

"between the doing and the ultimate achievement of law reform, it is always necessary to persuade government with its crowded calendar, of the need and of the priority."

The I.B.A. Conference gathered nearly 2,000 lawyers in discussion of a busy agenda which covered general professional practice and business law. Special interest was paid in the sessions on the practical use of computer technology in the law office. A great deal of interest was disclosed by the assembled delegates in Australia's innovative developments of administrative and family law reform. For details on the Conference, I.B.A. Headquarters are 7 St. James' Street, London, England.

## Making the Punishment Fit the Crime

"The hungry judges soon the sentence sign,  
And wretches hang that jurymen may dine."

A. Pope, *The Rape of the Lock*, 1712, III, 21.

The tasks assigned by the Government to the Australian Law Reform Commission are certainly not getting easier. On 13 July 1978, the Federal Attorney-General, Senator Durack, announced a new Reference which will require the Commission to examine the principles involving the sentencing of offenders. The Commission is required to review and report on the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and other related matters. Among the things which the Commission is required to take into account are:

- the costs and other unsatisfactory characteristics of punishment by imprisonment
- the desirability of uniform sentences for Commonwealth offenders
- the interests of the public and the victims of crime
- new alternatives to imprisonment

The Commission's attention is drawn to the conclusions of the Fifth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Geneva, 1975. Much discussion at that Congress centred on the defects of imprisonment and the exploration of

effective alternatives. The Sixth Congress will be held in Sydney in 1980. Over 2000 delegates specialising in criminal law, criminology and allied disciplines will gather for the Congress and inevitably Australia's criminal laws and procedures will come under the microscope. The co-ordinator of the 1980 Congress is Mr. Peter Loof, a senior officer of the Attorney-General's Department in Canberra.

Senator Durack said that it was expected that the A.L.R.C. report on sentencing would be "an important part of Australia's contribution" to the 1980 Congress. For this reason, the Commission is to collaborate with the Australian Institute of Criminology and is required to submit by 1 June 1979 an interim report dealing in particular with the institutionalisation of punishment.

Professor Duncan Chappell has been appointed Commissioner in charge of the project and useful discussions have already been had to secure the full co-operation of the Australian Institute of Criminology and other bodies and persons involved in the administration of criminal justice throughout Australia.

Some of the novel issues raised by the new Reference include:

- whether there should be stated "principles and guidelines" for judicial officers imposing a sentence of imprisonment.
- whether imprisonment should be the "last resort". The *Powers of Criminal Courts Act* 1973 (Eng) s.20 and *Criminal Justice Act* 1954 (N.Z.) s.43A put limits on prison sentences for some offenders e.g. the young, first offenders, minor offences etc.
- provision of new remedies for the victim: compensation orders, restitution orders, community service orders, etc.
- establishment of "guideline sentences" or a Sentencing Council to promote uniformity.

The full terms of reference of the A.L.R.C. are set out in (1978) 3 *Cth Record* 998.

The A.L.R.C. project will not be the first Australian effort at a comprehensive re-examination of sentencing principles. The first report of the South Australian Criminal Law and Penal Methods Reform Committee under Justice Roma Mitchell, *Sentencing and Corrections*, was put forward in 1973. The

Canada L.R.C. published a series of *Studies on Sentencing* in 1974. In fact the literature on the subject is legion.

A couple of important recent initiatives can be singled out:

- In the United States the *Criminal Code Reform Act* of 1973 is now before the Congress. It has passed the Senate but has become "stuck" in the H. of R. The Bill (S 1347) proposes the complete restructuring of the Federal criminal sentencing system in the U.S. It establishes a Sentencing Commission as a permanent part of the judicial branch of Government. The Commission would be responsible for collecting information on current sentencing practices throughout the country and establishing "guideline sentencing ranges" within each statutory category. Any judge going above or below the "guideline" would have to state reasons for doing so. Appeals against sentences would be allowed. Parole and "good time credits" would be almost entirely eliminated in order to achieve more "determinate" sentences. Critics charge that the Bill reduces individualised justice and unduly increases the power of prosecutors to affect sentences by the level of charge laid.

One thing is clear. There is a big move in the United States away from *deterrence* and *rehabilitation* and back to "*retribution*", as the chief rationale of punishment. Visiting U.S. Attorney-General, Griffin Bell, told *Law News* (1978):

"[T]he public has lost confidence in the system, because they read about someone receiving a long sentence and then invariably get[ting] out in much less time. The public has some trouble understanding that. We are advocating shorter sentences with certainty of service . . . there would be no need to have parole."

One of the leading criminologists in the United States, Professor Marvin Wolfgang, visited Australia in August 1978 for a Congress of the Australian Academy of Forensic Sciences. He explained the move back to so-called "just deserts" in the United States as a belated reaction by the majority middle class to perceived increases in crime and excessive leniency

in punishment. Professor Wolfgang described work being done in the United States aimed at defining the small group of anti-social repeat offenders who are responsible for the bulk of serious crime. He cautioned that some of the disenchantment with parole in the United States arose from administrative defects, some of which Australia had avoided. Whether this country should take the same course as the United States is now a question before the Law Reform Commission.

- In England two recent reports caused a stir. The first is the report of the working party "*Judicial Studies and Information*" (Lord Justice Bridge, Chairman) which recommended:
  - establishment of a Judicial Studies Board with a director of studies based in a university
  - compulsory 1-2 weeks' study to ensure that new judges are well informed in all subjects relevant to their jurisdiction, especially sentencing
  - continuation study programs for judges, including pupillage with experienced judges
  - interdisciplinary conferences with academics, prison, probation and other relevant officers
  - improvement in information available to the judiciary.

The report does not refer to the study program as "judicial training" lest that term infer a threat to judicial independence. However, in a section titled "The Well Informed Judge" it says this:

"It is when it comes to passing sentence that knowledge of law, procedure, practice and technique can never be sufficient. Beyond these, at least the judge should have a sound understanding of how the various facets of the penal system work in practice and of those difficult and controversial fields of knowledge concerned with the springs of criminal behaviour and the likely effect of different penal procedures on the criminal. No one requires of the judge that he be a penologist, criminologist or psychologist; but it is entirely reasonable to expect him to know what penologists, criminologists and psychologists are thinking."

Even more recent is the Home Office report of the Advisory Council on the

Penal System, *Sentences of Imprisonment* 1978 (Lady Serota, Chairman). The report proposed a reduction in maximum prison sentences, cutting maximum penalties for rape, kidnapping, and hijacking from life imprisonment to seven years. If adopted it would bring U.K. penalties more into line with those applicable in the European Communities. The terms of reference to the Council asked the question "How far [present maximum sentences of imprisonment] represent a valid guide to sentencing practice". The Council's recommendations are based on statistical evidence that 90% of sentences imposed by the courts are covered by the new proposed maximum. A let-out for a second tier "exceptional" category was put forward so that "ordinary" and "exceptional" cases would be dealt with differently. The report drew strong comments on both sides. *The Times* (28 June 1978) pronounced:

"This is a bad time for the public's penological tolerance to be tested, especially as the consequences of the proposed reform cannot be assessed with any certainty. . . . Judges understand the existing system well. So, on the whole, does the public."

Back to square one. In Australia, in addition to the A.L.R.C. initiative, things are happening:

- Queensland Minister for Welfare (Mr. John Herbert) announced in June his intention to incorporate community service orders into the *Offenders Probation and Parole Act* 1959 as an alternative to imprisonment. The Minister pointed out that the average annual cost of maintaining a prisoner in a Queensland prison was \$11,000. The average loss of wages by a prisoner was about \$9,000 a year and on top of that a prisoner's wife with two children received \$3,000. This adds up to \$23,000. Compared with that, the cost of supervising a person on probation or parole in Queensland is about \$300 per year. A big difference.
- A special committee has been established in Victoria under the Hon. F. R. Nelson, Q.C., formerly a judge of the Supreme Court. Set up by Attorney-General Haddon Storey, Q.C., in March 1978, the

committee has terms of reference to examine sentencing alternatives "with a view to improvement of administration of the criminal law". It includes among its members Mr. David Biles, Assistant Director of the Australian Institute of Criminology, police, departmental, social welfare and legal members. The committee was established by agreement with the Minister for Social Welfare and the Chief Secretary of Victoria and the A.L.R.C. has already established contact with it.

- In South Australia it is reported that a *Treatment of Offenders Bill*, based on the S.A.C.L.R.C. report, is about to be introduced into Parliament.

The A.L.R.C.'s latest project promises to be an important one. There is little new to be written on the rationale for punishment. It has all been said before. Theories come in cycles. Wells J. of the S.A. Supreme Court reminds us of the practical limits which will always be upon those who pass sentence:

"Courts . . . cannot be all things to all men. In the nature of things they cannot, like ministers of religion, undertake the salvation of souls, or, like the doctor or psychiatrist, work directly to cure an offender's body, or to restore him or her to mental health. They cannot make a person good by judicial order. . . . They cannot wholly undo the harm and suffering caused to the victim of a crime or wholly remove the indignation and resentment of the victim's family and friends. They cannot investigate every aspect of a crime, or of an offender's past and future life with the pertinacity and comprehensiveness of a scientist immersed in an all important experiment, or most offenders would never be dealt with at all—or at least would not be dealt with until a wholly unwarranted time had elapsed."

*The Queen v. Kear* [1978] 2 *Criminal L.J.* 40-41.

But can we do better?

## U.S. Attorney-General Visits L.R.C.s

"I have never been more struck by the good sense and the practical judgment of the Americans than in the manner in which they elude the numberless difficulties resulting from their Federal Constitution."

de Tocqueville, *Democracy in America*, 1835.

On 18 July 1978, the U.S. Attorney-General, Judge Griffin Bell, accompanied by U.S. Am-