Victorian Law Reform

> "The Victorians were not anxious to go away for the weekend. The Edwardians, on the contrary, were nomadic".
>
> T.H. White, *Fairwell Victoria*, Ch.4

In Victoria where things are always different, there are no fewer than three law reform bodies and the State Attorney-General, Mr. Hadden-Storey Q.C., also takes his own initiatives, as the recent proposal on defamation reform illustrates (see above).

The Victorian Law Reform Commissioner, Sir John Minogue Q.C., is also now the Chairman of the Victorian Chief Justice's Law Reform Committee, a voluntary part-time body which has been going strong since 1944. The Parliamentary committee (The Victorian Statute Law Revision Committee) under its Chairman Mr. Aurel Smith M.P., has been concentrating on an examination of a proposal that the Victorian State Constitution should include a Bill of Rights. Their report, which was tabled in December, recommended against such a provision. The Committee is co-operating with the A.L.R.C. on proposals for privacy protection, a matter on the agenda of each.

Under the headline "In Hot Blood" the normally staid Melbourne *Age* reported on 23 October on the V.L.R.C.'s latest Working Papers "Duress Coercion and Necessity" (#5) and "Provocation" (#6). The article records the relevant vignette that whilst Chief Justice of Papua New Guinea (Sir John retired in 1974) he tried more than 500 murder cases. He therefore had a unique opportunity to become very familiar with the defences argued in the criminal trial. The working papers cover similar territory. Each explores the extent to which the individual characteristics of an accused should be capable of providing a complete or partial defence.

In the paper on Duress, the V.L.R.C. adopts the proposal of the English Law Commission that duress should now be available as a defence to a charge of murder. To the argument that the sanctity of human life is such that the accused should sacrifice his own life rather than take another's, the V.L.R.C. suggests that the criminal law should not be seen as a blueprint for saintliness. Various alternatives are discussed for the reduction of the ambit of the defence and for the precise terms in which it should be couched.

The defence of Necessity is in many ways more fascinating. Every law student remembers the trial of the shipwrecks Dudley and Stephens who were sentenced to death when they killed a youth and ate his body to survive. Their sentence was later commuted to six months imprisonment. But a defence of Necessity was denied by a special panel of judges who considered the jury's finding.

In the United States, Necessity has been admitted as a defence in the case of prison escapees who were in fear of attack or bodily harm by other inmates. But Lord Denning recently held that homelessness was not a defence to trespass in a squatting case.

The V.L.R.C. recommends in favour of a general defence of Necessity carefully defined. The first basis is where the performance of a legally prohibited act may be justified by the exercise of the choice between two courses of action. If one can be said to promote greater social good or avoid greater harm, and this can be seen to be clearly the case, the act loses the taint of criminality and may be held to have been justified as being necessary.

The second basis proposed is that of excuse. A compassionate application of the criminal law pays regard to critical situations in which the individuals sometimes find themselves through no fault of their own. In such cases, so long as the individual has shown ordinary fortitude and decency, he should not be held blameworthy. The WP proposes that the jury should be the proper arbiter of community values. It rejects leaving the discretion to the executive or administrative agencies.

Some of the themes developed in WP 5 are repeated in the discussion of Provocation (WP 6). At the heart of the debate is whether the tests for the accused's conduct should be

objective i.e. the conduct of the reasonable person, or should concentrate only on the particular characteristics of the accused himself? The report quotes Mr. Justice Murphy's decision in *Moffa* v. *The Queen* and outlines the series of options by which Victoria could modify or abandon the present objective test. With its varied ethnic community, it is difficult to conceive the qualities or characteristics of the "ordinary person" in Victoria today. But under present law it is the propensity of such a person to lose his self control that must be considered against the conduct of the accused who may have temperamental traits which are different from the norm. The Commissioners' final report on these contentious issues will be awaited with interest.

The latest report of the V.L.R.C. (Report# 8) *Pre-Incorporation Contracts*, 1979, deals with the law relating to contracts purporting to have been made by a company or person as agent for a company at a time when the company was not yet formed. Because a company is an artificial creature of the law, it cannot, in current legal theory, before its creation, acquire or give rights or be subject to obligations. Even when formed, it cannot adopt or ratify acts performed or obligations incurred on its behalf before incorporation. All it can do to give binding force to such acts or obligations is to enter into a new contract. The unreality of this position for promoters and those dealing with them is spelt out and illustrated in the V.L.R.C. report. The difficulty of dealing with the problems that arise in large and small corporations is also dealt with. Legislative reforms overseas are examined and a number of proposals made for reform. These include:

- A company who would be able to adopt or ratify a contract and enforce and be liable for it, after incorporation.
- An epitome of any such ratified contract should be lodged with the Corporate Affairs Office.
- Where ratification is denied, a person purporting to contract on behalf of an unincorporated company would be deemed to warrant that within a reasonable time of its incorporation the company will ratify. Damages for breach of warranty should be as for breach of the contract.
- Companies, once incorporated, should not be permitted to take the benefit of an unratified contract.

Although dealing with a small area of company law, this is a commendable series of proposals and deserves consideration for uniform adoption throughout Australia.

What else is happening in Victoria? Attorney-General Storey has announced a departmental study of the operation of the Rape Offences (Proceedings) Act 1976 which followed a report of the V.L.R.C. The study has shown that the vast majority of rape victims are no longer having to face the trauma of being subjected to cross examination about their prior sexual history. In 75 trials, permission was given for cross examination about the complainant's sexual activities in only 9 cases. This follow up report on the operation of Law Reform legislation would seem to show that the reforms are achieving their stated objective.

The *Law Institute Journal* (September 1979) has a report that a committee appointed by the Law Institute of Victoria has concluded "the whole court system is outmoded, complicated, slow and inefficient". Experts are to be engaged and paid to prepare a comprehensive submission that could be used as a basis for reforms of the court system.

Matters to be investigated include:

- rationalisation of court jurisdictions.
- updating forms, practices and procedures.
- review of court costs.

In the same spirit of reform, a committee of the Institute has presented Commissioner Bruce Debelle (A.L.R.C.) with a submission in favour of limited form of class action procedure. More on this below.

The interim findings of the Dawson Committee of Inquiry into Conveyancing have been tabled in State Parliament. The Report con-

cludes that the argument that conveyancing costs in South Australia using land brokers are cheaper than in Victoria using solicitors cannot be sustained. The Report recommends that the existing monopoly of solicitors on conveyancing be maintained but that scale fees be abolished in certain cases. It will be interesting to compare these proposals with any proposals by the N.S.W.L.R.C. Inquiry into the Legal Profession.

Decline and fall of professions?

> "Being a hero is about the shortest-lived profession on earth.
>
> Will Rogers, *Roger's Thesaurus*, 1962

Recent weeks have seen the question asked whether the professions, like heroes, are on the way out.

Not so if the report of the English Royal Commission on Legal Services has its way. The main recommendations of the Royal Commission?

- *Solicitors/Barristers*: The two branches of the profession should remain separate with no partnerships between them or with other professions.
- *Advertising*: Solicitors should be permitted to advertise special skills and publish brochures.
- *Remuneration*: Calculation of fees should be made clearer to clients.
- *Conveyancing*: To be strengthened. Contracts for sale of land, presently uncontrolled, should form part of the monopoly on paid land conveyancing.
- *Advocacy in Higher Courts*: The barristers' monopoly to remain. In-house barristers not to be allowed to appear in court as advocates.
- *Professional Negligence*: Upper limits to liability to negligence by lawyers to be introduced.
- *Law Centres*: A system of citizens law centres should be established by government.
- *Legal Aid*: A higher threshold than at present and legal aid to be extended to tribunals and made a statutory right in higher criminal courts.

The report of the Royal Commission let loose a flood of anguished commentary. It was "the dog that didn't bark" according to Professor Michael Zander. Michael Beloff said it "lacks pulse and passion". "A damp squid" declared the *Daily Mail*. "Expensive and ineffective", "more pompous than ever" "what a waste" "an expensive Stg.1.25m flop".

The Guardian (4 October), more soberly describes the report as "a suspended sentence"

> "Any Royal Commission judged "magnificent" by the bodies which have been under scrutiny is in for a hard time. The lyrical reception by the legal profession's two main trade unions yesterday to the report of the Royal Commission on Legal Services will rightly raise public suspicions. Why such unqualified praise? Well look at the recommendations. ... By strengthening the solicitor's hold on conveyancing, the Commission has missed the best means of reducing charges ... South Australia, which has had licensed conveyancers for over one hundred years, has demonstrated how properly controlled house-sales specialists can bring down the costs of conveyancing without undue risks to the public.

Although The Thunderer was not yet back on the streets when the Royal Commission report was published, *The Economist* (6 October) did its best. Under a photograph of judges in ceremonial procession was the caption "Solidarity for ever". After dealing with individual points, *The Economist* then made a few general remarks:

> "How did the Commission go so wrong? It worked too closely with the lawyer's professional bodies. A major piece of research, that into solicitors' remuneration, was carried out jointly with the solicitors' organisation, the Law Society, which was thus able to influence the nature and scope of the questions asked. But the public at large was not taken into the Commission's confidence. Nor did other groups enjoy the privilege. The Commission issued no working papers or research reports ... Unfortunately, none of the few useful proposals made ... is examined in terms of costs and priorities. The proposals on legal aid beggar belief. The effect would be to direct massive sums of pub-