

lem of court procedures and that of the complexity of legislation."

*New Zealand:* An interesting article in the Jubilee Issue of the *Law Review of Victorian University of Wellington* is that by Mr. Justice I. L. M. Richardson "Advising on Overseas Law Reform" (1978) 9 V.U.W.L.R. 385. After conceding that "all of us are prisoners of our backgrounds", the author asserts that there are special difficulties in advising overseas countries on legislation which is based upon home experience. Richardson J. at one stage advised on fiscal and banking legislation for Mauritius, Tonga and Western Samoa.

Although the point is one of special relevance for the adaptation of sophisticated laws to a developing society, the general point made in the article remains valid. It is unacceptable and dangerous to pick up reforms designed for a different social and economic environment and expect them to take root when transplanted into another jurisdiction.

## Odds and Ends

■ The Law Reform Commission of Canada has now published its Working Paper No. 23 "*Criteria for the Determination of Death*". After describing death as a medical and as a legal phenomenon, the Canada L.R.C. discerns three possible approaches to its definition:

- Determination by a purely medical decision
- Determination by judicial development of the acceptable criteria
- Determination by legislative criteria.

Like the A.L.R.C. report on *Human Tissue Transplants*, the Canadian paper suggests that legislative prescription of clearly defined requirements is "probably the best alternative". The definition proposed is simple.

"A person is dead when an irreversible cessation of all that person's brain functions has occurred. The cessation of brain functions can be determined by the prolonged absence of spontaneous cardiac and respiratory function."

An interesting development is the news that the A.L.R.C. Report, *Human Tissue Transplants* (A.L.R.C. 7) is to be translated into

Spanish for distribution to interested Governments and institutions in South America, following a recent conference there, where the report was favourably commented on.

■ In 1975 a number of research scholarships were awarded by the N.S.W. Law Reform Commission to Sydney barristers and solicitors to investigate aspects of civil and criminal procedures overseas. The funds were provided by the N.S.W. Law Foundation. The N.S.W.L.R.C. has now begun to publish the reports of the investigations in occasional papers of a series "*Studies in Comparative Civil and Criminal Procedure*". Volume 2, by Mr. J. Bishop, a Sydney solicitor, includes a note on innovations in civil and criminal procedure found by him in several countries visited, including the United States, Canada, England, India, Sri Lanka and Singapore. A number of recommendations are made. These include

- the institution of a pre-trial conference in the Supreme Court, to be conducted by a Master;
- the introduction of optional settlement conferences to be conducted by Masters;
- the introduction of night arbitration of personal disputes, along lines found in Ohio; and
- the experimental introduction of pre-trial conferences in long criminal trials along lines now used at the Central Criminal Court in London.

Mr. Bishop recommends that the judge who presides in the conference should also preside at the trial but should not become involved in "plea bargaining".

■ One of the issues raised by the A.L.R.C. in its Discussion Paper on *Access to the Courts — Standing in Public Interest Suits* (D.P. 4) was whether the private citizen should continue to have "standing" to launch a criminal prosecution. The private criminal prosecution became news in Queensland in April when State Parliament passed the *Criminal Law Amendment Act 1979* (Qld.). The Act amends the *Justices Act* to limit the right of an individual to launch a private prosecution for an indictable offence, unless first securing

the leave of the State Attorney-General. A former Chief Justice of Queensland, Sir Mostyn Hanger, joined legal and church leaders in criticising the legislation. As reported in *The Australian* he said

"I regard this as a further erosion of the rights of the individual, reacting in favour of the executive government."

Following widespread criticism of the law, it was announced that the legislation would be reviewed by Parliament in the light of the public debate.

■ To be considered at the A.L.R.A.C. Conference in Perth are various suggestions for the future of the *Australian Law Reform Digest*. The A.L.R.C. is preparing a digest of all law reform reports produced in Australia between 1916 and 1978. The project is already half completed. The Commission produces a regular "*Interim Digest*" and it has announced, subject to the approval of the L.R.C.'s, that it will change the format and frequency of the Interim Digest supplements. It will, in future, concentrate exclusively on law reform commission reports and papers. On the suggestion of Mr. Justice Menhennitt (V.C.J.C.), the A.L.R.C. has circulated a questionnaire to update the schedule of "legislative follow-up" of L.R.C. reports. A review of current "success rates" will be contained in the next issue.

■ Reference has been made in the Commonwealth Parliament to the inevitable delays that arise from current staff and budgetary restraints imposed upon all Commonwealth authorities, including the Law Reform Commission. In accordance with new arrangements requiring a government response to Parliamentary reports, the Minister assisting the Prime Minister, Mr. Viner, commented on a report of the Senate Standing Committee on Constitutional Legal Affairs dealing with certain aspects of the A.L.R.C. staff ceilings. At present the Commission is pegged at a staff of 19, a limit fixed in 1975 before major research tasks were assigned.

"In one specific case the Constitutional and Legal Affairs Committee requested that the Public Service Board re-examine the staff ceiling of the Law Reform Commission. The Government understands that the Commission is revising its intended completion dates for reports on its references. In a time of staffing constraints, the Government believes that this

is as it should be and there does not seem to be any real reason to single out this Commission for special treatment."

The Senate Committee's suggestion that a lump sum payment should be made to A.L.R.C. Commissioners, particularly from interstate, was noted as receiving consideration.

■ Of vital importance for the future of administrative law reform in Australia are two decisions of the Federal Court delivered on 3 May 1979. In *The Collector of Customs (N.S.W.) v. Brian Lawlor Automotive Pty. Ltd.*, the majority (Bowen C.J. and Smithers J., Deane J. dissenting) dismissed the contention that the Commonwealth's Administrative Appeals Tribunal could not review the basis in law of an administrative act that was challenged. Had the argument succeeded, it could have required a strict bifurcation of challenges to administrative acts, prohibiting the A.A.T. from considering the lawfulness of the conduct of administrators. Deane J. was unimpressed:

"It may well be inconvenient that a person who wishes to litigate the question whether an enactment confers any power at all to make a decision, is unable to do so in the administrative tribunal which has authority to review decisions made under that enactment. Such inconvenience is not, however, an uncommon consequence of the division of judicial and executive powers."

In *Drake v. The Minister for Immigration and Ethnic Affairs*, the same bench of the Federal Court unanimously allowed an appeal from Mr. Justice Davies. However, it dismissed the argument that it was not competent for His Honour to constitute the tribunal because he was a Judge of the Federal Court. In a joint judgment Bowen C.J. and Deane J. stated:

"Such an appointment does not involve any impermissible attempt to confer upon a Chapter III court functions which are antithetical to the exercise of judicial power. Indeed, it does not involve the conferring of any functions at all on such a court. Mr Justice Davies' appointment as a presidential member was a personal appointment."

■ The Human Rights Commission of New Zealand has published a "*Report of a Seminar on Human Rights*" held in Auckland late in 1978. An interesting point raised by a participant was whether the principles in the Uni-

versal Declaration of Human Rights, adopted by the United Nations, were of truly universal application. Some doubted whether the "Western concept" of human rights was universally relevant or should be the only one to be fostered internationally. Precisely this question is raised in the A.L.R.C. project on Aboriginal Customary Laws. The Commission's Terms of Reference recite "the need to ensure that every Aborigine enjoys basic human rights" but require the Commission, in making its inquiry and report, to give "special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane". The difficulty of avoiding ethnocentricity in the A.L.R.C. approach to this Reference is already emphasised in a number of inhouse papers that have been prepared. The Commission is now assembling its team of consultants. It hopes to conclude field visits and to proceed to a Discussion Paper on possible solutions for the recognition of Aboriginal traditional laws later in 1979. The Commissioner in charge of the reference is Mr. Bruce Debelles.

■ Under study by the A.L.R.C. Division on Sentencing is the decision of the Federal Court of Australia (Full Court) in *The Queen v. Tait and Bartley* (1 May 1979, unreported). The observations of the court (Brennan, Deane and Gallop JJ.) are specially relevant to the problem of "plea bargaining" and the extent to which judges should receive communications in chambers concerned with a criminal trial they have to conduct. In England, Lord Scarman declined to lay down any absolute general rule that there must never be any communication outside the trial between the judge and those representing the Crown and the accused. *R. v. Atkinson* [1978] 1 W.L.R. 425. However, the Federal Court disagreed:

"A judge . . . ought not . . . countenance a procedure involving his receipt of a communication in private, calculated to affect the sentence he is to impose. If a private communication is permitted to affect the sentence so that it appears to be discordant with the facts publicly related to the court, the sentence will not be seen to be appropriate, the deterrent effect of punishment will be impaired and public confidence in the process of sentencing will be diminished."

## New Reports

### Australia

- A.L.R.C.: D.P. 9: *Child Welfare: Children in Trouble*, 1979 (See p. 58).
- : D.P. 10: *Sentencing: Reform Options*, 1979 (See p. 55).
- N.S.W.L.R.C.: D.P. 1: *Legal Profession: General Regulation*, 1979.
- : D.P. 2: *Legal Profession: Complaints, Discipline and Professional Standards—Part 1*, 1979.
- Tas.L.R.C.: *Entitlements of Persons Re-employed Following a Term of Imprisonment*, 1978.
- V.C.J.L.R.C.: *Contribution*, 1979.
- : *Trustee Companies*, 1979.
- : *Unincorporated Associations: Second Interim Report*, 1979.
- W.A.L.R.C.: Proj. No. 63: *Small Debts Court*, 1979.
- : Proj. No. 64: *Bail*, 1979.
- : Proj. No. 55: *Part One Review of the Justices Act 1902 part 1—Appeals*, 1979.
- : W.P. Proj. No. 72: *Retention of Court Records*.
- South Australian Royal Commission into the Non-Medical Use of Drugs. Final Report April 1979*.

### United Kingdom

- Scot.L.C.: 55: *Thirteenth Annual Report 1977-1978*.
- Justice: *Report on Pre-Trial Criminal Procedure: Police Power and the Prosecution Process*, 1979.

### Canada

- C.L.R.C.: *Seventh Annual Report, 1977-1978*.
- : 11: *Report on the Cheque: some modernisation*, 1979.
- : 12: *Report on Theft and Fraud*, 1979.
- : W.P. 23: *Protection of Life: Criteria for the Determination of Death*, 1979.
- Alberta I.L.R.R.: 30: *Report on the Builders' Lien Act: Certain Specific Problems*, 1979.
- : 31: *Report on Contributory Negligence and Concurrent Wrongs*, 1979.
- : B.P. 13: *Background Paper on Statute of Frauds*, 1979.
- British Columbia L.R.C.: 40: *Report on Execution Against Land*, 1978.
- : 41: *Annual Report*, 1978.
- : 42: *Report on Creditors' Relief Legislation: A New Approach*, 1979.
- Manitoba L.R.C.: 27: *Report on Limitation of Actions: Time Extensions for Children, Disabled Persons and Others*, 1979.
- : 28: *Report on the Enforcement of Judgements: Part 1: Exemptions under "The Garnishment Act"*, 1979.
- : 29: *Report on Emergency Apprehension, Admissions and Rights of Patients under "The Mental Health Act"*.
- Saskatchewan L.R.C.: *Fifth Annual Report 1978*.
- : *Tentative Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts*, 1979.