Australian Conciliation & Arbitration Commission to review professional fee schedules.

conveyancing reform. Meanwhile, the moves to reform the staple income producing activities of Australian lawyers in land title conveyancing continued during the past quarter. In an important ruling by the Chief Judge in Equity of the Supreme Court of NSW (Justice Helsham), the NSW Law Society failed in a bid to stop a cut-price conveyancing company from offering services allegedly in breach of the Legal Practitioners Act. That Act guarantees a virtual conveyancing monopoly in paid services for the legal profession. The Flat Fee Conveyancing Service was referring its cases to a retired barrister, whom the judge held to not fall within the prohibition in section 40B of the Act. According to John Slee, legal correspondent for the *Sydney Morning Herald* (11 May 1984) the ruling put an end to the Law Society's attempts to have the activities of the Flat Fee Conveyancing Service declared illegal. But it does not settle the broader question of whether other cut-price conveyancing companies, working with solicitors, are operating legally.

Meantime in Britain, the debates about cut-price conveyancing continue. See [1984] *Reform* 80. According to a report in the *Times* (25 April 1984), plans by fifty Liverpool solicitors to launch a cut-price conveyancing company on 1 May 1984 were shelved after a strong warning from the English Law Society. 'The Law Society did not actually threaten us, but there is always the danger that one can get into difficulties' said one of the solicitors involved in the scheme ominously.

A consultative document issued by the Lord Chancellor's Department on 3 April 1984 indicated that the United Kingdom Government is opposed to extra safeguards to protect the consumer against conflict of interests where solicitors employed by banks and building societies undertake conveyancing. The document foreshadows amendments of the Solicitors Practice Rules so that solicitors would be freed from restrictions on touting for work, from advertising and on fee sharing with persons not qualified as lawyers. The general issue of conveyancing law reform in England remains for the future.

odds and ends

■ ***surrogate mothers.*** During the last quarter the debate about surrogate motherhood has become more active in Australia and Britain. In Victoria, Attorney-General Jim Kennan has expressed concern about newspaper advertisements seeking volunteers for surrogacy. He suggested that any such contracts may be against public policy and indicated that legislation could be introduced to ban such ads, pending the report by the committee chaired by Professor Louis Waller, Victorian Law Reform Commissioner. In Britain the Council for Science and Society, in a report published on 23 May 1984 declared that surrogate motherhood contracts could be 'almost as exploitive as prostitution' and 'degrade the process of childbirth'. According to the *Times* (24 May 1984) an American-based surrogacy agency has been set up in Britain and two British women are pregnant with babies for whom they will be paid £6 500. The Chairman of the Council which produced the report, *Human Procreation : Ethical Aspects of the New Techniques* (OUP, 1984) is Rev Professor Gordon Dunstan, Emeritus Professor of Moral and Social Theology at the University of London. According to a leader in the *Times* : 'It is more important to prepare clear principles and a code of conduct for observance by professionals. Only later will it be necessary to devise some legal codification for the laity. It is the conduct of scientists which matters immediately, since scientists are hustling society to take a view about these matters'. Professor Ian Kennedy in the *Times* (26 May 1984) declared that two issues stand out as 'particularly taxing'. These are the use of a woman's womb to bring to term the fertilised egg of a couple and the use of embryos for research. According to Kennedy, if the law is to command respect (and therefore obedience) it must not 'stray too far from the collective conscience of society'.

■ ***defamation progress?*** Depending on which media outlet you read 'good progress' has been made on moves for defamation law reform based on the ALRC report No 11, *Unfair Publication.* That, at least, is the conclusion of the *Sydney Morning Herald* (26 May 1984). The Melbourne *Age* of the same day declares 'uniform defamation laws in danger'. Most gloomy of all is the *Australian* which concludes 'defamation law accord blocked by defence issue'. The 'defence issue' referred to is the stumbling block of the defence of justification. Should it be 'truth' alone as in half of Australia's State jurisdictions? Or should it be 'truth and public benefit' or some other dual defence, as in the others? The Federal Government is to prepare a further draft of the model uniform defamation law circulation to the Standing Committee of Attorneys-General. In what the *Australian* described as 'a major win for media interests' Senator Evans announced that he would not pursue plans for a mandatory right of reply as proposed by the ALRC. Notwithstanding the continuing differences which are delaying the uniform defamation law, Senator Evans said that 'substantial progress' had been made and that agreement had been reached on eight outstanding matters concerning criminal defamation, defamation of the dead and privilege for media reports. The proposal is to come up for review before SCAG in August 1984. Victorian Attorney-General Kennan declared himself 'pessimistic' about agreement on defamation reform. Meanwhile, the media continue to beat their own drum. The *Australian Financial Review* (4 May 1984) in a leader declared that 'recent results of the existing defamation law have shown that there is a very serious threat to free speech emanating from a combination of bad law and intolerant courts and juries'. Senator Peter Durack QC, Opposition Spokesman on legal matters, pointed out in a statement on 29 May 1984 that he had referred the ALRC report to SCAG immediately it was received five years ago. 'Many people saw the Law Reform Commission's report as a useful starting point for the development of such a code. Five years later the Attorneys are still at loggerheads over its contents'. But, concluded Senator Durack, the 'trade-off and compromises' necessary to achieve uniformity were too high a price. Less ambitious attempts should be pursued from now on, he declared. And Group General Manager of News Limited, Mr Brian Hogben, a consultant to the ALRC in its project, concluded (*Weekend Australian,* 5 May 1984) that the SCAG draft Bill had reversed the effort of the ALRC to remedy an imbalance which had developed over the centuries in favour of reputation as against freedom of speech. Let the final word be had by the *West Australian* (28 May 1984). In a leader, it asked : 'Dare we hope that the seven year crawl towards uniformity, aptly described by Senator Gareth Evans, as a slow and desolute business, is nearly at an end?' Let's hope so.

■ ***contempt action.*** The inquiry by the ALRC into the law of contempt was noted in [1984] *Reform* 62. The issues paper there mentioned has begun to attract numerous submissions and suggestions for reform. ALRC Commissioner in charge of the project, Professor Michael Chesterman, aided by social scientist researcher John Schwartzkoff, is putting the finishing touches on a series of surveys to be directed to judges, magistrates and tribunal members throughout Australia. This survey will seek opinion and reactions to proposals for contempt law reform. It will form an important basis for the ALRC reform report expected late 1985. In addition, a national survey is being conducted to obtain community attitudes to the law of contempt. This survey is being conducted under the Federal Government's job creation scheme, the Community Employment Program (CEP). It is one of six CEP projects sponsored by the Federal Attorney-General's Department in 1984. It will take approximately nine months and involve three women employees. Two of these assigned to the ALRC are Susan Wilson and Jenny Fitzgerald. They have already commenced interviews with a wide cross section of the community, including media representatives often on the receiving end of contempt proceedings. Meantime, during a speech to the Annual Conference of the Pacific Area Newspaper Publishers' Association in Sydney on 1 May 1984, Federal Attorney-

General Evans suggested that Royal Commissions in Australia do not need to be armed with the contempt powers as wide as those traditionally considered appropriate for the courts. The ALRC project covers not only contempt of court but also contempt of Federal tribunals and commissions. Reports in the *Times* (18 April 1984) disclose that the English Law Society and the Guild of British Newspaper Editors have asked the Lord Chancellor for 'an urgent and thorough' overhaul of the working of the Contempt of Court Act 1981. In a joint statement they indicate that they are 'increasingly concerned' about the way the judiciary has used the power under the Contempt of Court Act to postpone press reports of trials. They also declare that they are 'dismayed' that since the 1981 Act came into force, 80 such orders have been made by the Central Criminal Court in London. The Chairman of the Joint Committee, Mr Peter Carter-Ruck, noted English writer on the law of defamation and a consultant to the ALRC in its project on defamation, said that the Act seemed to have changed the attitude of the courts to their powers which previously had been used with more restraint. The ALRC is reported to be studying the reactions to the English legislation. Finally, perhaps it should be noted that the conviction for contempt of Melbourne barrister Anthony Lewis, noted in [1984] *Reform* 66, was quashed by the High Court of Australia on 15 May 1984. The court declared that barristers had a 'high responsibility' to ensure that the case of their clients was 'fully and properly presented – fearlessly and with determination but an over-riding duty to the court, the profession and the public to contribute to orderly trials'. The contempt power, declared the High Court, was to 'vindicate the integrity of the court'. It was rarely, if ever, used to vindicate the personal dignity of a judge.

■ ***wild horses.*** In the last issue of *Reform* (see [1984] *Reform* 72) reference was made to the absence of Mr John Stone, Secretary to the Treasury, from the Permanent Heads' Meeting on administrative law reform. It will be recalled that at this meeting Public Service Board Chairman Dr Peter Wilenski defended the reforms and Mr Derek Volker, Secretary of the Department of Veterans' Affairs, long-time critic of the reforms, explained a partial Damascus Road conversion. It now seems that *Reform* for once got it wrong. The reason that Mr Stone – champion of decisive administration and unfeigned critic of some of the Federal reforms – was absent was that he was attending a meeting with the Reserve Bank of Australia in Sydney. According to a letter he wrote at the time, but for this obligation 'wild horses' would not have kept him away.

■ ***moral laws.*** The last quarter has seen a number of important changes or proposed changes in Australian laws relating to sexuality. In New South Wales the Parliament passed a homosexual law reform Bill designed to decriminalise adult consensual homosexual conduct. The legislation fixed the age of consent at 18, two years higher than for consent to heterosexual conduct. This 'discrimination' led to condemnation by some reform groups and to demands for 'full equality' in the law. Rival demonstrations were held outside Parliament House, Sydney. But in the end the law was enacted with the addition of an Opposition amendment, making it an offence to 'solicit, incite, procure or encourage' a male person under the age of 18 years to have homosexual sex. In an editorial in the *Australian* (17 May 1984) the reform, which was a Private Member's Bill introduced by the NSW Premier, Mr NK Wran QC, was described as 'basically, a triumph for common sense, popular community attitudes towards sexual mores and change. The new laws would remove persecution of homosexuals but further reforms 'must wait upon time and community attitudes'. A proposal for similar reform in Western Australia was defeated in the State's Upper House by a vote of 18-15. A Private Member's Criminal Code Amendment Bill introduced by Mr Bob Hetherington was defeated, ostensibly because of a combination of 'vigorous and implacable' opposition by some Christian Churches and opposition by homosexual groups on the grounds of discrimination concerning the age of consent

(18). In Victoria on 4 May 1984 it was announced that the State Government had backed down on its commitment to include private sexual preference in legislation banning discrimination in employment, home letting and the like. The proposal had been condemned by the Opposition and was 'reluctantly' dropped by Victorian Premier, Mr Cain, in order to secure passage of the Bill which provides against discrimination because of political views or physical disability. Even more controversial is the proposal in Victoria, announced in late March 1984, that prostitution is to be made legal in massage parlours which have planning permits. It was stressed that the government did not condone prostitution but suggested that a 'realistic view' should be taken on the realities. Meanwhile in New South Wales a parliamentary committee is inquiring into prostitution. But curiously the proposal has been opposed by the Australian Prostitutes' Collective which urged that private sexual arrangements should not be controlled by government at all and that the law should 'simply get out of the bedroom'. Finally, in April 1984, Federal and State Ministers with responsibilities dealing with censorship agreed in Sydney to a new uniform national videotape classification system to tackle so-called 'video porn'. The system will involve requiring all videotapes for sale or hire to be classified. Federal Attorney-General Gareth Evans said that the intention was to substitute a compulsory for the present voluntary system. Certain categories of materials will be refused classification altogether, including those dealing with child pornography, bestiality and gratuitous depictions of violence and acts of significant cruelty or terrorism. The meeting deferred without decision for 12 months consideration of a proposal to introduce 'X' ratings for cinemas.

■ ***royal commissions.*** Australia's infatuation with Royal Commissions has been challenged by NSWLRC Chairman Professor Ronald Sackville in an article for the *Current Affairs Bulletin.* Declaring that a new approach is needed to avoid encroachment upon civil liberties by these commissions, evident in the past decade, Professor Sackville offers a number of proposals. First, he suggests that Royal Commissions and Inquiries with similar coercive powers should be used more sparingly. If Inquiries are set up, coercive powers should only be given if the circumstances truly warrant them. In particular this should be so for overriding the privilege against self-incrimination. Royal Commissions themselves should show greater restraint in making and publishing findings of criminal guilt against individuals subjected to investigation but not given the protections of a criminal trial. Chairman Sackville declares that there is a strong case for using judges as investigators more sparingly, particularly where allegations involve high matters of politics. Australian courts, like their New Zealand counterparts, should be 'less reticent' when asked to review the conduct and findings of Royal Commissions. Professor Sackville suggests that in particular they should be prepared to quash adverse findings which have been reached in violation of the principles of natural justice. This is a timely warning, having regard to the 'wave of commissions' and the continuing proposal to establish a National Crime Authority in Australia. The lastmentioned proposal was still before Federal Parliament as this issue of *Reform* went to press.

■ ***insurance contracts.*** One of the most significant reforms based on a report of the Australian Law Reform Commission is also presently before Federal Parliament. Drawing on the ALRC report, *Insurance Contracts* (ALRC 20) the Insurance Contracts Bill 1983 was introduced into the Senate on 2 May by Federal Attorney-General Evans. This followed an earlier announcement by Senator Evans and Federal Treasurer Paul Keating of adoption of the ALRC proposals, with a number of modifications that followed consultation with the insurance industry. The reforms were welcomed by Government Senators and by representatives of the Australian Democrats. Senator Jack Evans (AD-WA) congratulated the Attorney-General for having made 'a genuine attempt to reach a degree of consensus between the conflicting demands on the insurers and the in-

sured'. He acknowledged that the Bill would make 'a dramatic change' in the insurance industry. He also expressed the hope that the legislation based on the earlier ALRC report dealing with insurance intermediaries (*Insurance Agents and Brokers,* ALRC 16) would be introduced into the current session of Federal Parliament – something that has now happened. An Opposition Senator, Robert Hill (Lib-SA) commended the Commissioner in charge of the ALRC project, Professor David Kelly, and the efforts made by the Commission to consult widely in the insurance industry and beyond. He said that the ALRC report was 'a document produced by the co-operative endeavours of many within the community who have a particular interest or expertise in this subject'. Whilst this did not in any way allow the Parliament to 'abdicate its responsibility' in favour of the Commission, 'it does mean at the very least that the Bill deserves respect and careful attention'. Senator Hill acknowledged many 'worthwhile reforms' but expressed disagreement with the Bill, specifically because of provisions dealing with fraud which include a power to excuse fraudulent misrepresentation in limited circumstances. The former Federal Attorney-General, Senator Peter Durack (Lib-WA) was not so complimentary. 'The Law Reform Commission did not come up with any statistics which establish the need for reform. Because a reference is given to a law reform commission it does not mean to say that it has to come up with reform. It could say that it is not necessary. The Commission did not say that. This is something we have learned about the Law Reform Commission. It seems that if we give it a reference it will recommend reform, whether it is for its own sake or for good reasons. The Law Reform Commission in this case has not come up with any statistics which justify the major reforms it proposes in this case'. Senator Gareth Evans in reply declared that he had had a 'very nostalgic half hour' listening to Senator Durack. He declared that it reminded him 'compellingly and acutely' of the 'desolate lethargy' which he claimed 'so characterised the performance of the previous government in the law reform area'. He pointed out that the reference to the ALRC was given by former Liberal Attorney-General Ellicott and that the ALRC consultation with the insurance industry and other interested groups had been careful and intensive. *Commonwealth Parliamentary Debates (Senate)* 7 May 1984, 1657. A typical day in the life of the Australian Senate. The Insurance Contracts Bill has now passed both the Senate and the House of Representatives. It is by any standard a major reform.

new reports

Australia

ALRC	: *ACL RP 11/12*	: Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals, 1984.
	: *ACL RP 15*	: The Recognition of Traditional Hunting, Fishing and Gathering Rights, 1984
	: *ACTLR 1*	: Contributory Negligence, Consultative Paper, 1984. See above p 108.
NSW LRC	: *Community Law Reform 4*	: Sound Recording of Proceedings of Courts & Commissions: The Media Authors and Parties, 1984. See above p 108.
	: *Community Law Reform 5*	: Passing of Risk Between Vendor and Purchaser of Land, 1984. See above p 108.
NTLRC	: *DP 1*	: Defacto Relationships, 1983.
	:	: Annual Report 1983/84.
SALRC	: *73*	: Relating to the Reform of the Law of Perpetuities, 1984.
	: *78*	: Dealing with Disparate Subjects in the Inherited Imperial Law, 1984.
	: *79*	: Dealing with the Inherited Imperial Law, 1984.
TasLRC	: *WP*	: Law Relating to Powers of Attorney in Tasmania (by WG Briscoe), 1983.
	: *WP*	: Law Relating to Succession Rights on Intestacy (by WG Briscoe), 1983.
WALRC	: *34*	: Report on Trusts and the Administration of Estates Part V – Trustees' Powers of Investment, 1984.
	: *DP Progr ≠ 80*	: The Problem of Old Convictions, 1984.
	: *IP Progr ≠ 80*	: The Problem of Old Convictions, 1984. See above p 100.