

## reform machinery

'There is social enthusiasm for law reform in the broad sense of the world of the common law. It should not, therefore, be too difficult to mobilise the will and devise the means for securing a sufficient infrastructure'.

Lord Scarman, 1983

***institutional reform.*** One of the features of the political program of the new Australian Government which secured little attention during the election was the emphasis of the law and justice policy on changes to institutional machinery. Heading the list are:

- establishment of a national Law Reform Advisory Council;
- creation of a full-time Secretariat to serve this Council and the Standing Committee of Attorneys-General;
- provision of increased support for the ALRC;
- early implementation of outstanding ALRC reports;
- encouragement of maximum public participation in the law reform process
- creation of the Companies Law Review Committee.

So far as the proposed national Law Reform Advisory Council is concerned, the new Government's policy document says this:

'There are eight major law reform commissions in the Commonwealth, the States and the Territories in addition to numerous other working parties and committees of review. The law reform agencies meet occasionally in conference but there is no official co-ordination of law reform on a national basis. The national Law Reform Advisory Council will comprise representatives from law reform agencies and from both Government and Opposition in the Commonwealth and each State and Territory. Its brief will be to co-ordinate national and uniform law reform developments, as has been done for many years by the Uniform Law Commissioners in the U.S. and Canada'.

This proposal for a uniform law institution reflects the concern expressed by the ALRC in its first *Annual Report* (ALRC 3, 50). In that report, which was signed by Gareth

Evans as a Commissioner, attention was called to the absence of a permanent Secretariat for the Standing Committee of Attorneys-General and the absence in Australia of uniform law machinery such as exists in Canada and the United States. Resolutions of the third Australian Law Reform Agencies Conference, proposing a uniform law reform role, were rejected by the Standing Committee of Commonwealth and State Attorneys-General in July 1975. Commenting on the lack of administrative support from the Standing Committee of Attorneys-General, the new Government's document says:

'The Standing Committee meets infrequently and has no permanent Secretariat of its own. Little wonder that it has become more a graveyard for law reform proposals than a vehicle for their implementation. Labor will establish a full-time Secretariat to serve it and the Advisory Council to ensure that between meetings there is continuing work on the preparation and implementation of proposals for law reform'.

***community reform.*** Happiest news for the ALRC is the commitment in the law and justice policy for increased support for the ALRC and early implementation of its outstanding reports:

'The budget for the ALRC is 1982-3 is \$1.29 million. This is simply inadequate. The Commission has made it clear that some of its important references — in particular the sentencing reference — are simply lying idle for want of resources. Labor will remedy this situation by an immediate increase in funding. Early attention will be given to those ALRC reports which have not yet been implemented.'

Happily, the increase in ALRC resources is given a 1A priority for the new Attorney-General. The Commission is already hard-pressed with a busy program given to it by the outgoing Government. If it is to have resources to address new problems, particularly urgent problems, for the incoming Administration, it will need a transfusion of funds and personnel. During the election campaign, Senator Evans told

the ABC radio program *The Law Report* that he would achieve quicker processing of ALRC reports by:

- adopting the approach that prima facie such well-documented reports, following such extensive consultation should be implemented without delay;
- by casting the onus on those who oppose implementation to show why;
- by attending to parliamentary machinery for the processing of ALRC reports. Senator Evans was a leading member of the Senate Committee which produced the report *Reforming the Law* in 1979 (see [1979] *Reform* 52). That report urged automatic reference of ALRC reports to a multi-partisan committee of Federal Parliament.

The ALP law and justice policy also stresses the need for community participation – something the ALRC has itself practised since its inception:

'Public interest and participation in the law reform process has increased steadily in the last decade. Formal consultation processes conducted by law reform commissions have involved increasing numbers of individuals and groups. Labor supports maximum public involvement of this kind. The Australian Law Reform Commission will be asked to develop further the practice of compiling a register of law reform suggestions, and, on the model of the New South Wales Law Reform Commission's community law reform project, to seek and process law reform suggestions and proposals from members of the public and the legal profession'.

Amongst matters listed where uniform law reform will be encouraged are:

- consumer protection laws;
- road and industrial safety laws;
- crimes compensation;
- criminal investigation
- complaints against police;
- sentencing and parole;

- transfer of prisoners
- privacy;
- deceptive electoral advertising.

Half of the above items are relevant to ALRC reports or projects still current in the ALRC.

*alrac meeting.* Institutional law reformers throughout Australia will have a chance to reflect on the new Federal administration and its proposals when they meet in Brisbane on 1-2 July 1983. The occasion is the 8th Australian Law Reform Agencies Conference. The Chairman of the Queensland Law Reform Commission, Mr Justice Bruce McPherson, will host and chair the ALRC meeting. The current agenda contemplates a busy program:

- opening by Sir Walter Campbell, Queensland Chief Justice and past Chairman of the QLRC;
- paper by Mr Ian Turnbull, second Commonwealth Parliamentary Counsel, on 'Problems of Legislative Drafting';
- paper by the WALRC on cost-effectiveness of law reform measures;
- paper by Mr Bruce Piggott, Tas LRC chairman, on closer co-operation between LRC's and uniform law reform; and
- discussion of constitutional problems of admiralty jurisdiction by Mr Justice Zelling (SALRC), Professor C.W. Ryan, Q.C. (QLRC) and Dr James Crawford. Dr Crawford is leading the ALRC project on admiralty jurisdiction (see [1983] *Reform* 11).

Senator Evans has been invited to attend and address the conference. The last occasion he attended was at the third ALRC Conference as a member of the ALRC in 1975.

*costs and benefits.* The subject of costs and benefit in law reform, which will be led by

the WALRC in Brisbane, has been a topic of much interest in the last quarter. The harsh economic realities make the costs of law reform a constant factor to be considered by law reforming agencies and governments receiving their reports. The ALRC is giving special attention to costs and benefits in its several reports. The subject is discussed in the Commission's *Annual Report* for 1982 (ALRC 21) with reference to the Commission's report on *Insurance Agents and Brokers*. It was in that report that the Commission grappled with the problem at length for the first time. This endeavour received mixed reviews from Dr Cento G. Veljanovski ('Cost Benefit and Law Reform in Australia' (1982) 132 *New LJ* 893, 947). Dr Veljanovski commented:

'The economic analysis of law is well developed in North America but not in Britain and less so in Australia. It is therefore surprising that the ALRC should have taken the lead amongst Commonwealth law reform bodies in promoting economics, when Australian academics have not made any significant contribution to this literature. The reasons for the ALRC's adoption of an economic approach are ones of personality and circumstance...The Australian Law Reform Commission's endorsement, and use of, an economic approach to law reform is to be applauded. While one can criticise its application of economics as being unsophisticated and sometimes wrong, there is no question that the Commission has taken an important and urgently needed initiative. One only has to compare the quality of its analysis with that of the Royal Commission on Legal Services which considered the regulation of the legal profession in the most unstructured and superficial way to confirm this view...To fulfil their duties properly, law reform must consider the costs of proposals'.

Dr Veljanovski urges that the ALRC's examination of economic issues would improve if it did not have to do economic analysis 'on the cheap'. Reliance on honorary consultants is 'a recipe for poor quality analysis':

'If economics is to be employed by law reform bodies it must be good economics which is applied in a way that is sensitive to legal concerns

and problems. This requires that competent economists or lawyer-economists be employed who can apply economics to law. After all, it must be appreciated that applying economics to law is considerably more difficult than applying it to economic matters'.

Fortunately for the ALRC, with the assistance of the Centre for Policy Studies at Monash University, Dr Veljanovski, an Australian economist with training in law currently working at Wolfson College in Oxford University, is spending a period working with the ALRC Commissioners in Sydney during March and April 1983. He will be assisting the ALRC particularly on its cost-benefit analysis in reports on:

- privacy protection;
- reform of the law of standing;
- debt recovery; and
- class actions procedures.

It would be hard to find a more appropriate expert. In late 1982 Dr Veljanovski published a book titled *The New Law-and-Economics* (Centre for Socio Legal Studies, Oxford).

**cost impact statement.** On 7 February 1983, Mr Justice D.L. Mahoney of the NSW Court of Appeal addressed the problem of 'law reform and cost' at one of the regular NSW Law Foundation law reform workshops. He proposed a law reform enquiry into costs of legal servicing. He posed the question whether the law required lawyers to do unnecessary work and thereby required unnecessary legal costs to be incurred. Examining accident compensation litigation, procedures for court pleading and the process of land title conveyancing, Mr Justice Mahoney suggested that law reformers should be examining positively the ways by which costs of legal services to the community could be reduced:

'Many transactions for which a client must pay could, I think, be done in a different way, a way which would require less of the lawyer and therefore less cost to the client. It would, I think,

be possible in many cases for a standing committee of the legislature or a committee of the law reform commission, to scrutinise legislation proposed to be passed for the purpose of ensuring that what will be required to be done by lawyers will not result in lawyers, for their time, skill and attention, being required to charge costs which, had the thing been done otherwise, would have been avoided. There is a precedent for committees which examine legislation in advance. There can, I think, be no more important purpose for such examination than to reduce costs...The establishment of machinery for this purpose is something which a law reform committee may well undertake'.

It is inevitable that in hard times, economics should loom large. Dr Geoffrey Palmer, former law professor at the Victoria University of Wellington, NZ and now Deputy Leader of the Parliamentary Labour Party in New Zealand, brought this point home in an address to the Northern South Island Regional Conference of the Party on 20 February 1983:

'In the current climate we have got to be extremely disciplined. We are not going to be able to do all the things we want to do — there will be very little money. Economic issues will dominate all others. The need to repair the economy and provide employment are goals to which everything else must be subordinated. Since we cannot do everything at once, we must be rigorous in our choice of what to do first. And we must educate the electorate in that choice of priorities. We can all make fine speeches about what needs to be done about a great many imperfections in our society. The public cannot take it all in. They believe it to be Utopian. The key problem is the economy'.

A recognition of this 'key problem' is now penetrating law reform agencies and is being considered and discussed in a more open and expert way. A concern about the costs of the law, bordering almost on an obsession, had now begun to permeate not only law reform reports, but also comments from within the top jobs of the legal profession. The President of the Law Society of England and Wales, Mr Maxwell Williams told the Society:

'There is no point in having the world's greatest legal system if it is so expensive as to be

unavailable for a significant percentage of the population. The courts must not continue to price themselves out of the market'. (1982) 132 *NewLJ* 893.

Commenting on these remarks, the editor of the *New Law Journal* (ibid) was sceptical:

'Laudable though the President's speech was, was it what the average member of the profession wanted to hear from the head of the governing body? Reform might seem a somewhat incongruous topic. After all the Law Society is not exactly renowned for its reforming zeal. Mr Williams thought not. Law Society reform was not an example of oxymoron. But should not the President of the Law Society have been addressing himself to the problems facing the solicitor's branch of the profession?'

**new books.** Two new books of interest to institutional law reformers, published in the last quarter should be noted:

- A.R. Blackshield (ed) '*Legal Change, Essays in Honour of Professor Julius Stone*', Butterworths, 1983. Launching the book the Chairman of the Committee which organised it, NSW Chief Justice Sir Laurence Street, said that Stone was 'revered, admired and affectionately regarded by his students and his disciples'. NSW Premier, Mr Neville Wran, Q.C., admitted to embracing the principle of 'pragmatism' rather than 'social idealism' — two chapter headings of Professor Stone's *Province and Function of Law*. 'He lifted our sights' said Mr Wran. Of special interest to law reformers are the essays by Professor Ronald Sackville and by the ALRC Chairman on the meaning and achievement of law reform in Australia.
- M.D. Kirby *Reform the Law!*, OUP, 1983. Thirteen of the ALRC Chairman's speeches over the past few years have been collected by Oxford University Press Australia and published in March 1983. The essays range over the work of the ALRC

and contain some reflections on institutional law reform. The Foreword by Lord Scarman, extracted at the head of this section, questions whether the 'all-embracing, universal approach to law reform is appropriate'. 'Is that the right approach to law reform?', he asks. Admitting that there are 'many doubting voices to be heard in the dark jungle of the law, some pessimistic and some petulant', Lord Scarman concludes that he 'needed no convincing' that the approach 'is absolutely right: that law reform serves no true social purpose unless it is to "take the whole body of the law" as Bacon put it, under review and to sustain the review indefinitely, calling for reform in this, that or the other part of the system as the review progresses'.

## bioethics 83

'Death like birth is entry into an unknown country. The only access leads through a torture chamber and is therefore frightening. Death is becoming unborn again'.  
Arthur Koestler 1905-1983

*human issues.* Before the Federal Election the incoming Federal Attorney-General, Senator Gareth Evans asked whether the Federal Attorney-General had made any decision concerning references to the ALRC on legal problems and issues associated with:

- in vitro fertilization
- embryo implantation;
- artificial insemination;
- surrogate parenthood; and
- genetic engineering.

Senator Evans asked whether the Federal Attorney-General would acknowledge that disuniformity of the law was likely to result 'unless a single national enquiry was conducted by the Australian Law Reform Commission'. Answering on behalf of the Attorney-General on 12 October 1982,

Senator F.M. Chaney said that the Attorney-General had decided that it is inappropriate to make a reference to the Law Reform Commission on the ground that 'the actual control of these processes is a State matter involving a wide group of Ministers'. Clearly the problems of bioethics are not confined to any particular State or even particular countries. They are human problems and a number of developments in the last quarter need to be noted.

Further progress has been made on the implementation of the ALRC report on *Human Tissues Transplants* (ALRC 7). In December 1982, the legislation based on the report was adopted in Western Australia. See [1983] *Reform* 27. In April 1983 the Human Tissue Act 1982 (Victoria) comes into force. Legislation based on the ALRC report is now in force in five of the eight Australian jurisdictions. Others are set to follow. The success indicates that progress can be made in Australia towards uniform laws, including in highly sensitive and controversial areas of bioethics.

In January 1983, the National Health & Medical Research Council of Australia announced the establishment of a special committee to deal with social, legal and ethical questions associated with medical research. The committee is to keep developments under review, to monitor the work of institutional ethics committees and to respond to requests by Ministers. Published during the last part of 1982 and now available is the NH & MRC 'Code of Practice for Transplantation of Cadaveric Organs'. A member of the working paper which developed the Code was Mr Russell Scott, Deputy Chairman of the NSWLRC and formerly Commissioner in charge of the ALRC project on human tissue transplants. The Code provides numerous detailed guidelines and references to State legislation. The latter have now been overtaken with the enactment of new laws based on the ALRC report in WA and