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-

mentary institution is to survive, it must deal with questions of this order as well as vote-catching questions. Parliamentarians need institutional support and to some extent they need to distance and protect themselves from outcry and strongly held views in minority groups. Unless there has been an adequate exposure of sensitive and controversial questions before they are considered in Parliament, it is possible, indeed likely, that parliamentarians will take the easy course and shelve what may be important and generally accepted reform measures. Modern democrats will work to improve and uphold the parliamentary institution. But that institution needs help, not least in the time when the modern media of communication can exacerbate and exaggerate and encourage the tendency to avoid difficult problems. Parliaments and parliamentarians, of all political persuasions, need expert assistance, provided by bodies which have faced the 'test of fire' of media, lobby and public scrutiny of tentative reform proposals.

Likewise addressing the 19th Annual Congress of the Royal Australian and New Zealand College of Psychiatry in Perth on 11 October 1982, the same speaker drew attention to the need for adaptation of democratic institutions to ensure that controversial and sensitive questions such as mental health law reform, could be developed in the first branch of government:

> The true democrats amongst us will seek to ensure that the representative parliament rather than the elite judiciary or the opinionated bureaucracy, provide the important law reforms including on such community problems as mental health law. Yet unless the representative parliament and the community it reflects can be assisted, it is likely to postpone difficult and controversial problems to another time. And that is precisely where bodies such as the Law Reform Commission come in . . . If our democratic institutions are to survive and are to be more than a cliché in our system of government, it is important that we should vigorously develop support machinery that will assist the legislative process to address promptly and systematically the needs of legal renewal in Australia.

kite flying. Commenting on the proposal for the use of LRCs as a means of testing reform 'before it is imposed on a public that may have strong and valid objections' the editorial in the Sydney *Daily Telegraph* (21 July 1982) saw merit in this:

> The people . . . are not the sheep some politicians would believe — capable of crossing the right square at an election if they have not been upset by something but, beyond that, incapable of thinking for themselves. They do have ideas and can understand and accept someone else's grand plan if it is explained — not just foisted on them . . . Why not, as Mr Justice Kirby rightly suggests, make use of outside expertise by appointing consultants? Why not present ideas to the public through the media, seminars or discussion papers? Why not conduct public hearings and test the reaction or hear the ideas of the people?

This thesis of public participation, notwithstanding the increasing technocratic nature of modern society was developed by Mr Christopher Puplick, former Senator for New South Wales in an address to the N.S.W. Freedom of Information Council in April 1982. He reminded his audience that Harold Macmillan had once stated that democrats 'had not fought to overthrow the divine right of kings simply to replace it with the divine right of experts'. Mr Puplick referred to developments in biotechnology and information science to justify the need for fresh attention to the operations of the parliamentary system of government. He urged:

- establishment of a joint parliamentary science and technology committee;
- creation, to service it, of an independent scientific body for advice on scientific and social issues;
- more effective use of mechanisms which already exist for public involvement and participation, 'in particular the law reform commissions around Australia';
- establishment of citizen advisory bodies;
- creation of, 'science court' to expose arguments about science and technology affecting society.

the great centrepoint. Concern about the effectiveness of the legislative process and particularly of Parliament has been sounded in many quarters since the last issue of *Reform*. On 18 July 1982 in an opening address to the Young Liberal Movement Council in Sydney, Senator Alan Missen (Lib-Vic) ruminated on the 'declining performance' of the Parliament:

> One can only observe the performance of Parliament in recent years with some foreboding. Efforts must be made to return Parliament to the centrepoint of our system and to curb the excessive powers which Cabinet and outside cliques and organisations have over its determinations. I am concerned at what I believe is the declining calibre of the Parliament and its relatively

> poor performance. It is, of course, accentuated by the trivial ways in which its deliberations are reported in the media of this country.

Returning to the same theme in an address for the N.S.W. Young Liberal Council on 27 July 1982, Senator Missen discussed 'the decline of parliamentary government in Australia'. It is an important address with a broad historical analysis. It repeats Professor Gordon Reid's 1980 diagnosis 'that the elected parliament is a weak and weakening institution' with a loss of power to the Executive Government and to the judiciary. Senator Missen seeks to identify the chief factors in this decline. Most alarming is the statistic on the diminishing number of major reports produced in recent years by the standing committees of the Federal Parliament in Australia. The cure?

> There needs to be growing recognition of the need for constitutional reform, and this will probably mean bringing the public more closely into discussions which, so far, have taken place only among parliamentarians on constitutional reform issues. We must see whether the updating of our Constitution cannot achieve also an updating of the role of Parliament . . . The political scene in Australia, and in other democracies, has been a mean and divided one over the last ten years. We have seen a decline in consensus and the loss of common values which once united Members of the Parliaments and enabled a great area of public responsibility to be debated rationally . . . I believe that the conversation of politics can be elevated, and must be, if we are to continue with the Parliamentary system.

a glacial pace? Members of parliaments (Federal and State) continue to take an interest in law reform. On an institutional basis, the Australian Parliament's Senate Standing Committee on Constitutional and Legal Affairs has assumed a major role. In its *Report on Annual Reports* (September 1982) the bipartisan committee reviewed the sixth and seventh annual reports of the ALRC. A specific recommendation is made that the Federal Government should give consideration to the staffing of the ALRC 'with a view to providing the Commission with sufficient staff to properly discharge its important task of law reform'. Other matters called to attention:

- the value of draft legislation attached to ALRC reports;
- the 'high regard' held for work of the ALRC. The Senate Committee expressed the unanimous view that 'the value of its contribution to the process of law reform is simply beyond question';
- the slow rate of response by the Government to ALRC recommendations and reports which the report describes as a 'glacial' rate of implementation and comments 'in view of the extent and thoroughness of the Law Reform Commission reports it is difficult to think of any justification for such delays';
- the inadequacy of the resources of the Senate Committee fully to assume the oversight of the implementation of ALRC reports accepted by the Senate Committee as one of its functions, by resolution of the Senate, passed in 1981.

Outside the Parliament, the Deputy Chairman of the Senate Committee, Senator Gareth Evans (Lab.-Vic) criticised the performance of the Federal Attorney-General, Senator Durack in law reform. In a statement issued on 8 September 1982, Senator Evans instanced as examples of 'non-implementation or delay':

- the report on *Criminal Investigation* which produced the Criminal Investigation Bill 1981, introduced in November 1981 'and not seen in the Parliament since';
- the report on *Unfair Publication,* defamation law reform which Senator Evans claimed 'was languishing in the Standing Committee of Attorneys-General';
- the rejection of the report on *Insurance Agents and Brokers;*
- inaction on the report on *Sentencing of Federal Offenders.*

Senator Durack in response, listed five major law reform achievements during his five years as Attorney-General:

- the passage of freedom of information legislation;
- the enactment of offshore sovereignty legislation;

- the creation of the Human Rights Commission of Australia;
- successful negotiations with the United States concerning anti-trust law application in Australia;
- achievement of agreement with the States to abolish Privy Council appeals.

Senator Evans on 13 June 1982 released details of proposals for law reform, in the event of the election of a Federal Labor Government. Amongst proposals with a specific law reform content were:

- establishment of a National Law Reform Advisory Council with representatives from governments, opposition and law reform agencies from the Commonwealth and each State and Territory 'to more effectively co-ordinate and advance the work of law reform and major issues of common or national interest';
- law reform governing sentencing and parole to ensure Australia-wide uniformity;
- redefinition of the law of rape and sexual offences;
- uniformity in legal treatment of de facto relationships;
- uniform minimum standards to control firearms;
- restructuring of legal aid services.

According to Senator Evans, law reform is a central element in the Opposition's electoral program, having, he claims, the added advantage 'in the present economic climate that it does not cost very much'.

politics of law reform. Finally, a note on two books which have surfaced during the past quarter:

- Stan Ross *The Politics of Law Reform* (Penguin) examines, from the point of view of an Australian legal academic, the political process of law reform in present day Australia. With the benefit of a number of case studies, conversations with politicians, law reformers and others, Mr Ross, who is a Senior Lecturer in Law in the University of New South Wales, Sydney, studies Australian institutions of law reform: the politicians, the judiciary and law reform bodies. He does not pull his punches, concluding that the law reform process, at least for the achievement of significant reform, involves struggle — and this whether there is a 'progressive conservative' or 'social democratic' government in office. He contends that the role of the law reformer will differ according to what kind of government is in office and concedes that the process of law reform is 'extremely complex'. He has a few choice words about law reformers:

> We have seen from our profiles of the bureaucrats, judges and politicians that the law reform system is run by middle-aged, middle to upper class white males. This fact in itself does not necessarily mean certain law reforms will or will not be pursued, although it can readily be argued that it frequently plays a significant role in what is and what is not pursued. Essentially, it means that significant law reform that threatens the position of those running the system will generally be opposed.

  Mr Ross reverts to the subject of a theory of law reform, discussed above and boldly concludes that people seeking significant law reform 'must also start to develop clearer ideas on what kind of alternative to our present system they want'.

- Professor C.G. Weeramantry (Monash University) has published his latest work *An Invitation to Law* (Butterworths, 1982) to offer a conspectus of world legal systems and an analysis of probable new directions of the law. Amongst new directions mentioned, of relevance to law reformers and legislators generally, are:

  - deformalisation of justice
  - increased judicial creativity
  - a more realistic legal profession
  - less discrimination and greater tolerance of sub-cultures
  - new concepts of compensation
  - sexual equality
  - open government
  - internationalism

There is a useful appendix with extracts from key writings in the great legal systems of the world. The book is therefore a healthy antidote to the general self-contentment of anglophone lawyers with their common law system.

aboriginal law: progress

While Europeans may have cultural difficulty in fully comprehending their significance, the importance of the relics to the [Aboriginal] appellants in their intimate relationships to the relics readily finds curial acceptance.

Mr Justice Stephen (now Governor-General of Australia) in *Onus* v. *Alcoa*

changing values. In his speech on the farewell of Sir Ninian Stephen from the High Court of Australia to take up the post of Governor-General in succession to Sir Zelman Cowen, Attorney-General Peter Durack QC pointed to the awareness in the Court 'that it does not work in a vacuum: that it must take account of changing social and community values'. In support of that assessment, he quoted Mr Justice Stephen's 'unqualified acceptance' in *Onus* v. *Aloca* 'of the importance to the Aboriginal community of the relics of their ancestors' occupation of an area of land'.

Further evidence of the High Court's sensitivity to the position of Aboriginals in the Australian community may be seen in two other cases during the past quarter:

- In *Koowarta* v. *Bjelke-Petersen & ors* (1982) 56 ALJR 625, the court, by majority, upheld key provisions of the Racial Discrimination Act 1975 as valid Federal legislation based upon the 'external affairs' power under the Australian Constitution. The majority view stretched the previous understanding of the Federal power to support national legislation in pursuance of international obligations.
- In the appeal of *Percy Neal* (so far unreported) the court disturbed the decision of the Queensland Court of Criminal Appeal, increasing a sentence on an Aboriginal, imposed for spitting at a white official. During argument, a number of criticisms were made by High Court justices of the Queensland criminal justice system.

During the Commonwealth Games in Brisbane in early October 1982, demonstrations, in which large numbers were arrested, urged changes in Queensland's laws governing land rights for Aboriginal people. Important land rights legislation has already been achieved or promised in a number of parts of Australia.

One piece of the mosaic of the change in the Australian legal system to reflect a heightened sensitivity to Aboriginal rights, is the project on Aboriginal customary laws before the Australian Law Reform Commission. In 1977, the Commission was asked to report on whether, and if so to what extent, Aboriginal customary laws should be recognised in the legal system of Australia. Since the reference was received, much work has been done collecting a wide range of material, submissions, literature and so on. In 1980, the Commission delivered a general discussion paper *Aboriginal Customary Law — Recognition?* This paper formed the basis for extensive public hearings held throughout Australia during 1981. During this period, the Commissioner in charge of the reference was Mr Bruce Debelle.

new personnel. In 1981, Mr Debelle returned to private legal practice in Adelaide. He remains a part-time Commissioner associated with the project. But leadership of the ACL reference has now passed to Dr James Crawford, Reader in Law in the University of Adelaide, who joined the ALRC in January 1982. Since that date, the reference has entered a new phase. Detailed proposals are being formulated in particular areas of the reference for consideration by the Commission, its consultants and other persons and groups interested. At the same time, the ALRC has continued the process of consultation with Aboriginal people, communities and organisations.

One of the new part-time Commissioners of the ALRC, Professor Alice Ehr-Soon Tay of Sydney University has now joined the ALRC Customary