reform : too much or too little?

Too bad that all the people who know how to run the country are busy driving taxi cabs and cutting hair.

George Burns

too much talk. The Chief Justice of Victoria (Sir John Young) has never been one to pull his punches. Long-term readers of this journal will recall his 1978 remarks about the dangers inherent in 'meddling with the law'. See [1978] *Reform* 39. Sir John returned to and warmed to his theme in an address delivered on 'The Courts and Law Reform' at the Third Biennial Oration for the Association of Australasian and Pacific Area Police Medical Officers in Melbourne on 16 February 1984. The report of his address is just to hand.

Declaring that the function of the legal system is 'not to change the world but to keep the foundations and framework of society steady', Sir John had a few remarks to offer about law reform in general and the efforts of the Victorian Law Reform Commissioner dealing with voluntary intoxication, in particular:

> One of the difficulties, however, is that so often what is described as public criticism is criticism contained in a few uninformed newspaper articles enlivened by eye-catching headlines. There are continual demands for what is described as 'reform' but much of the clamour is based on misapprehension.

Sir John Young referred to the debates about the effect of the decision of the High Court of Australia in *O'Connor* 's case, dealing with exculpation by reason of voluntary intoxication. Pointing out that juries were showing 'no inclination to acquit on this ground' he referred to the 'very careful discussion paper' issued by the Victorian Law Reform Commissioner, Professor Waller and appealed for time to be allowed to elapse and experience gained 'before considering whether the law needs the drastic interference of legislative intervention'. He then offered some general advice to would-be reformers:

> Legislative intervention is drastic because it is so very difficult to alter the law by legislation. In one sense Parliament cannot alter the law. All it can do is issue specific commands and the infinite complexity of human affairs is such that it is extraordinarily difficult to provide in legislation a general rule that will work fairly in all cases. Yet, of course, a general rule must be prescribed. It would have been preferable to wait and see ... But what happened was the result of clamour in the press and the Law Reform Commissioner has published the fact that members of the public who have responded to his invitation have almost unanimously said that not only should intoxication not be an offence but on the contrary it should be an aggravation. Yet I cannot help thinking that if those members of the public had had the real problem explained to them and experience of the operation of the law, they would have thought otherwise. It is for this reason that the more experienced the lawyer, the more hesitant is he to advance sweeping reforms. What concerns me is that much of what is demanded by way of reform is based on misapprehension. Bodies such as yours, however, which are professional, which are experienced and which are concerned, can, I think do much to help remove many of the misapprehensions that exist. I would not urge you to 'go public' but I would urge you, in your particular field of expertise, to make your opinions known in the appropriate quarters when questions within your expertise arise.

and not enough. Responding to these remarks in the Inaugural Lecture of the Public Lecture Series on Law Reform sponsored by the Victoria College in Melbourne, the ALRC Chairman (Justice Kirby) suggested that there should be more and not less discussion about perceived problems in the law. Amongst points made by him were:

- The *O'Connor* decision broke new ground in the law.
- While trusting to the common sense of juries, it was important to clarify the legal principles upon which they would be instructed by judges.
- The media had merely reflected community anxiety that criminals would escape punishment because of voluntarily-induced intoxication.
- Engaging the community in discussion, as the VLRC had done, was aimed at helping Parliament to reform laws in a more efficient and sensitive way.
- Offering suggestions behind closed

> doors instead of 'going public' was in contrast to the methodology adopted by the ALRC and other law reform bodies in Australia which sought out a 'full opportunity of public participation in key policy decisions affecting legal change'.

According to reports received from the Victorian Law Reform Commissioner's office, the VLRC attracted a large response to the issues paper on voluntary intoxication, first published in November 1983. More than 1 900 copies of the issues paper were distributed, about 1 200 being sent on request to members of the public. Approximately 120 written submissions were received. A public seminar held by the VLRC to discuss the issues paper on 27 January 1984 was attended by nearly 100 people. Various interest groups were represented including legal practitioners, police, temperance organisations, the churches, health workers in the alcohol and drug field etc. But there were also many members of the general public. The discussion was by all reports 'moderate and reasoned' with most speakers being prepared to understand the views of others. The seminar received substantial television, radio and press attention and was followed up by radio talk-back programs and seminars concerned with social responses to the problems of alcohol and other drugs.

A discussion paper has now been prepared by the VLRC canvassing the arguments for and against the creation of a new statutory offence of dangerous or criminal intoxication. This paper is to be distributed to a further seminar being organised on 29 June 1984. Participants will include judges, magistrates, legal practitioners, academic lawyers and other civic groups. Interestingly enough, also during the last quarter the New Zealand Criminal Law Reform Committee released its report on *Intoxication as a Defence to a Criminal Charge,* proposing reform.

abstract mysticism. It is interesting for Australians to read reports now coming in from Canada that the President of the Law Reform Commission of Canada (Justice Allen Linden) is engaging for the first time in public hearings and seminars on all aspects of the Canada LRC's program. According to initial comments by Justice Linden, these public encounters have been a 'great success'.

In his address at the Victoria College on 5 April 1984, Victoria Attorney-General Kennan closed his remarks with a reference to the need for community discussion of law reform. He said that the ALRC had 'encouraged lawyers and others in the community to think about the role of law in society and to dream a little bit as to how it may operate'. Mr Kennan said that to be an effective reformer it was necessary to avoid confrontation and rather to use 'wit', 'prose style' and 'compelling logic'.

In a review of the ALRC Chairman's publication *Reform the Law* (OUP, 1983) Professor Alex Castles of the Adelaide Law School, also a former ALRC Commissioner, referred to the initiatives taken in the early days of the ALRC, when Professor Castles was one of the foundation Federal Law Reform Commissioners:

> In less than a decade the catch-phrase 'law reform Australian style' has gained a measure of currency to describe what may, in some ways at least, be regarded as a new social phenomenon. The chief hallmark of this has been a special emphasis on reaching out for community involvement in the process of ordering legal change. In theory there may seem to be little, if anything, which is really innovatory in this. In practice, however, the reality has often been quite different ... The legal profession often retained an air of almost abstract mysticism in its approach to updating the law. Too frequently, for example, shaded by the pretence that 'lawyers' law' was essentially 'value free'. It would seem that it was almost an impertinence to suggest that the community at large could have any effective concern in many law reform processes. Today, however, 'law reform Australian style' and notably in the fashion developed by the ALRC since it came into existence in 1975, has sought to overcome these and other barriers to direct community involvement in law reform processes.
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> AC Castles, Book Review, (1984) 9 *Adelaide L Rev* 309, 310

community reforms. The latest development in institutionalising law reform responses to community suggestions has borne further fruit

in the last quarter. The community law reform scheme is now in operation both in the ALRC and the NSWLRC. See [1984] *Reform* 50.

In May 1984, the ALRC issued its first community law reform consultative paper. Written by Mr Nicholas Seddon, presently working with the ALRC in its Canberra office, the paper tackled the issue of whether contributory negligence should be available as a defence in fatal accident cases and in industrial accident cases where a worker has been injured by the failure of management to comply with statutory safety standards. See ACTLR 1, *Contributory Negligence.* The paper comes to the conclusion that:

- in fatal accident cases the family of a breadwinner killed by someone else's negligence has the right to claim compensation for the economic consequences of the death of the breadwinner and should not be penalised because, through no fault of their own, the family is deprived of support;
- in industrial accidents the safety procedures laid down by statute are designed amongst other things to protect workers against their own inattention and carelessness. They should be so designed as to ensure that the worker is fully protected.

Similar reforms have been adopted in New South Wales. The consultative paper attracted widespread publicity in Canberra and is now the subject of careful discussion by Mr Seddon with ACT community groups, the insurance industry and others.

Meantime, the NSW Law Reform Commission community law reform program continues with the publication of the fourth and fifth reports in the series:

- The fourth report, titled *Sound Recording of Proceedings of Courts and Commissions : the Media Authors and Parties,* proposes that a number of groups, particularly representatives of the news media, lawyers and parties, should have the statutory right to use a sound recorder to record proceedings of courts, royal commissions and inquiries without having to obtain leave. However, a reserve right to forbid recording and limitations on public broadcasting of proceedings without permission are included in the recommendations.

- The fifth report, *Passing of Risk Between Vendor and Purchaser of Land,* recommends that legislation altering the time when risk passes to the purchaser, should be designed to protect the uninsured purchaser. The most appropriate reform, according to the NSWLRC, is to enact legislation providing that the risk of damage to, or destruction of, premises should not pass from the vendor to the purchaser immediately on entry into a contract for sale but should pass when the transaction is completed or when the purchaser is entitled to possession or takes possession. The aim of these reforms is to protect purchasers who have not taken out insurance against unexpected loss, because they have an enforceable contract for sale.

questioning the system. A special word of encouragement for the process of community law reform came during the past quarter from an unexpected source, the Dubbo newspaper, *The Liberal* (17 April 1984). Following an address by the ALRC Chairman in Dubbo on the subject of abolition of oaths and affirmations in Australian courts, substituting for them a secular promise to tell the truth, *The Liberal,* from the heartland of middle Australia, offered its message of approbation:

> The suggestions made in Dubbo this week about changing some legal traditions which many have taken for granted, reflect the work the Australian Law Reform Commission has been involved in for some time. The Commission has been questioning many aspects of the Australian legal system and assessing the need for them to stay a part of that system. It is not surprising, therefore, that the Commission's activities should have been a subject of criticism from those who believe the judicial system

is satisfactory as it is. Yet the work of the Commission is something which needs to be done. There are too many aspects of our society which we just take for granted without ever questioning. We rarely stop to think if certain traditions and methods of administration are out-dated and no longer necessary or in need of change to fit a changing world. Many changes are forced on us as we adapt to that changing world but other changes which might be made are ignored simply because we have not stopped to think about the necessity of those traditions or their relevance to the present world. It is important that the Law Reform Commission continues to question the current system.

corporate law reform

It is only the innate gentility of the average company director, the natural sweetness of your natures, which generally restrains many of you from expressing the feeling that the law is unnecessarily obscure and that lawyers intentionally speak in riddles, disguising meaning in a mass of verbiage so as the better to mystify the unsuspecting layman.

Sir Ninian Stephen, National Conference, Institute of Directors, March 1984

ingenious device. Ambrose Bierce in his famous Dictionary defined a corporation as 'an ingenious device for obtaining individual profit without individual responsibility'. Other commentators have been more generous. Lord Wilberforce, for example, once described the corporation as one of the most brilliant legal contributions to economic advancement.

To ensure the ongoing improvement of Australia's companies and securities law, a five-member Companies and Securities Law Review Committee (CSLRC) has been established. A note on the membership of this committee was contained in [1984] *Reform* 45. Professor Harold Ford of the Melbourne University Law School is the Chairman of the committee, which is assisted by a full-time Research Director, Mr John Kluver. The committee is established in Sydney, sharing resources with the Secretariat of the Ministerial Council for Companies and Securities and the Accountants Standards Review Board.

Australia's legislation on corporations and securities was developed between 1979 and 1981. As a result, the National Companies and Securities Commission was set up and new take-over legislation, securities and companies legislation was enacted by Federal Parliament to be law in the ACT. That legislation was then made applicable in the States of Australia by a series of Acts passed in each State. Uniform legislation and administration have been enacted in this round-about way. The role of the CSLRC is to keep the uniform code under review and to formulate proposals for new legislation and regulations. The actual establishment of the committee was foreshadowed in clause 21(2) of the Interstate Corporate Affairs Agreement. The review committee is to assist the Ministerial Council to carry out research and advise on law reform in relation to the legislation and regulations. It has no initiating power, being limited to matters referred to it by the Ministerial Council of Federal and State Ministers.

practical reform. According to Professor Harold Ford, in carrying out its functions, the CSLRC aims to develop proposals for law in its special field which:

- are practical;
- facilitate the activities of people operating or investing in companies or dealing with them or with securities;
- do not increase regulation beyond the level needed for proper protection of the community.

So far, the Ministerial Council has referred a number of matters to the committee for inquiry and review. It has given the committee a complete discretion to arrange the priorities of its program. Amongst the items on the current program are:

- use of the corporate form, including the forms of the legal organisation of businesses and circumstances in which courts should be empowered to 'lift the corporate veil';
- legal regimes available for small enterprises;
- mechanisms for regulating take-overs;
- prescribed interests;