- 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 reassessment, 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

is appropriate, if a prison sentence is imposed;

- provisions enabling a Federal offender to apply, on grounds of financial circumstances, for further time to pay a fine or for any other available order in lieu of imprisonment;
- provision to make available for the punishment of Federal offenders, alternatives to imprisonment (such as community service orders or weekend detention) available in the State in which he is convicted. Typically, community service orders are much cheaper than imprisonment, have fewer damaging side effects and promote a sense of community responsibility by requiring convicted offenders to perform work such as community gardening, assisting aged persons and other like services.

At the close of business in the Australian Parliament at the end of 1981, the Bill had been passed through the Senate. It was anticipated that it would be amended by the Government in the House of Representatives and then resubmitted to the Senate for passage early in 1982.

The initiative in introducing the Bill (which also contains a major review of penalties in Federal legislation) can be seen as part of the endeavour of the Federal authorities to update the criminal justice and penal system within the Commonwealth's domain. The reforms were acknowledged in the media, the *Canberra Times* (10 September 1981) saying:

> Senator Durack's proposals, stemming from a Law Reform Commission report, are entirely commendable — but they have been a long time in coming. . . . Federal offenders will gain equality with State offenders in terms of the kind of penalties that can be imposed, while ACT offenders have gained something less. But another, more important form of equality proposed by the same Law Reform Commission report, Guidelines for Magistrates and Judges to Ensure Consistency in Punishments for Similar Crimes, did not rate a mention. . . . Regrettably, the anomalies and discrepancies are all too apparent from figures taken last year showing the number of prisoners per 100,000 of the population in each State and Territory, the ACT and the NT being the lowest and highest respectively and the States all being two, three or even fives times the ACT rate. It is not possible to believe that levels of crime vary so widely — clearly there are very great differences between jurisdictions in the use of imprisonment. Senator Durack has brought about some notable reforms both in legislation and in the courts. But it is not time yet for him to rest upon his laurels.

consistency problem. This editorial was written before the form of the Federal legislation was known. In introducing the legislation, Senator Durack indicated his intention to have discussion with State Attorneys-General about the establishment of a national Sentencing Council comprising judges, with a view to the creation of an institution which could lay down guidelines to bring greater consistency in the punishment of offenders in all parts of Australia. In November 1981, the Federal Attorney-General spoke to the State Ministers seeking their support for the creation of the Sentencing Council. The Council proposed by him differs somewhat from that envisaged in the ALRC report. The latter proposed a Council comprising judges, magistrates, criminal justice administrators, correction authorities, legal practitioners and academics. The ALRC urged that the judicial members should form the majority. Under Senator Durack's initiative, the Council will be comprised of judges only. Furthermore, Senator Durack's proposal is for the establishment of a Sentencing Council administratively, rather than by legislation.

In December 1981, the Federal Attorney-General told the *Sydney Morning Herald* (1 December 1981) that he had had discussions with the State Attorneys-General concerning the Sentencing Council. He 'hoped it would be working soon'. Its members would be drawn from 'Federal, State and Territory judges'. It would seek uniformity in sentences rather than changes in statutory penalties available. The legal correspondent for the *Sydney Morning Herald*, John Slee, pointed out that difficulties would arise from:

- differing terminology in the different States concerning like but not identical offences;
- different laws and policies on parole;

- different attitudes to the use of sentencing statistics.

Soon after Senator Durack's initiative was announced, the Victorian Attorney-General, Mr. Haddon Storey QC, announced his support for the move to establish the national Sentencing Council.

Delivering the inaugural Whatmore Memorial Oration in Melbourne on 10 November 1981 on the subject 'Modern Developments in Penology', Mr. David Biles, Assistant Director of the Australian Institute of Criminology, called attention once again to the significant disparities between jurisdictions of Australia in the use of imprisonment, parole and probation. His principal thesis was the need to reduce 'the average length of time that offenders stay in prison'. He felt that this, rather than the provision of alternatives to imprisonment, was likely to have the greater impact. But how was it to be secured? Mr. Biles said:

> As far as sentences imposed by the courts are concerned, I believe that much more could be done to reduce disparity in sentencing and avoid the unnecessary use of imprisonment by the development of guidelines or statements of principle . . . . It is gratifying to note that the Commonwealth Government has very recently moved to define imprisonment as a punishment of last resort as far as Federal offenders are concerned. It is also gratifying to note that the Commonwealth Government, on the recommendation of the Australian Law Reform Commission, is moving to establish a national Sentencing Council of judges whose main task will be to establish sentencing guidelines.

Mr. Biles said that 'the most important thing that has to be said about modern penology is that there is now fairly widespread and generally accepted belief that the number of people held in prison should be kept as low as possible'. Federal legislation and administrative efforts are now heeding this well-established, well-documented but not always popular lesson of reformers and penologists.

Comments on the initiative of Senator Durack in the media have been favourable. The Hobart *Mercury* (3 November 1981) put it this way:

> The Federal Attorney-General, Senator Durack, is pioneering moves to try to iron out inconsistencies in sentences handed down in State and Federal Courts. It is a move that is long overdue. What seemed to be gross inequities in sentences for similar offences are daily occurrences in Courts throughout the land. Similarly, there are many instances where serious offences attract far more lenient sentences than relatively minor breaches of the law. These apparent inconsistencies in sentencing have done nothing to improve public respect for the law or the Courts. ...The report of the Law Reform Commission formed the basis of what Senator Durack is now proposing. ... Interestingly, Senator Durack's proposal covers a wider field than that suggested by the Commission. The Commission can concern itself only with Federal law and Federal Courts. Senator Durack wisely wants the attempt to correct sentencing inconsistencies to extend to State Courts. ... Victoria already has agreed to co-operate with Senator Durack. All States have nothing to lose and much to gain by doing the same.

To the same point is the editorial in the Melbourne *Herald* (2 November 1981):

> One of the most intricate problems remains how best to ensure reasonably even treatment of offenders. Difficulties are increased by our system, in which Federal offenders are generally dealt with by State and Territory courts. There are also wide differences in jailing practices within jurisdictions, under purely State or Territorial law. No-one has yet come up with a generally satisfactory answer. But the decision of the Federal Attorney-General, Senator Durack, to seek Federal and State co-operation in implementing a national council on standardisation of sentencing, as suggested by the Law Reform Commission last year, is welcome as an exploratory step.

n z proposals. Whilst reforms are being initiated in Australia, an interim report of the New Zealand Penal Policy Review Committee became available in September 1981. The Chairman of the Committee is Mr. Justice Maurice Casey of the New Zealand High Court. The committee was established in February 1981 by the New Zealand Minister of Justice, Mr. J. K. McLay MP. The committee, which comprises judges, the Secretary for Justice (Mr. J. F. Robertson), academics and other current or retired Crown officers outlined in its interim report the way in which it is proceeding towards its general final recommendations. These are expected to be in the hands of the New Zealand Government early in 1982. The committee has divided its terms of reference into five sections

and five working parties have been established to prepare drafts on those sections.

The Council has before it a submission by the Department of Justice of New Zealand urging the establishment of a Council to review court sentencing practices. Such a Council would not be designed to challenge judicial discretion, which would continue to occupy a central place in the penal process. However, the manner in which sentencing policy was applied had a major influence on the policy, cost and administration of the penal system and therefore required Government to take 'sensible and positive measures to ensure that sentencing policy was clearly enunciated, understood and applied'. The functions proposed for the Sentencing Council by the Australian Law Reform Commission were outlined in the New Zealand Department of Justice submission.

Interestingly enough, the interim report indicates that the New Zealand committee is conducting a survey of the New Zealand judiciary on sentencing. The initiative of the ALRC in conducting such a survey in Australia provoked general support amongst the judiciary (there was a 75% return) but resistance and criticism in one State. It will be of interest to compare the New Zealand experience:

> Consultants have been engaged to carry out a survey of the judges of the Court of Appeal, High Court and District Court in respect of sentencing. This will lead to a fuller appreciation of the judiciary's attitude to penal policy and has their full support. No review of sentencing options and sanctions can be complete without such information. The committee is satisfied that the review is proceeding on a very broad public front. An extended public participation has been sought and obtained with the combination of a large number of submissions from a wide area of interests; a publicity program which includes advertising, release of submissions to the media, media interviews and press releases; the wide range of skills and interests held by members of the committee and the working parties; and a large number of visits to special interest groups by the working parties. Clearly, penal policy is an area for public education, and this review has taken steps towards meeting that need.

Amongst other matters canvassed in the interim report are:

- an identification of the guiding principles of the criminal justice system;
- the use of new modes of punishment including criminal bankruptcy and 'day fines';
- review of prison classification and use;
- review of facilities in prison to promote rehabilitation, work training and industry;
- consideration of expungement of criminal records.

The interim report calls attention to the much higher rate of imprisonment in New Zealand when compared to other countries. In August 1981 New Zealand penal population stood at 88 per 100,000 compared with 66 in Australia, where the figure has fallen from 168 per 100,000 in 1910. But even these figures are high by Western European standards. For example, in The Netherlands, so often cited, the figure is only 22, largely because of shorter prison sentences.

other developments. Further developments in the last quarter include:

- The Western Australian Chief Secretary, Mr. Hassell, has introduced into State Parliament in October 1980 a Bill designed to reduce the WA prison population, which is the highest in any State in Australia. Amongst reforms in the new Prisons Bill is the increase in the rate of remission for good behaviour from one quarter to one third of the sentence for prisoners serving a finite term;
- In Victoria, the Chief Commissioner of Police, Mr. S. I. Miller, condemned a recent kidnapping case as 'an absolutely deplorable trend which has developed in crime'. The only answer to this kind of violent crime, he declared, was for the courts to impose stiff penalties. 'One would hope' said Mr. Miller 'the condemnation of society would be reflected in the courts after the perpetrators have been properly convicted. The deterrent for these crimes has got to come from the courts'. The *Age*, 10 November 1981.

- On the other hand, the Executive Director of the Australian Foundation on Alcoholism and Drug Dependence, Mr. Pierre Stolz, delivering a personal view to a Conference of Stipendiary Magistrates in Hong Kong, warned against 'simplistic efforts' to reduce or eliminate drug consumption by the imposition of tougher penalties. According to Mr. Stolz, current efforts to reduce drug abuse in Australia were 'doomed to failure' because prohibition and tougher penalties imposed by a minority did not appear to work. He questioned the implementation of the recommendation on punishment in the Australian Royal Commission of Inquiry into Drugs and called for 'control policies on all drugs' which he said should be consistent with other controls on activities such as gambling and 'risk taking' activities such as hang-gliding'.

- In October 1981, the Victorian Minister for Community Welfare, Mr. Jona, reported a big rise in the number of women convicted of crimes and sentenced to imprisonment. The Queensland Minister for Police, Mr. Hinze, said that the number of crimes committed by women and juveniles was rising. The statistics showed that crimes by females had increased from 14.2% in 1978 to 22.1% in 1980. Mr. Jona reflected that it was a result of the move of women and of the courts towards 'sexual equality' in crime and punishment.

- According to the official Pars news-agency, the President of the Iranian Supreme Court, Judge Musavi Ardebili, has revealed that a number of Iranian judges have been imprisoned for 'weaknesses and irregularities and making mistakes'. According to the news report, one of the grounds for imprisonment was that the judges were too 'weak'. Law reform works in differing ways!

insurance bill

The business of government is to keep the government out of business — that is, unless business needs government aid

Will Rogers

campbell report. In mid November 1981 the Federal Treasurer (Mr. J. W. Howard) tabled in the Australian Parliament the report of the Committee of Inquiry into the Australian Financial System. The report is known for the Chairman of the committee (Mr. Keith Campbell). It suggests a major Federal initiative towards the reduction of government regulation of business, particularly in the financial sector. A number of suggestions are made relevant to projects before Australian law reform bodies, notably proposals concerning the need for reform and unification of laws governing credit and debts. Interestingly, the Campbell Report comments on the Australian Law Reform Commission report *Insurance Agents & Brokers* (ALRC 16). Noting that there has been little regulation of insurance brokers or agents in Australia and that self regulation has been fragmented. The committee also points out that neither common law nor statute are clear concerning the responsibility of insurers for the actions of their agents. It was to clarify this responsibility that much of the ALRC report was directed. In June 1981 the Treasurer announced the government's rejection of the ALRC recommendations for a system of registration of insurance brokers and a requirement for brokers to maintain client funds in audited trust accounts. Significantly perhaps, the Campbell Report did not embrace faith in self regulation and on the contrary expressed concern about the proliferation of differing State laws to regulate insurance brokers:

> The committee would not favour sole reliance on self regulation. Governments clearly have a role in protecting individual consumers against fraud and misrepresentation. The committee also stresses the desirability of consistent regulation. ... It believes every action should be taken by the Government to ensure that appropriate co-operative national legislation is developed. This could provide for the holding of funds in trust accounts in connection with their business as brokers, as recommended by the Law Reform Commission.