

of the wife and her relatives were not to be seen as the remnants of a vanishing culture which will be obliterated in time by the process of assimilation. They are to be seen as part of the sense of identity and development of the children, part of their links to an Aboriginal culture and heritage which comes to them through their mother. In her Honour's view, the failure of the husbands to recognise this and to encourage these links should have weighed in the trial judge's decision about custody.

### **costigan & beyond**

In a way beset with those that contend, on the one side for too great liberty and on the other side for too much authority, 'tis hard to pass between the points of both unwounded

Thomas Hobbes

The Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union presented its Sixth and Final Report to the Victorian and Federal governments on 26 October, 1984. Letters Patent had been issued in September 1980 but varied in June 1981, April and December 1982, February and December 1983 and then June 1984. The scope of the Commission's investigations was significantly extended during its course, eventually covering all parts of Australia and strata of society. To assert that controversy has surrounded the Final Report would be more pregnant of understatement than originality. Reaction has been polarised. Critics have claimed that in its zeal to identify organised crime in Australia, the Costigan Commission was contemptuous of civil liberties and ignored elementary principles of natural justice. They have said too that its proposals for a new criminal investigation regime paid insufficient attention to the regulation and accountability of the police. Supporters have claimed on the other hand that thieves and drug-runners should not be protected by 'legal niceties' and have pointed to the invasions of civil liberties perpetrated by criminals of the kind the Costigan Commission investigated.

The controversy which has been generated by the Final Report and Kerry Packer's involvement in the fracas has served to some extent to

draw attention away from the important achievements of the Commission. Undeniably, it has highlighted the value of computerised technology in the fight against organised crime. This technology will be taken over by the National Crimes Authority. As a result of the Commission's Fourth Interim Report in July 1982 dealing with 'Fraud on the Commonwealth Revenue', two Special Prosecutors were appointed Mr Roger Gyles QC was charged with the task of dealing with the 'bottom of the harbour' tax schemes and Mr Robert Redlich dealt with criminal matters arising out of the confidential sections of the Report. Considerable sums have been returned to the public purse as a result and it has been claimed by some that Australia's tax evasion industry in the process has suffered its cruellest ever blow.

However, the Sydney Morning Herald has reported the New South Wales Premier, Neville Wran, as having declared that the credibility of the Costigan Commission 'has been shattered' by the finding of a Queensland coroner that the death of Brisbane bank manager, Mr Ian Coote, was due not to 'foul play' but suicide. It had been suggested by the Commission that Mr Coote, linked in the media as a business contact of Kerry Packer, had been murdered. A number of expert witnesses before the inquest denied that this was possible. Mr Wran is quoted as saying of the Costigan Report, parts of which were leaked in the National Times:

People's names and reputations were sullied without any attempt being made at all to see who was responsible for the leaking of confidential material. You can't condemn a journalist for wanting a scoop or information that's not available to anyone else but I am highly critical of the people who make confidential material available in that way because it does such great harm to individuals and the whole fabric of society.

A number of issues relevant to law reform arise out of the Commission's Reports:

- The Costigan Commission, like the Stewart Royal Commission and the neonatal National Crimes Authority, is still another of the ventures by government

into 'alternative' means of dealing with organised criminal activity and criminal complicity on the part of prominent persons. These recently have included Royal Commissions, Commissions of Inquiry, Judicial Inquiries and Senate Special Committees. Royal Commissions and their like, though, do not bring criminal proceedings nor are they purely investigative bodies. It is out of this strange and little analysed meld that problems about the proper function of bodies such as the Costigan Commission rear their heads. The new Federal Attorney-General, Mr Bowen, has also been critical of some of the practices of the Costigan Commission maintaining that the government is still completely committed to the fight against organised crime but stressing that:

...this fight can and must be waged without encroaching on fundamental civil rights. The government specifically reaffirms that it rejects, as a means of combating criminal activity, the policy favoured by Mr Costigan of public exposure of persons suspected of criminal activities. There is no place in our legal system for guilt by accusation or denunciation.

For example, how public should they be? How accountable does the community wish them? Although they are not curial bodies, to what extent should the rules of natural justice and even of evidence apply?

- The considerable amounts of publicity generated by hearings before Royal Commissions and like bodies create real dangers that those subsequently charged will not be able to receive a fair trial in the courts. *Sub judice* rules do not prevent what can be absolutely damning information being made available in memorable form to the public not long before those involved are charged. Of particular concern is the fact that, as the rules of evidence do not apply to non-curial proceedings, findings made by such investigative bodies may well be based substantially on material that cannot be admitted in the courtroom. Hearsay evidence, opinion evidence and admissions of

dubious voluntariness may all contribute to findings of various degrees of certainty – on the balance of probabilities, beyond reasonable doubt etc. The likelihood of a jury being able to bring its collective mind impartially and without pre-judgment only to the issue and the facts put before the court subsequent to the findings of a Royal Commission is dangerously reduced. These are some of the issues that are being examined in the Commission's Contempt Reference headed by Professor Michael Chesterman. A wide-ranging research paper on the effects of prejudicial publicity, will be completed in 1985, together with tentative draft legislation aimed at balancing the rights of the accused to a fair trial with the interests of the community in the free dissemination of newsworthy material and in public investigation of allegations of corruption, crime and fraud.

- Issues of privacy and media accountability are raised by the leaking and publication of confidential aspects of the Costigan Commission's investigations. The seriousness of such breaches of security cannot be underestimated, both insofar as they have the potential improperly to harm the reputations and livelihoods of the individuals concerned and because they could effectively frustrate the investigations being conducted by the Commission or being referred to the National Crimes Authority for further attention.
- Of further interest to the ALRC's Reference on Insolvency headed by Mr Ron Harmer are the recommendations of Commissioner Costigan on bankruptcy. He has proposed that the Bankruptcy Act be amended:
  - to provide specifically that the Official Trustee may investigate trusts, companies, businesses, partnerships and other entities suspected of being financially associated with the bank-

- rupt or any member of his or her family;
- to rectify the apparent anomaly appearing in s 269(b) by making it an offence to carry on business in the bankrupt's own name without disclosing to the person with whom he or she deals that he or she is an undischarged bankrupt;
  - to render it an offence to fail to disclose to the Registrar in Bankruptcy or the Official Trustee all banks, building societies, credit unions, credit and other accounts in any name used by, or on behalf or for the benefit of the bankrupt; and
  - to require the bankrupt to supply to the Official Trustee quarterly statements of all deposits into and drawing from such accounts.
- One of the first achievements of the Commission was the successful recommendation of its Third Interim Report that s 16 of the Income Tax Assessment Act be amended to allow access to records held by the Taxation Office. In its Final Report, the Commission also recommends the enactment by agreement between the Commonwealth and the States of laws to the same effect to the Racketeer and Influenced and Corrupt Organisations Statute in the US. For the future, Commissioner Costigan recommended both significant changes to the Victorian Lotteries Gaming and Betting Act 1966 and that there be a reference by all State Governments to the National Crime Authority to investigate illegal bookmaking throughout Australia.
  - Commissioner Costigan has also recommended changes to the perjury provisions of the Royal Commissions Act 1902 (Cth) to delete the requirement that the false answer be shown to be 'material' to the inquiry. In addition, the Commission's Report recommends that the Commonwealth and the States enact

laws similar to those in the United States in the Labour-Management Reporting and Disclosing Act of 1959. Thus, a person would be prohibited from holding office in a union for a period of five years following conviction for an indictable offence.

- Central to the recommendations of the Costigan Report is the perceived need to investigate 'any apparently unexplained accretion of great wealth'. Section 264 of the Income Tax Assessment Act does not over-ride legal professional privilege nor the privilege against self-incrimination (see ALRC, *Interim Report on Evidence*, forthcoming). Were the Costigan Report's recommendations acted upon, these restrictions on the Tax Officers' investigative powers could be lifted. Matters which formerly were the subject of s 264 notices could then be handled by a Taxation Investigation Tribunal. The Report calls also for the establishment of an office of Special Tax Investigator which would oversee small teams investigating criminally-sourced income. Each team would consist of small numbers of experienced tax officers together with permanently seconded officers from the Australian Federal Police and from the police force of the State in which the team operated. Matters for investigation would be referred by the Tax Office, law enforcement bodies, the National Crimes Authority or the government. The investigator would also have power to take on subjects of its own volition and the government could *not* direct the investigator on the targets he or she was to pursue.

### **on the western front**

Out where the handclasp's a little stronger,  
Out where the smile dwells a little longer,  
That's where the West begins.

Arthur Chapman, 'Out where the West Begins'

*trusts and the administration of estates.* The last few months at the Western Australian Law Reform Commission have seen the issue of a