reform

A regular bulletin of law reform news, views and information
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Federal Ministers Visit A.L.R.C.

> "The men who have reformed the universe have never accomplished it by changing officials but always by inspiring the people."
>
> Napoleon, *Maxims*, 1804.

March 1978 saw the visit to the Law Reform Commission of two Federal Ministers with law reform responsibilities. Senator Durack, Federal Attorney-General, met the Commissioners on 3 March and spent three hours discussing the A.L.R.C. past and future programme. He was briefed on the outstanding references and on suggestions made for future tasks in Commonwealth law reform. Senator Durack expressed himself in favour of the steps that had been taken by the A.L.R.C. to activate public and professional debate about law reform: its purposes and function.

On 6 March, the former Attorney-General, Mr. Ellicott, also met with the A.L.R.C. Commissioners. Since his appointment as Minister for Home Affairs and Minister for the Capital Territory, there has been an increase in interest in legal renewal in the Australian Territories. Responsibility for law reform in the Federal Territories is divided. In late 1977, responsibility in the Northern Territory passed from the Federal Government in Canberra to local authorities in Darwin. Even in the Capital Territory, the development of law reform proposals is a task shared by many government departments. In an endeavour to break the "log jam", Mr. Ellicott has activated an interdepartmental committee, designed to suggest projects of law reform and priorities that should be observed. He has encouraged the A.L.R.C., which has a statutory responsibility for law reform in the Territories, to assist in focusing those matters which require urgent attention.

In February, the Commissioners had a conference with representatives of the A.C.T. Law Society. The A.C.T. Police Commissioner and other community groups were also asked to suggest urgent tasks of law reform for consideration by the Attorney-General.

How does one fix priorities in law reform? It is impossible to quantify, for comparison, the amount of mischief done by an outdated *Limitations Act* or by outmoded child welfare laws. All law reform bodies work with limited resources. In the case of the A.L.R.C., it is for the Attorney-General to give the references that set the Commission to work. Furthermore, he is empowered to give direction as to the order in which the Commission is to deal with references and as to any interim report it must make. The A.L.R.C. is empowered to suggest matters appropriate for reference to it. It has done so. The latest suggestion, contained in its report *Insolvency: The Regular Payment of Debts* (A.L.R.C.6) was for a general review of Australia's *Bankruptcy Act*. In the end, it is for the Federal Attorney-General, doubtless in consultation with other Ministers and departments, to decide what the Law Reform Commission should do. In one sense this diminishes the Commission's autonomy. In another sense it puts the responsibility for priorities where it should be: with politicians who must in the end convert proposals into law and assess, by community standards, where a law is going wrong.

Judicial "Imperialism"?

> "The business of a judge is to hold his tongue until the last possible moment, and to try to be as wise as he is paid to look."
>
> Ascribed to Lord Hewart by Glanville Williams *The Proof of Guilt*, 26.

The last quarter has seen judges and the judicial office under scrutiny in Australia and elsewhere. Professor Gordon Reid (W.A.) identified a new development in an address to the Australian Institute of Political Science on 29 January 1978. This development he called "judicial imperialism". He listed the use being made of judges, throughout Australia, for essentially executive office and expressed the opinion that "the practice is fraught with dangers for a fearlessly independent Judiciary". Reid quotes the traditional view of the judge's functions stated in a memorandum to the Victorian Government by Irvine C.J. in 1923.

> "The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and a subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law. There begins and ends the function of the Judiciary."

In contrast to this view, the development of the judicial-type review of administrative decisions at a federal level, the expansion of the Family Court of Australia and the development of a new Federal Court are identified by Reid as transformations which are "revolutionary".

> "And, as if this was not radical enough, we also have new statutes providing for a network of Legal Aid Commissions throughout Australia, a newly created and active federal Law Reform Commission and legislation is now before the Parliament for a Human Rights Commission. . . . The Federal Judiciary has made obvious territorial gains in the developments just explained."

A list of bodies using federal judges is impressive. In the United States, the view has been taken on this issue by the American Bar Association:

> "A judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

Reid acknowledges that many, including judges, regard the strict division of functions as unnecessary Montesquieuian fundamentalism, inappropriate to the modern state. He suggests that thought should be given to stopping the erosion of the "ailing" Parliament by loss of power to the Executive and the Judiciary.

In England a controversy was stirred by comments made by a trial judge in a case involving alleged racial discrimination. Parliamentary questions and protests were reflected in the general media. On 24 January John Mendelson wrote a leading article for The Times, *Should Parliament Have the Power to Take Action Against Judges?* The author, a Member of Parliament, identified a hard-core question:

> "If a judge acts in such a manner that Parliament comes to be convinced that he is not carrying out the existing law, particularly in his directions to the jury and in his further comments, then action by Parliament is not only justified but wholly necessary in the public interest. . . . There must be a final effective