- In New South Wales, a major reforming statute on child welfare law lapsed with the dissolution of Parliament for a State election. It is expected that the new Minister, Mr. Kevin Stewart MP, will reintroduce a revised Community Welfare Services Bill early in the parliamentary session in 1982.

The Year of the Child has passed. But 1982 may be the year of child welfare legislative reform in Australia.

accident compensation : try again

It is not Justice, the servant of men, but accident, hazard, Fortune — the ally of patient Time — that holds an even, scrupulous balance

Joseph Conrad, *Lord Jim,* 1900, 34.

inquiry announced. Readers of these pages will know that one of the major reform controversies in Australia remains the subject of the just compensation of victims of accident. New pressure for reform has been exerted in recent months by verdicts of an unprecedented size for the grossly injured in motor car and industrial accidents. It seems that not a week goes by but another paraplegic recovers a verdict of more than $2 million. These amounts put pressure on the current mixture of workers' compensation, third party and negligence procedures, available in Australia for accident compensation cases. In 1974 the National Committee of Inquiry into Compensation and Rehabilitation in Australia, chaired by Sir Owen Woodhouse, recommended a national, no-fault, comprehensive scheme, similar to that operating in New Zealand. Although the former Prime Minister, Mr. Whitlam, introduced legislation based on the Woodhouse report, when in Opposition in 1977, the Federal Government has indicated that it will not be proceeding with the Woodhouse scheme, because of perceived opposition and funding and constitutional problems.

In mid November 1981, the State Attorney-General for New South Wales, Mr. Frank Walker QC, announced a reference to the New South Wales Law Reform Commission on accident compensation. Mr. Walker said that the NSWLRC would advise the NSW Government of how, in what cases, and to what extent, compensation might be payable for death or personal injury resulting from accidents. In particular, the Commission would be required to examine whether 'no fault' compensation should be payable for all cases of death or injury suffered, in the first case, in road accidents and, in the second case, in other accidents:

> Our existing laws on accident compensation can lead to gross injustices. For example, while one accident victim in a hospital bed could stand to gain more than $2 million, the person in the next bed, also an accident victim, could be liable for not a penny compensation. The first patient, a road accident victim, would be able to claim personal injury damages in court. The second, a housewife injured in a house accident, has no claims for compensation. The schemes the Law Reform Commission will examine would overcome these injustices.

wide reference. Among the issues raised by the reference Mr. Walker has given the NSWLRC are:

- whether no-fault compensation should be payable in respect of death or personal injury;
- if so, what benefits should be provided, the means of financing the scheme, administration of the scheme and the relationship to other forms of assistance or entitlement;
- whether no-fault compensation should be substituted for all or any rights to compensation under existing law, including workers' compensation legislation and common law damages;
- transitional arrangements to implement the scheme.

Commenting on the 'wide-ranging' scope of the proposed inquiry, the NSWLRC says:

> It is open to the Commission to examine whether the common law system of compensation should be modified. It will be remembered, for example, that the Pearson Royal Commission in the United Kingdom (the Royal Commission on Civil Liability and Compensation for Personal Injury) recommended that a threshold should be imposed for

damages for non-pecuniary loss and that a system of period payments should be introduced to pecuniary loss caused by death and lasting injury.

The NSWLRC points out that, though wide, the terms of reference do not include:

- compensation for illness, except work-related illness;
- prevention of accidents;
- rehabilitation of victims.

It is pointed out, however, that these matters could be considered insofar as they are incidental to the principal thrust of the Commission inquiry.

insistent calls. The reference to the NSWLRC is a prompt response by the NSW Government to a number of recent calls for reform action:

- following the plea at the Australian Legal Convention for a system of periodic payments instead of single verdicts, the *Sydney Morning Herald* (5 October 1981) urged that this would not be enough:

  Their introduction would not, however, remove the other objections to the present system of dealing with accident cases. Ultimately a national compensation scheme (in which the legal profession will have little or no part to play) will have to replace the primitive, unfair and extremely costly system we now have.

- A Melbourne law professor, Harold Luntz, has continued his insistent calls for overhaul of the accident insurance system. Writing in the *Law Institute Journal,* as reported in the *Age* (11 November 1981), Professor Luntz urges that the current compensation system advantages only the 'lucky few', encourages costly and uncertain court litigation, promotes high-cost last-minute settlements and encourages 'the lure of the lump sum' which destroys the incentive to improve.
- Following announcement of the NSWLRC reference, numerous letters to the *Sydney Morning Herald* (10 October 1981) urged sweeping reform. The President of the NSW Paraplegic and Quadraplegic Association, Dr. John M. F. Grant, wrote that the compensation of $2.7 million ordered to one quadraplegic could provide a modern facility for 42 people, with no recourse to the law for compensation:

  Surely we must look at the wisdom of persisting with this headlong rush into multi-million dollar verdicts and question whether some of the capital from whence such verdicts are to be paid would not be better diverted into provision of facilities [for the uncompensated disabled].

- Kathryn Bradshaw, on behalf of the Compensation Reform Action Group, criticised the current law as complex, inequitable, slow, discouraging of re-employment and totally failing to provide effective rehabilitation.

A comment in the *Sydney Morning Herald* of 5 October 1981 suggested that:

> one of the great obstacles to the change in the workers' compensation system is the legal profession itself. The former Prime Minister, Mr. Whitlam, expressed it colourfully at a dinner given by the NSW Society of Labor Lawyers in July last when he castigated a large number of lawyers present for attaching themselves to trade unions to ensure a steady income from handling union members' workers' compensation and third party claims.

critics speak out. Whilst many members of the legal profession welcome the introduction of a no-fault motor vehicle scheme, such as has been introduced in Victoria, Tasmania and the Northern Territory, others are sceptical about a comprehensive Woodhouse-type scheme which would abolish claims for damages, in which lawyers inevitably become involved. Mr. G. A. Murphy, Vice-President of the Law Council of Australia, has raised, in several conferences, his objection to the Woodhouse approach on the basis of:

- the total cost to society;
- the bureaucracy of processing claims;
- the temptation to Governments to reduce benefits;

- the abolition of 'proper' compensation for at least some victims of accidents.

On 16 December 1981 the High Court handed down two decisions (*Todorovic* v. *Waller* and - *Jetson* v. *Hanking*) on the approach to be taken to 'national discounting' of lump sum damages awards to take account of the effects of potential investment earnings and inflation and taxation. According to a report in the *Sydney Morning Herald* of 17 December 1981, the court pronounced that damages for the one cause of action must be recovered once and forever and, unless there is a statutory exception, must be awarded as a lump sum and that the court cannot order period payments. Chief Justice Gibbs and Mr. Justice Wilson are reported to have said that the law relating to the assessment of damages for personal injury is far from satisfactory, but that:

> any decision as to the way in which the law should be reformed depends on views as to social policy which can be formed only by the legislatures

This decision and other recent court verdicts, the injustice of uncompensated victims of accidents and a special legislative compensation for victims of work, sporting and criminal injuries, all suggest that the NSWLRC will have a lot on its hands as it approaches the subject of accident compensation reform.

reform action. Even when the NSWLRC reports, it will be a long haul before reform action can be expected. In a subject where there is strong feeling in the legal profession, the insurance industry and the trade union movement, the road of the reformer will not be easy. This much was admitted in an editorial in the London *Times,* 'Listen to the Judges' (19 October 1981). Commenting on a call by Lord Denning in early October 1981 for legislative intervention to reform the law governing damages for victims of injuries, the editorialist pointed to the inefficiences, injustices and uncertainties of the current compensation system. Not surprising, he reverted to what Professor Luntz has called the 'lump sum syndrome':

> Should an assessment of damages also be subjected to periodic review? 'Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future losses and suffering — in many cases the major part of the award — will almost certainly be wrong. There is really only one certainty: the future will prove the award to be either too high or too low', Lord Scarman admits. Allowing the parties to the original litigation to come back for re-assessment, in the light of supervening circumstances, is one way of reducing the element of lottery that our law on damages inescapably contains. All of these issues were canvassed thoroughly in the Pearson Report on Civil Liability which the Government has, inexcusably and to its great discredit, ignored. Now the judges have thrown their weight behind comprehensive reform. It is surely time for the Government to take notice.

So far, no action from the United Kingdom Government; but another inquiry was announced in Australia.

sentencing council?

Consistency requires you to be as ignorant
today as you were a year ago

Bernard Berenson

federal reforms. An important legislative measure introduced into Federal Parliament by the Federal Attorney-General, Senator P. D. Durack QC, implements a number of recommendations contained in the ALRC interim report, *Sentencing of Federal Offenders* (ALRC 15). Among the proposals picked up in the Crimes Act Amendment Bill 1981 are some which were put forward as final recommendations and others which were advanced on a tentative basis by the ALRC. Apparently, the latter sufficiently convinced Senator Durack to proceed without delay. The result is a significant reforming statute. Included in the 'package' are:

- provision that, when a gaol term is not mandatory, a person convicted of a Federal or Capital Territory offence should not be sentenced to prison unless the court is satisfied that in all the circumstances no other penalty is appropriate;
- provision requiring a court to state its reasons in writing why no other sentence