reform. To date, the Commission has not received its approved programme. As previously announced in these pages, the Chairman of the Nigerian Commission is the former Chief Justice of Nigeria, the Honourable Sir Darnley Alexander.

Scarcely a quarter goes by now but a new Commonwealth law reform agency is established. For example it has been announced that a new Law Reform Commission has been established for Hong Kong. The Chairman of the Commission is the Attorney-General for the Colony, Mr. John Griffith Q.C., who was at Lagos. Also present was the Chief Justice, Sir Denys Roberts, who is a member of the Commission. Other members are recorded below (see p. 132). The first meeting of the Hong Kong LRC occurred in June 1980. The first three topics referred to it for consideration are:

- commercial arbitration
- crime: homosexuality laws
- the laws of evidence in civil proceedings

It is envisaged that the Commission will work principally through sub-committees to which will be co-opted suitable experts and that it will proceed to examine both detailed minor corrections and improvements of the law and fundamental aspects of reform of laws or procedures of Hong Kong. Consideration of proposals for reform advanced by the Government or private sector will also be part of its function.

The intellectual feast at Lagos was equalled by the social hospitality and exotic cultural events organised by the hosts. Of special interest to the ALRC were the many papers on the integration of Nigerian customary laws into the Nigerian legal system. The revival of Islam, with its preponderance in the North of the country, has led to the call for parallel systems of Islamic courts and a return to some of the severe rules and punishments prescribed in the Koran. In one session a call was made for a return to stoning of adulterers!

privacy inquiry gathers pace

> The grave's a fine and private place
> But none I think do there embrace
> Andrew Marvell, c.1670

A major national debate is continuing in Australia in the wake of the ALRC discussion papers on privacy protection detailed in [1980] *Reform* 68. Led by the new Commissioner in charge of the reference, Associate Professor Robert Hayes, the ALRC is receiving and analysing large numbers of comments, induced by proposals contained in its DPs 13 and 14. Put shortly, the Commission has proposed new Federal legislation in Australia to deal with:

- intrusions by Government officials and private concerns
- secret surveillance, including telephone tapping
- data protection and data security (computerized information)

Editorial Comment. Generally speaking, the reaction in the public media continues to be favourable. Under the heading 'Protecting us from Spies' the Brisbane *Courier Mail* says:

> The Australian Law Reform Commission's recommendations on protecting the right to privacy, now open for Government consideration and public debate, deserve widespread support. They are far from radical proposals. ... Their moderation is the more surprising because according to the Commission Chairman ... the day of Big Brother may not be far off. The recommendations take two unexceptionable forms — to set up protective bodies which would handle complaints, conciliate, develop codes of practice and set standards and to make provision for a wronged person to take civil action. ... If the Commonwealth adopts the report, the States should go along with it. This is not a matter for argument about State rights. It is about people's wrongs. Nor is it a matter on which the hoary and generally ill-advised argument that 'if a person has nothing to fear he has nothing to worry about', should apply.

When the editorialist of *The Canberra Times* dipped his pen, he was somewhat less sanguine:

> The ultimate success of all the labours of the Australian Law Reform Commission to recommend legislation to protect individual privacy will

> depend upon the political will of the Federal Government. This in turn will depend upon whether this Government, or any other, assesses the popular will to make the protection real everywhere. ... The two discussion papers are excellent and ought to be widely read and discussed. But we have to learn that even when new laws are finally passed, they are weak and tend not to be enforced, if they are about human liberty and dignity. This suggests that urgency is less important than the development of a great popular demand for effective action to protect our individual privacy. Such a demand should transcend all boundaries and have to be heeded by Federal and State politicians. Hence the importance of the public hearings and seminars in capital cities which the Australian Law Reform Commission is about to conduct.

It was to the methodology of the ALRC that *The West Australian* editorial (21 July 1980) turned its attention:

> One of the great virtues of the Australian Law Reform Commission is its unswerving commitment to the principle of community involvement. In its search for argument on how best to shape new laws and redraft old ones, the Commission is constantly seeking to tap public opinion — among laymen and experts alike. This is not only desirable from a democratic point of view, it also makes good sense in practical terms. The more than can be learned about a problem and about people's needs in relation to it, the better our chances of coming up with a satisfactory legislative solution. A great deal of community comment has gone into the preparation of Commission reports since the agency was set up.

The West Australian picked up an appeal by the ALRC for assistance from the computing profession in particular. It expressed the hope that the appeal would 'stir the social conscience within the computer industry'.

Children's Privacy? Less favourable were comments on one small but highly controversial question: at what age does the right to privacy begin? A tentative proposal included in the discussion paper was that in relation to medical and education records a child of 12 should have the right to object to doctors and teachers making information, claimed to be confidential and personal, available, even to parents or guardians. *The Daily Telegraph* (16 June 1980) began with a concession but finished tartly:

> The Australian Law Reform Commission has done some excellent work in seeing that people's rights are protected. It is a catalyst for changing laws which are not in society's best interest. And like the legislators who enact laws, it must be guided by society's constantly changing attitudes. ... The law cannot be inflexible. ... The Law Reform Commission comments 'even within the family unit there are legitimate claims to privacy'. Within very strict limits that is true. But as far as creating a society in which children lead lives that are kept secret from their parents, we hope the Commission is working not for today but for some brave new world of the far distant future.

Likewise, John Laws, a national broadcaster, declared that the proposal was a 'giant step back in law reform'. On this issue, the ALRC has now received many letters expressing similar critical views. Whilst this matter must be reconsidered in the light of comments and criticisms, many of these fail to take account of:

- the ALRC statement that doctors and teachers could overrule a child's request
- the fact that the law already recognises children's legitimate rights to privacy from parents e.g. in legislation on venereal diseases
- the evidence, paricularly in Britain, that many children will not go to doctors or other advisors for drug, sexual or intimate treatment, for fear of disclosure to parents
- the consideration that in a loving family, problems of this kind would not arise in the first place and that proposals must be made where supportive family relationships have already broken down
- the need to protect children disclosing and complaining about child abuse, assaults, incest and so on which will not be reported and treated, if parents must be informed.

This small issue reveals the complexities of the privacy protection debate. It is not as simple of resolution as some critics would have it. The ALRC is seeking the voice of children as well as adults in the determination of the matter.

Joint Hearings. An interesting innovation, which may have possibilities for uniform law reform in appropriate areas, is the decision of the WALRC and ALRC to hold joint public hearings in Perth on privacy protection. The

public hearing in Perth on 10 November 1980 will be the first occasion on which two law reform commissions in Australia have sat together in a public inquiry. Arrangements for the joint hearing were settled in Perth on 4 August 1980 in discussions between the two Commissions. The WALRC, which has always been interested in co-operation with other law reforming agencies, has a reference from Attorney-General Medcalf (Western Australia) substantially parallel to that received by the ALRC from the Federal Government. It has already commented closely on the ALRC report, *Unfair Publication,* with its proposals on privacy protection. At the public hearing in Perth, the ALRC will be represented by its Chairman, Mr Justice Kirby, and two Commissioners, Professor Hayes and Mr. J. Mazza. The WALRC will be represented by Chairman David Malcolm Q.C. and Mr. Eric Freeman, Commissioner.

Prompted by this Western Australian innovation, the ALRC is investigating the possibility of similar arrangements with other State bodies with relevant interests.

State Moves. Privacy remains a live issue in most of the Australian States. Presenting the Liberal Party's policy statement in Queensland, the Party Leader, Dr. L. Edwards said that invasions into privacy were on the increase in Australia and that a committee should be established by Act of the Queensland Parliament with functions to receive and investigate complaints by the public of alleged violations of privacy by individuals, government departments, companies or businesses. In Western Australia, the WALRC has issued a report on the retention of court records. Though not specifically concerned with privacy, the report, by proposing procedures for retention and destruction, has clear implications for data protection. In New South Wales, the vigorous Executive Member of the NSW Privacy Committee, Mr. W. Orme, is reported to have 'put his job on the line' by allegedly accusing the NSW Government of failing to take action to stop the disclosure of records of juvenile offences, many years later. Mr. Orme criticised the Government for failing to take up the proposals suggested by the N.S.W. Privacy Committee. One of the issues addressed in the ALRC discussion papers, concerning sanctions and remedies which will effectively protect privacy, is whether resort to the media in this way is an adequate substitute for court remedies which can order, in appropriate cases, due protection for individual privacy.

Overseas Developments. Privacy protection remains an active concern in many overseas countries:

- In Canada, on 17 July, the Secretary of State, Mr. Richard Fox, introduced legislation providing for:
  - •• freedom of information legislation, with a public right of access to Government information
  - •• privacy legislation extending the individual's right to access to, and protection of, personal information in Government files
  - •• elimination of absolute Crown privilege

The Canadian Bill provides an independent review process by an Information Commissioner (or in the case of privacy, by the Privacy Commissioner). Provision is also made for judicial review in the Federal Court. The burden of proof to withhold access is on the Government and a refusal can be overruled by a judge. The legislation has been generally well received. It is suggested that it has been influenced by the Australian Senate Committee report on the Australian Freedom of Information Bill.

- In England, criticism is mounting concerning inaction on the proposals of the Data Protection Committee (Chairman: Sir Norman Lindop). In the *New Scientist* recently Malcolm Peltu writes: Home Office 'fiddles while privacy issues burn'. It is pointed out that demands for action on privacy are coming not only from the National Council on Civil Liberties but from the computer industry itself and from big business. This is because of the growing pressure in Europe, where there is comprehensive privacy protection

legislation, not to permit international flows of personal data without recipient protection for the privacy of subjects. This 'unlikely alliance' (*The Times,* 24 June 1980) calls for the creation of a data protection authority for Britain and for comprehensive laws on information privacy. Recent reports suggest that legislation on privacy is currently being prepared by the Home Office in England and that an announcement concerning the legislation will be made before the end of 1980.

- On the international stage, the Council of Europe Committee on Legal Co-operation finalised the text of the Draft Convention on Data Protection on 27 June 1980. The Draft Convention has now been sent to the Committee of Ministers which will examine it during meetings in the northern autumn. It is pointed out that the Draft Convention was elaborated in close co-operation with the EEC Commission and the OECD and that representatives of Australia, Canada, Japan and the United States had observed its preparation. Meanwhile, the OECD guidelines on privacy are due to go before the OECD Council, probably by the end of September 1980.

Wider Implications: The Myers' Committee Report. The last quarter has also seen debate about the wider implications of computerisation of society in Australia. Above all, the report of the Committee of Inquiry into Technological Change in Australia (Chairman Professor Rupert Myers) was widely distributed and debated in August 1980. The report concentrated on the effect of the new technology on stuctural change, particularly in employment patterns. But on the question of privacy protection, it took a line, consistent with the ALRC central proposal that, with exceptions provided for by law, individuals should have a right of access to computerised (and other) personal data. This right of access is the so-called 'golden rule' on information privacy. After declaring that the ALRC inquiry was 'an important task', the committee said this:

> 6.73 The committee is concerned that, although a considerable time has elapsed since the problems of potential intrusion into personal privacy made possible by new technology have been recognised, the rights of individuals with respect to the collection and use of personal data are not well established. The committee believes that individuals should have the right to be informed of the nature of the data held, to inspect the factual information and to challenge the accuracy of it and in appropriate cases to require the removal of stored information.

At the opening of Information Technology Week there was much agonising about the computer and its impact on society. An optimistic note was taken by Sir Charles Court, Premier of Western Australia:

> Surely, in considering information technology, what is required of us is that we weigh the advantages and the potential disadvantages against each other — not take each in isolation. Can we advance in medicine, in construction, in mining, in farming, in space exploration, in energy alternatives ... and in a host of other fields ... without computer-based information.

Sir Charles criticised the 'sudden fashion' to emphasise the traumatic and negative effects and to discount the dramatic and positive aspects of the new technology. Speaking at the same function, the ALRC Chairman drew attention to the recent Swedish Government report, *'The Vulnerability of the Computerised Society',* 1979. He pointed out that in this report a number of problems of a novel kind are called to attention and would have to be addressed in Australia before too long. Among the 'vulnerability factors' the community would have to face as it became a 'wired society' were:

- the greater risk of sabotage, espionage and susceptability to terrorism
- the greater potential of misuse for political or economic purposes, in an interdependent society
- increased risks resulting from catastrophies and accidents which put out of operation key computer facilities
- the critical functional importance of key computerized systems including banking, insurance and inter-corporate exchanges
- the growing importance of key personnel with access to data bases.

Mr. Justice Kirby pointed to the steps being taken in Sweden to face up to these problems. He said that when Australia had attended to the implication of computerisation to employment and personal liberties, it would need to face up to the problems posed to the vulnerability of society.

Lord Denning and judicial reform

> This is the age of legal aid, law reform — and Lord Denning
>
> Lord Scarman, 1977

> His view of justice is too personal, too idiosyncratic, too lacking in principle for greatness.
>
> J.A.G. Griffith (1979) 42 *Mod L Rev* 348-350

The controversy about the extent to which judges, in the forensic medium, should play a part in reforming the law has attracted further attention in Australia during the past few months. But about this topic, one 'towering figure' of the common law has no doubts. Lord Denning, now well into his 9th decade, shows no signs of flagging vigour or loss of confidence about the capacity of the common law of England to renew itself to deal, in innovative ways, with novel social and legal problems presenting themselves in cases coming before the English Court of Appeal. His stand was taken 30 years ago in *Candler* v. *Crane, Christmas & Co.* [1951] 2 KB 164, 178 in a decision which took 15 years to be accepted:

> The argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law. In each of these cases, the judges were divided in opinion. On one side there were timorous souls who were fearful of allowing a new course of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law, that the progressive view prevailed.

Amongst many young lawyers in Australia and elsewhere throughout the Commonwealth of Nations, Lord Denning is something of a hero. They like his admittedly iconoclastic approach which upsets older and more orthodox lawyers. Lord Denning once stated his approach before an Oxford audience thus:

> What then is the way of an iconoclast? It is the way of one who is not content to accept cherished beliefs simply because they have been long accepted. If he finds that they are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied in the case in hand. He will search the old cases and the writers old and new, until he finds it. Only in this way can the law be saved from stagnation and decay.

Celebrating Lord Denning's 81st birthday, the Sydney University Law School birthday party took many forms. Far the most extraordinary was a celebratory setting to stanza by Professor W. L. Morison of the decision in *Johnson* v. *Davis* [1979] [1979] AC 264 in which the House of Lords took a dim view (not for the first time) of some of Lord Denning's innovations. A sample verse will whet the appetite of those Morison students who have an unduly staid impression of that distinguished Professor. Referring to Jenny Davis' case, and to the tune of 'Island in the Sun' it goes:

> Now Jenny'd left the flat
> Lord Denning's heart went pit-a-pat
> His brethren's holdings had to go
> And with them *Young* v. *Bristol Aeroplane Co*

Verses of equal poetic and legal beauty follow. Rather more ordinary was the first Lord Denning Lecture delivered by Mr. Justice Kirby at Sydney University on 26 July. After recounting Lord Denning's career and his views on the need for reform amidst stability in the law, the lecturer referred to Lord Denning's disinclination to leave law reform exclusively to the Law Commissions. In *Liverpool City Council* v. *Irwin* [1976] 1 QB 319, 332, Lord Denning held that the courts should imply into a tenancy agreement (which said nothing about the subject) an obligation upon the landlord to take care that lifts and staircases were reasonably fit for the use of tenants and their visitors:

> I am confirmed in this view by the fact that the Law Commission in their codification of the law of landlord and tenant recommended that some such terms should be implied by statute. But I do not