reform

A regular bulletin of law reform news, views and information
Australian Law Reform Commission, Box 3708, G.P.O., Sydney, 2001, Australia

Editor: Mr. Justice Kirby

oct. 1982 no. 28

in this issue

reformers' introspection	118	of constitutions and courts	144
the legislative branch	121	tax reform	147
aboriginal law: progress	125	odds and ends	148
lawyers' soft sell	128	new reports	149
good ideas	131	new references	150
the law's delay	132	what's going on in the LRC's?	150
and a good judge too	136	obituary	154
migrants' law	139	personalia	154
crimes commission controversy	141		

reformers' introspection

The Law Reform Commission, with respect, is a body of gentlemen with no knowledge of animal habits.
Hon. O.M. Falkiner MLC, N.S.W. Leg. Council
Debates 30 March 1977, p. 5949

reformers meet. The sixth meeting of the Australian Law Reform Agencies Conference convened in Adelaide on 24-25 September 1982. Present were representatives of all Australian law reform agencies. In addition, Mr. Pomat Paliau, recently appointed Secretary of the PNGLRC, attended.

Mr Justice Zelling (Chairman SALRC) introduced the Chief Justice of South Australia (King CJ) who gave the opening address. Referring to the difficulty of obtaining parliamentary time for the enactment of the recommendations of law reform agencies, the Chief Justice said an antidote might be 'awareness':

> It is necessary to induce and sustain a constant awareness in Government, Parliament and the public of the pressing need for the law to keep abreast of the changes in society. Only that awareness will ensure that the recommendations of law reform bodies are translated to the Statute book. Changes in society continue to intensify and accelerate, and the need for law reform activity correspondingly increases.

Referring to highly controversial and sensitive questions, such as law and de facto partners, artificial insemination, in vitro fertilisation and genetic engineering, Mr Justice King proposed that law reform bodies were 'by far the best equipped available instruments' to undertake the first step of laying out the legal options and exploring the legal consequences. The second step of opting for change was much more difficult; but could not be ignored lest vital decisions be taken out of the hands of the law and 'made by individual scientists in their laboratories'.

democratic legitimacy. The second lead paper was offered by Professor Ronald Sackville (Chairman, NSWLRC). Offering 'some reflections on the role of law reform commissions' Professor Sackville drew attention to the 'democratic legitimacy' of law reform commissions, receiving their tasks from the Attorney-General and reporting their conclusions to him. He quoted observations of the new Governor-General of Australia, Sir Ninian Stephen, while still a member of the High Court of Australia, in contrasting the 'abrupt and radical quality' of judicial law-making with the 'painstaking work of law reform commissions' which engage in a 'process of reasoned persuasion'. Professor Sackville urged that LRCs should seek references on broad and potentially controversial issues as part, but not the only part, of their work programs. He also envisaged an important practical task of monitoring the progress from report to statute:

> The final report, although marking the end of the commission's examination of a reference, constitutes only one phase in the educational process. Its value as an educational document is seriously diminished if members of the commission are precluded from public discussion of the reasoning and recommendations in the report.

Professor Sackville suggested that the only exception to this rule would be the positive rejection by the Government of reform proposals:

> The time is ripe for law reform commissions to give careful consideration to their place within the legal system. While modern law reform commissions have become a well-established component of the legal system, many unresolved issues remain concerning their role and functions.

Professor Sackville's paper is important because of the consideration it gives to what it identifies as three major issues to be addressed by modern law reformers:

- the nature, content and balance of their programme
- the extent of post-report discussion and lobbying
- the broadening of LRC functions to include continuing responsibility for law reform suggestions from the legal profession and the community at large.

The last major paper for the conference was by Mr Hal Jackson of the WALRC. He presented a paper largely prepared by Mr Eric Freeman, past Chairman of the WALRC, now appointed W.A. ombudsman. (See below p. 155) Titled 'The Cost Effectiveness of Law Reform Methods and Techniques or "Driving the Law Reform Dollar Further" ', the paper tackled the issues of consultation:

- How successful are working papers and discussion papers in inviting comment?
- How valuable are the responses? Do WPs and DPs have other purposes e.g., political, public participation?
- Do governments and the public want/need the degree of research LRCs typically give?

Mr Jackson's paper invited a flurry of comments which continued to the close of the sixth conference. The seventh ALRAC conference will be held in Brisbane in 1983, coinciding with the Australian Legal Convention. A major meeting of the law reform agencies of the Commonwealth of Nations is to be held in Hong Kong to coincide with the Commonwealth Law Conference there in September 1983. These national and international law reform meetings are now a settled feature of the law reform scene. Of course, law reformers have to be careful that they do not spend their entire professional lives in introspective ruminations. Just the same, as the role and techniques of LRCs develop, the value of ideas is paramount. Two workshop series in recent months deserve to be noted:

philosophers step in. In mid May 1982, the first of a series of working seminars was held at the University of Newcastle. Convened by Professor of Philosophy C.A. Hooker, the workshop tackled the theme 'the challenge of rapid change'. The report on the program, which gathered together some top lawyers, government officials, scientists and philosophers, became available in September 1982. As evidence of the variety of problems facing law reformers in Australia today, the list of subjects dealt with by the seminar is impressive. Some of them:

- legal change by legal experiments;
- laws as a response or as an anticipatory social control;
- justification and positive control of medical intervention;
- temporal, institutional, cultural and other limits to legal response to problems;
- law and social information;
- law reform values and processes.

As befits a conference organised by a philosopher, a good deal of attention was paid to the last-mentioned issue. The subject of 'values' by which law reform suggestions may be made, is one from which practising law reformers often retreat. Professor Hooker, Professor Stanley Benn (ANU) and other philosophers present challenged the law reformers:

> What value judgments are in fact made? What value judgments ought to be made? How are the answers to this latter question influenced by social and political philosophy? How do the value judgments involved in law reform structure its processes and outcome? Should that structuring be made explicit within law reform commission reports themselves? A case can be made for an affirmative answer both from intrinsic desirability of the explicit disclosure of assumptions for all rational human processes and in recognition of the diversity of value positions presented to society. . . . A case can be made for non-disclosure, on the grounds that it would bog otherwise pragmatically consensual reforms down in endless disputes about values and commission reports would not achieve the range of discussion and effectiveness in attracting parliamentary and civil service support if they digress too far from immediate legal concerns.
>
> Report of the Working Seminar, *The Challenge of Rapid Change,* Univ. of Newcastle, 1982

The seminar at Newcastle was sponsored jointly by the University, the Law Foundation of New South Wales and the Law Society of New South Wales.

sydney workshops. The Law Foundation of N.S.W., in another initiative, has convened a permanent series of workshops on law reform to bring together institutional law reformers, judges, legal practitioners and others in monthly meetings to discuss law reform technique. The Chief Justice of New South Wales (Sir Laurence Street) and other judges of the Supreme Court of N.S.W. have taken an active part in meetings so far. To date, there have been three meetings:

- In July, ALRC Chairman Mr Justice Kirby, fresh from the Newcastle conference, reviewed the same issues of law reform values and philosophy.
- In August, Dr Greg Woods, Head of the Criminal Law Review Division of the Attorney-General's Department (N.S.W) reviewed the practical achievement in reform of the law of homicide within his Division.
- In September, Dr Peter North, Law Commissioner of the English Law Commission examined the process of consultation.

Mr Justice Kirby's contribution admitted that the common law legal system tended to be embarrassed about values, and content with moving, sometimes over decades, from single instances to a principled legal development. He suggested that it was the duty of LRCs to do better than this and to examine the issues of methodology needed in the process. Dr Woods referred to the advantage that could arise when the law minister took a keen interest in law reform and backed up proposals with political clout, to ensure that law reform efforts were quickly translated into law. This philosophy was repeated by the N.S.W. Attorney-General, Mr Frank Walker QC, in a revealing interview in the weekend *Australian* (2 October 1982):

> Law reform commissions in the past were made of grey-headed people who cogitated for unconsionably long periods. What we must do now is meet immediate needs. And if that means sometimes putting forward legislation quickly as it is needed, even if it is not fully polished, and if that in turn means that it has flaws that

> need amending legislation, then it can be quickly patched up, I'm never embarrassed to go back to a piece of legislation and amend it.

Dr Peter North, visiting Australia for three weeks in September/October 1982 addressed the workshop on 22 September 1982. Starting with a review of the remarkable development of law reform agencies throughout the common law world and the several 'common aspirations and problems', Dr North acknowledged that the worldwide law reform movement could learn from experiments in other places:

> Use of the working paper method of consultation, developed by my Commission . . . has been copied . . . It was developed further by the Australian Law Reform Commission's use of much shorter, widely distributed pamphlets — a technique which we in England have since adopted and adapted for our own use.

But Dr North turned to the question of the excess of consultation — 'Is there too much of it?' he asked:

> Is there a danger of a law of diminishing returns in operation? Widespread consultation . . . is regarded as necessary to give the law reform process legitimacy. The regular recipients of this weight of material are showing signs of distress under their burden . . . Is this a problem in Australia? If so what is the cure for this? Is it to make working papers less 'learned', less comprehensive . . . ensuring that they go directly to the heart of the issue . . . Is there too much consultation altogether? The English experience is one of difficulty, from time to time, in the case of government consultation. Decision-makers have to react to a report — they do not *need* to react to a working paper.

In his closing comment Dr North, who has now returned to his post in the Law Commission, took a swipe at tedious legislation:

> English legislation, including law reform legislation, is unduly complex and lengthy. One reason for this is the legislature's desire to make the statute 'judge-proof' . . . If the legislature is to be the new custodian of the common law — advised by law reform agencies — should it not be prepared to lay down no more than general principles, leaving the detail for judicial decision . . . so as to enable the judges to continue their creative role within the new general principles laid down by statute?

The October Law Foundation workshop is to be addressed by Mr Tim Moore, N.S.W. Opposition spokesman on legal matters. His contribution promises to be equally lively, dealing as it does with such matters as:

- parliamentary adoption of freedom of information laws;
- securing reform, long promised, in suicide law;
- a non-official comment on the recent failure of the N.S.W. Parliament to achieve homosexual law reform.

the legislative branch

> Congress is so strange. A man gets up to speak and says nothing. Nobody listens — and then everybody disagrees.
> Boris Marshalov

an end to jibes? Parliament and politicians are fair game for criticism and denigration. Cheap jibes proliferate. Take James H. Boren's American effort:

> Einstein's theory of relativity, as practised by Congressmen, simply means getting members of your family on the payroll.

The need to get behind the parliamentary institution and to make it work more effectively has been a constant theme of leading institutional law reformers. Speaking in a BBC interview, on the retirement of Lord Denning, the first Chairman of the English Law Commission, Lord Scarman expressed a preference for the parliamentary over the judicial method of law reform. He suggested that law reform agencies helping parliament to develop the law was a much more satisfactory procedure of law reform than idiosyncratic judicial decisions.

To the same point was the comment of the ALRC Chairman, speaking at a seminar on community information organised by the Inner Sydney Regional Council for Social Development on 20 July 1982:

> Law reform commissions provide politicians with appropriate routine machinery for dealing with difficult, controversial, sensitive questions. If the parlia-