A.L.R.C. Chairman, Mr. Justice Kirby, and Commissioners David Kelly and Professor Alex Castles, heard viewpoints of the Aboriginal and other communities in the Centre before moving on to Darwin where similar public sessions were held. These sittings are only the first in what will obviously become a complicated and sensitive inquiry. The A.L.R.C. has been asked by the Commonwealth Attorney-General, Mr. Ellicott, in consultation with the Minister for Aboriginal Affairs, Mr. Viner, to look into a number of questions concerning Aboriginal Tribal Law :

- \* Whether existing courts dealing with criminal charges could apply Aboriginal Customary laws and practices.
- \* Whether Aboriginal communities should have the power to apply their own laws and practices and if so how.
- \* Whether special exceptions need to be made to ensure that no person is subject to treatment or punishment which is cruel or inhumane.

The A.L.R.C. inquiry mirrors growing concern in the Australian community to strike a "new deal" with the indigenous Aboriginal people. The movement took impetus from the Referendum to amend the Constitution, carried in 1967. A number of recent developments have brought the issue to public attention and sent the editorialists rushing for their pens :

- \* The trial in Adelaide in May 1976 when a tribal Aboriginal was handed over to the tribal elders and subsequently speared, as punishment for killing his wife.
- \* The acquittal in the Supreme Court of Western Australia sitting in Kalgoorlie in May 1977 of a number of tribal Aboriginals charged with murder.
- \* The call by Mr. Stewart Harris on the A.B.C. *Guest of Honour* programme for a new "treaty of commitment" with the Aboriginal people of Australia.
- \* The stinging attack in mid June by Mr. Justice Muirhead of the Northern Territory Supreme Court on the system of criminal justice for Aboriginal children in the Northern Territory.