LAW REFORM

SUMMARY OF LAW REFORM MATERIAL RECEIVED, AUGUST 1987

— *Surrogate Motherhood: Australian Public Opinion*, Research Report on Artificial Conception, May 1987, New South Wales Law Reform Commission.
— *The Jury in a Criminal Trial: Empirical Studies*, Report on Criminal Procedure, June 1986, New South Wales Law Reform Commission.
— *Procedure from Charge to Trial: Specific Problems and Proposals*, Report on Criminal Procedure, February 1987, New South Wales Law Reform Commission.
— *Workplace Pollution*, Working Paper 53, 27 January 1987, Law Reform Commission of Canada.
— *The Charge Document in Criminal Cases*, Communique on Working Paper 55, 22 May 1987, Law Reform Commission of Canada.
— *Annual Report*, 1986, New South Wales Law Reform Commission.
— *Sale of Goods*, 2nd Report, 1987, New South Wales Law Reform Commission.
— *Legislation and its Interpretation. The Acts Interpretation Act 1924 and Related Legislation*, Discussion Paper and Questionnaire, 1987, New Zealand Law Commission, 1987.

Surrogate Motherhood: Australian Public Opinion, Research Report on Artificial Conception, May 1987, New South Wales Law Reform Commission.

In November 1986, the Commission conducted a national sample survey of public opinion on the issue of surrogate motherhood to assist it in formulating recommendations for its report. This report presents the results of the survey.

16% of Australians expressly approved of surrogate motherhood, and one third did not object. Another one third objected to surrogate motherhood for married couples. Those most favourably disposed were women without children, non-religious rather than religious persons, and those who had fertility problems. 40% of people were in favour of paying the surrogate mother her medical expenses plus an agreed fee. 34% would omit the fee, and 17% felt there should be no payment at all. 40% surveyed thought parties should be allowed to make surrogacy arrangements, provided they have the approval of a government agency. Only 17% thought government agencies alone should make such arrangements. Only 3% approved of profit-making agencies and individuals being involved. One third of people felt that, in the event of the surrogate mother refusing to surrender the child, the married couple should have the first claim. 26% supported the surrogate mother, and one quarter thought the court should decide. Men and women held similar opinions. There was strong support (17%) for disclosing to the child the identity of her surrogate mother. This was mainly among younger people, support decreasing as age increased.

Two thirds of Australians felt the following categories of people should be forbidden to make a surrogate motherhood arrangement: male homosexual couples living in a stable domestic relationship; females in the same situation; people under 18; and people who could not financially support a child. About half thought elderly couples, a single man, and a single women should also be forbidden. There was less opposition for unmarried couples living in a stable domestic relationship, and for people who already had children. There was a little support for surrogacy arrangements for non-medical reasons, relating to occupation, life-style, or concern about appearance — 80% of those surveyed disapproved. Men were more inclined than women to approve of surrogacy arrangements for these reasons.

This is only a brief overview of the results, based on the Commission's summary. The report provides analysis on the basis of demographic and other factors, and it explores the views held by young married people without children, people with fertility problems and younger people generally, as well as the influence of religious affiliation.

The Jury in a Criminal Trial: Empirical Studies, Report on Criminal Procedure, June 1986, New South Wales Law Reform Commission

The New South Wales Law Reform Commission, while broadly requested to review the law and practice relating to criminal procedure, found this inevitably drew attention to the rôle of the jury, being 'symbolic of society's approach to criminal justice and of crucial concern in its administration.' Following their discussion paper of 1985, an investigation was instituted in the form of surveys of jurors, prospective jurors, judges' associates (*re* court procedure) and judges. The surveys revealed that the main reasons for people being deleted from the jury roll were: being of or above the age of 65 years; having the care, custody and control of children under the age of 18; and being ill or infirm. A concern was that 20% of notifications for jury duty were either returned unclaimed or with the advice that the recipient had moved from the district. As the jury roll is drawn up directly from the electoral roll, this suggests the latter is not a complete list of adults eligible for jury duty.

The Commission recommended in March 1986 that the age limit for people claiming an exemption for jury duty on the ground of advanced age should be raised from 65 to 70 years. Although 22% of deletions were on this ground, only 6% were from people aged 65 to 69. The Commission also recommended that spouses of people in ineligible occupations remain ineligible, as well as *de facto* spouses. It rejected, however, the idea of providing child care facilities at courts, to reduce the 17% of deletions being people having the care, custody and control of persons under 18 years, on the grounds that this is a more general community issue, and that the exemption reflects the relative importance of the care and supervision of children compared with that of jury duty.

The Commission also noted that only 0.2% of deletions were for people with a conscientious objection to serving on a jury.

Data from a demographic study confirmed that the Jury Act 1977 (N.S.W.) has been effective in making juries generally representative of the population.

Although male and females were about equal in representation, males aged 18-29, unemployed people and blue-collar workers were all under-represented. It was noted that more than two thirds of people *convicted* in New South Wales higher criminal courts in 1983 were males under 30 and about half the convictions were of unemployed people. Of 180 trials in which the sex of the foreman was recorded, 79% were males.

The survey of court procedures revealed, amongst other things, the following points of interest:

— in 27% of cases, the jury function was effectively negated by direction from the judge;
— 44% of jury absences were for determining the admissibility of evidence, about 25% for other applications by the defence, 5% relating to Crown applications, and over 10% concerning clarification of legal issues;
— the average jury deliberation time was just over two hours;
— in 13% of trials, the jury was discharged before being asked to deliver a verdict.

What might seem a small percentage, 15% of jurors considered the trial on which they had served had been difficult to follow. The Commission concluded difficulties were directly related to particular cases. The most common complaint was insufficient, confusing or contradictory evidence. Only 11.2% blamed not understanding points of law and only 4.3% found legal language a difficulty. 60% of judges thought some trials are simply too complex to be suitable for trial before a jury. Although 64% of judges always informed the jury of the general rôle and obligations of jurors, the same proportion never informed them of matters relevant to rules of evidence or elements of the offence charged in preliminary instructions. The Commission found nothing to criticize in this, noting that such matters are often not of importance for the jury, or not known to the judge in advance.

Of the jurors surveyed, one third did not take notes during the trial. Of these, 40% later said they would have been assisted by notes. It emerged that 26% of judges always inform jurors of their right to take notes, 45% sometimes do and 21% never do so. In March 1986, the Commission recommended that legislation be enacted requiring judges to advise jurors of this right. While some judges considered that providing juries with a transcript of the trial could be useful in long, complex or technical cases, a perceived danger was that they could be misunderstood or cause confusion. The practical difficulties of editing out inadmissible material and checking the transcript for accuracy were also recognized.

36% of judges thought a written summary of the facts to be proved would assist juries, if given to them at the beginning of the trial, at least in some cases. A problem was the difficulty of preparing an agreed summary and drafting it so as not to give rise to confusion. Prosecutors suggested useful aids might be a list of the charges with names of witnesses and documents related thereto; schedules of documentary exhibits; individual copies of exhibits; and schematic diagrams analysing the evidence. 82% of prosecutors considered visual aids could be dangerous.

With regard to their summings-up, 55% of judges considered self-defence

difficult for jurors to understand, followed by intoxication (38%). The main reason was the formulation of words required to be given. Almost all jurors felt the judge's summing up helped their understanding. 57% of judges agreed that providing jurors with their directions of law in *writing* would be of assistance, particularly regarding self-defence and the standard and burden of proof.

93% of jurors surveyed supported the retention of juries in criminal trials. 90% had no objection to serving. The most common suggestion for improving the conditions in which juries work was better or more comfortable seating!

Procedure from Charge to Trial. Specific Problems and Proposals, Report on Criminal Procedure, February 1987, New South Wales Law Reform Commission.

This is a lengthy work, comprising two volumes of approximately three hundred pages each. It is therefore only possible to indicate the issues discussed, without examining any details or conclusions.

The paper begins by examining the current law and practice relating to the procedure from charge to trial, covering investigation, arrest, charge, bail, first court appearance and the procedure thereafter. The discussion then turns to the time limits on the prosecution of offences, comparing the law and practice in New South Wales with the position in other jurisdictions, and making tentative proposals for reform. The same approach is used in examining:

— disclosure by the prosecution (including arguments for and against compulsory pre-trial disclosure);
— disclosure by the defence;
— determination of the mode of trial (with specific comparisons with England);
— committal for trial or sentence;
— listing cases in the higher courts (including discussion of the arguments for and against listing by the prosecution, and the option of an independent listing authority);
— pre-trial hearings;
— finding 'No Bill';
— plea bargaining (comparing Australia with England, the United States and Canada);
— the function of the prosecuting authority (with an examination of the D.P.P. Act 1986); and
— pre-trial publicity.

The reform proposals are simply too many to review adequately in summary. Submissions and comments from the public were invited, and it was intended to begin preparation of a final report to the Attorney-General on the issues in June 1987.

Workplace Pollution, Working Paper 53, 27 January 1987, Law Reform Commission of Canada.

This Report deals with proposals for improving workplace conditions. These include widening workers' legal rights to refuse unsafe work and providing a

legal guarantee of access to all information regarding potential hazards of workplace pollution. Workplace pollution apparently describes a reality of working life for many Canadians. One set of calculations suggests as many as 3,600 Canadians die each year from cancer caused by workplace pollution (three times the number of people killed in accidents on the job). However, Canadian courts have been reluctant to convict employers of criminal negligence causing death. The Commission indicates that this could be remedied by a new Criminal Code offence of negligent endangerment causing the risk of death or serious bodily harm (proposed in Report 30, *Recodifying Criminal Law*). However, only a few acts or omissions are proposed to be treated as criminal. The Commission stresses the need to prevent workplace pollution before the stage is reached where compensation is needed, and to this end suggests an expansion of workers' own ability to use the law to defend themselves against occupational hazards — for example, by way of appeal to a labour board or tribunal with the necessary remedial powers.

The Charge Document in Criminal Cases, Communique on Working Paper 55, 22 May 1987, Law Reform Commission of Canada.

The working paper discusses the technicalities involved in drafting criminal charges and the difficulties of balancing clarity with the need to maintain fairness in the administration of justice. The central proposal is that where there is a fault in the drafting of the charge, the charge should be amended, not quashed. The working paper also covers the ability of the court to grant a severence of accused or counts joined together in the proposed single charge document.

Annual Report, 1986, New South Wales Law Reform Commission.

Sale of Goods, 2nd Report, 1987, New South Wales Reform Commission.

The Report recommends a number of amendments to the Sale of Goods Act 1923 (N.S.W.). These are summarized as follows

1. The rules of equity relating to rescission for misrepresentation should be expressly preserved for sale of goods contracts.
2. Rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that the contract has been performed.
3. Rescission of a sale of goods contract for misrepresentation should not necessarily be precluded by the fact that misrepresentation has become a term of the contract.
4. Acceptance should not bar rescission for misrepresentation unless there are words or conduct which would amount to affirmation under the general law.
5. The Sale of Goods Act 1923 should be amended to make it clear that it does not exclude the right to treat a contract sale as repudiated for a sufficiently serious breach of an intermediate stipulation.
6. Section 9 of the Sale of Goods Act 1923 should be repealed. Section 9(1) states that a contract for the sale of any goods of value $20 or more is unenforceable by action in absence of some note or memorandum in writing

signed by the person to be charged, unless the buyer has accepted and received part of the goods or given something in earnest or part payment for the goods.

7. The passing of property in specific goods should no longer, of itself, bar rejection of the goods.
8. The description of acceptance in s. 38 of the Sale of Goods Act 1923 should be subject to s. 37 in the case of acceptance by an act of the buyer inconsistent with the ownership of the seller. Section 37 basically provides that: where goods that the buyer has not previously examined are delivered, the buyer is 'not deemed to have accepted them unless and until he has had reasonable opportunity of examining them' to see if the goods conform to the contractual requirements.

Legislation and its Interpretation. The Acts Interpretation Act 1924 and Related Legislation, Discussion Paper and Questionnaire, 1987, New Zealand Law Commission.

This is a discussion paper which reviews and examines New Zealand's Acts Interpretation Act 1924. It discusses the nine major matters in the Act, namely:

1. The Act's applicability;
2. The commencement of legislation;
3. Temporal application of legislation: retrospectivity, repeals, transition;
4. The proof, availability and citation of legislation;
5. The elements and characteristics of a statute;
6. Principles of interpretation;
7. Standard definitions;
8. Powers conferred on public officials additional to those conferred by particular legislation; and
9. Criminal and penal matters (especially definitions).

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