

## LAW REFORM

### *SUMMARY OF LAW REFORM MATERIAL RECEIVED, APRIL 1987.*

- *Australia's Constitution; Time to Update*, Summary of the Reports of the Advisory Committees to the Constitutional Commission, September 1987, Constitutional Commission.
- *Names: Registration and Certification of Births and Deaths*, Discussion Paper, December 1987, New South Wales Law Reform Commission.
- *General Insolvency Inquiry*, Discussion Paper No. 32, August 1987, Commonwealth Law Reform Commission.
- *Police Powers of Arrest and Detention*, Discussion Paper on Criminal Procedure, August 1987, New South Wales Law Reform Commission.
- *In Vitro Fertilization*, Discussion Paper 2 on Artificial Conception, July 1987, New South Wales Law Reform Commission.
- *Company Law*, Discussion Paper, 1987, New Zealand Law Commission.
- *The Structure of the Courts*, Discussion Paper, 1987, New Zealand Law Commission.
- *Restitution of Benefits Conferred Under Mistake of Law*, July 1987, New South Wales Law Reform Commission.
- *Public and Media Access to the Criminal Process*, Working Paper, 1987, Law Reform Commission of Canada.
- *The Limitation Act 1950: Preliminary Paper No. 3*, Discussion Paper, 1987, New Zealand Law Commission.

*Australia's Constitution: Time to Update*, Summary of the Reports of the Advisory Committees to the Constitutional Commission, September 1987, Constitutional Commission.

This report is a summary of the recommendations of the Constitutional Commission's five Advisory Committees.

#### *Individual and Democratic Rights Committee*

The Committee recommended that the Constitution should be amended with the aim of protecting ordinary Australians from the improper interference of governments. To these ends it recommended that:

- There should be a new preamble to the Constitution which would embody the fundamental sentiments held in common by Australians of all origins.
- The power of governments should be limited, rather than proclaiming the rights of citizens in abstract terms in a bill of rights.
- The Constitution should explicitly preserve traditional rights and freedoms to make it quite clear that nothing is being lost or taken away in the process of increasing the guarantees of rights and freedoms in the Constitution.
- Voting, as a fundamental democratic right should be protected by the Constitution.

- The Constitution should include the 'one vote one value' principle with reference to both State and Federal elections.
- An accused person should be entitled to a jury as of right for all offences, be they state or federal, which are punishable by a term of imprisonment of 12 months or more.
- Certain other common law principles of procedure and justice ought to be entrenched in the Constitution, including a reasonable right to legal representation, and rights of appeal.
- The Constitution should prevent all forms of governmental conduct which interfere with freedom of religion.
- Freedom of movement should also be protected under the Constitution.
- The Constitution should prevent governments from interfering with any form of speech which deals with the political process and with issues which concern the functioning of government, public policy and administration, and politics.
- The opportunity for peaceful assembly should be guaranteed by the Constitution.
- The status of citizens should be provided for, and protected, in the Constitution.
- The rights of minorities to preserve their culture, practice their religions and speak their mother languages should be guaranteed.
- There should be a simple prohibition on 'unfair' discrimination 'on any grounds' and the Constitution should also prevent governments denying equality before the law.
- There should be provision in the Constitution for voter-initiated referendum for constitutional change.

#### *Distribution of Powers Committee*

This Committee considered the division of powers between the Commonwealth and the States, as found in the Constitution.

One of the Committee's most interesting recommendations was that the Federal Government's ability to use its powers for purposes other than those connected with its allocated heads of power, be maintained. Hence the federal power to enact legislation to implement treaties should not be restricted, but a Treaties Council involving the states should be set up to improve consultation and communication.

It is also recommended that the Federal Parliament be given an express power over nuclear fuels, nuclear energy and ionizing radiation.

#### *Trade and National Economic Management Committee*

The Committee recommended that:

- The Federal Parliament should have power to prevent lack of uniformity in business regulation across Australia.
- The Constitution be amended to give the Federal Parliament shared or concurrent power to make laws about all aspects of corporate activity and the securities industry.

- The Federal Parliament should have the power to pass uniform consumer protection laws.
- States be given the power to impose 'final consumption' taxes, but not taxes on production of goods (Majority view only).
- The deletion from s. 51(ii) (giving the Federal Parliament the power to levy taxes) and s. 51(iii) (preventing any lack of uniformity in bounties on the production or export of goods) of the stipulation against discrimination between the States.
- The repeal of s. 99 which provides that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to any one State or part thereof.

#### *Executive Government Committee*

The Committee recommended that:

- Australia maintain its system of the Parliamentary Executive.
- An explicit statement that the head of government is the Prime Minister be added to the Constitution and that when the Governor-General appoints or dismisses ministers, he should do so on the advice of the Prime Minister.
- The Senate should not have the power to block supply for more than 30 days.
- The Constitution be amended to provide explicitly that all powers vested in the Governor-General, except 'reserve powers' be exercisable only in accordance with ministerial advice.
- The Governor-General's exercise of 'reserve powers' should be reviewable by the courts (Majority view only).

#### *Australian Judicial System Committee*

The Judicial System Committee, by majority, opposed the integration of the federal and the state court systems.

It recommended *inter alia* that:

- There should be no change in the appointment of federal judges.
- Power to make appointments to the High Court should remain with the Commonwealth.
- The Constitution should be amended to provide for a judicial tribunal to determine whether facts found by it are capable of amounting to misbehaviour or incapacity warranting the removal of a judge.
- Parliament should still decide whether a judge should be removed.
- There should be guarantees in the Constitution of the independence and integrity of state, as well as federal and territory courts.

#### *Further Constitutional Issues*

The report notes that the Commission itself is also looking at such controversial issues as whether the Federal Parliament should have four year maximum terms rather than three years. It is also considering whether there should be a power to make uniform defamation laws throughout Australia, whether the method of changing the Constitution should be altered, and whether obsolete parts of the Constitution should be removed.

The Commission will report its findings to the Federal Government by 30 June 1988, leaving their possible implementation by referendum, to the Government.

*Names: Registration and Certification of Births and Deaths*, Discussion Paper, December 1987, New South Wales Law Reform Commission.

The Commission analyses the principles it sees as the basis to any reform, noting the necessity of balancing the use of information for the efficient administration of government, with the justifiable claim of the individual to privacy.

The Commission tentatively proposes a number of specific guidelines for reform, and invites public comment on these issues. Its proposals include that:

- The supply of information with respect to a mother's occupation should be mandatory.
- A man who formally acknowledges his paternity, or who can prove cohabitation with the mother in circumstances giving rise to a legal presumption of paternity, should be entitled to the same rights as a married father.
- Parents should have total freedom in the choice of a surname, including the choice of a surname which is different from that currently used by either parent.
- Information concerning the registration of change of sex on birth certificates applying to transsexuals should be recorded on the register, but in such a way that the original register is not open for public or official scrutiny without the consent of the person involved, or without a court order.
- Forms of certificate should be more flexible. Applicants should be able to obtain a certificate omitting any detail which is unnecessary for their purpose in requesting it.

*General Insolvency Inquiry*, Discussion Paper No. 32, August 1987, Commonwealth Law Reform Commission.

The proposals presented in this paper represent the progress of a consultative process initiated in January 1985. The appendix to the Discussion Paper takes the form of draft legislation, with the aim of promoting informed and constructive comment on specific proposals and the manner in which they should be translated into legislative form.

The Commission considered the law and practice relating to the insolvency of both individuals and bodies corporate. This required particular reference to the provisions of the Bankruptcy Act 1966 and to parts VII, X and XII of the Companies Act 1981. A preliminary question was whether the Commission should advocate unification of the two branches of law. Whilst the benefits of a uniform legislative scheme were conceded, on balance it was thought that this would distract from more pressing reforms. It was noted that complete uniformity was impossible, that jurisdictional issues could arise through foreshadowed national companies legislation.

The Commission identified a number of general aims of bankruptcy legislation:

1. That insolvency law should be at the national level. Individual and company

insolvency should be in separate enactments which should be uniform so far as is possible.

2. Individual insolvency —

- (a) There should be a more extensive range of forms of insolvency administration.
- (b) The concept of an ‘act of bankruptcy’, the existing form of ‘bankruptcy notice’, the present form of bankruptcy petition and the term ‘sequestration’ order should be abolished.

A bankruptcy order should be available to a creditor against a debtor. Two forms of special application for bankruptcy orders were proposed, to apply to statutory appointees under legislation dealing with control of certain classes of persons, (such as real estate agents, travel agents, finance brokers and creditors).

- (c) The Part X system of voluntary administration should be retained, but modified to promote efficiency and prevent abuse and manipulation of the procedure.
- (d) The discharge provisions were considered; first, in the light of proposals for alternative forms of insolvency administration, then in terms of their present functioning.

3. Company insolvency—

- (a) There should be two principal methods for dealing with insolvency:
  - a winding up in insolvency
  - a deed of company arrangement
- (b) A new form of voluntary administration was proposed. Official management would be abolished.
- (c) Special provisions for companies which become insolvent through the conduct of trading trusts should obtain.
- (d) The power to appoint a receiver would be retained, but the holder of a floating charge would be able to appoint an administrator to a company which has defaulted under the provisions of a charge. Receivers appointed under floating charges should be under a statutory duty to take reasonable care. ‘Automatic’ crystallisation of a floating charge should be restricted in some circumstances.
- (e) The Commission advocated the establishment of a fund for the administration of assetless companies, created by means of a levy upon all incorporated companies.
- (f) The provisions relating to director liability should be reviewed.

4. General insolvency provisions—

- (a) Strengthening of the antecedent transaction provisions.
- (b) An administration in insolvency should include all debts and liabilities, including tortious claims, even though unliquidated.
- (c) One self-regulatory system of qualification, registration and regulation of insolvency practitioners.
- (d) Categories of property exempt from distribution should be reviewed.
- (e) Review of several areas in relation to procedural aspects of insolvency administration.

- (f) Rationalisation of existing insolvency offences.
- (g) Administration of foreign insolvencies in Australia should be improved by: (i) Use of international treaties; (ii) Insertion of a provision in the companies legislation to enable recognition and enforcement in Australia of administration proceedings in a foreign country; (iii) Greater reciprocity in the application of s.29 of the Bankruptcy Act.

*Police Powers of Arrest and Detention*, Discussion Paper on Criminal Procedure, August 1987, New South Wales Law Reform Commission.

The Commission, under a reference on 17 January 1982, was required to inquire into and review the law relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto. It was asked to give priority to a review of the law relating to the police powers of arrest and detention.

The Commission made a number of tentative proposals. It submitted that a single and comprehensible code of procedure should govern powers of arrest and detention. It should implement the following reforms:

1. Police powers independent of arrest.

A police officer should have the power to stop and search a person or vehicle in a public place, or to require a person to disclose his or her name and address, where reasonable grounds exist. Involuntary detention without arrest should generally be prohibited.

2. Powers of arrest.

Powers of arrest should be used only where a summons or court attendance notice procedure is not practicable. A private citizen's power of arrest should be restricted to offences carrying a maximum penalty of 12 months imprisonment or more.

3. Procedure following arrest.

An arrested person should be brought before a custody review officer at the nearest police station as soon as possible. He or she should be informed of the right and be entitled to have access to a lawyer at the station. All relevant communication between a police officer and the arrested person should be recorded by means of electronic equipment. Investigative procedures authorised by statute may be conducted at the station. It should be within police power to take fingerprints and photographs where there are reasonable grounds to do so. Forensic evidence should be obtainable from the arrested person without consent, either by a police officer or, where appropriate, a qualified medical practitioner. It should be within police power to grant unconditional release, or release on condition of attendance at a police station or at a court.

4. Length of detention.

It should be within police power to detain an arrested person at the police station for as long as it is reasonable, but for no longer than four hours before either release or appearance before a court. This period could be extended on the order of a court for such time as the court considers reasonable.

5. Constitution of Court.

Where the procedure requires the involvement of a court, the court should consist

of a judge, magistrate or justice employed by the Attorney-General's Department. It should be available for contact by telephone outside normal court sitting hours.

6. Admissibility of evidence.

Evidence obtained in breach of procedural rules should generally be inadmissible unless the party seeking to have it admitted can show its admission would not be unfair or contrary to the interests of justice.

*In Vitro Fertilization*, Discussion Paper 2 on Artificial Conception, July 1987, New South Wales Law Reform Commission.

This paper is the second of three reports produced by the Commission on Artificial Conception, under a reference from the Attorney-General on 5 October 1983.

Part I of the paper provides a background to the issue of in vitro fertilization, giving some indication of the problem that it was intended to remedy, the development and recent history of the process, and the practice of IVF. It then reviews the current state of the legislation, and the issues raised in public debate.

Part II sets out the tentative views and recommendations of the Commission. It suggests that blanket regulation of IVF is not necessary, provided practice is confined to the medical profession. Questions of eligibility for IVF and acceptance of patients for treatment should be a matter for professional determination by medical experts within a framework of legislative guidelines.

The Commission proposes that legislation provide that there be a conclusive presumption that a woman bearing a child by means of artificial conception is that child's mother. Where stored reproductive tissues have been used posthumously, the child should not be regarded as the child of the testator or testatrix for the purpose of inheritance unless provided for by will. A clinic should have power to determine use, storage and disposal of reproductive tissue.

The Commission advocates the continuation of IVF research; it believes that as long as it is properly conducted and subject to proper controls it would be tolerated by the community. In particular, records should be kept and divulged only in restricted circumstances.

The issue of consent and liability for damage resulting from the IVF procedure should not be regulated by legislation.

The Commission proposes the creation of a state advisory committee with the purpose of informing the public and assisting IVF practitioners and researchers in decisions relating to the acceptability of their practice and proposals.

*Company Law*, Discussion Paper, 1987, New Zealand Law Commission

On 5 September 1986 the Commission was asked to review the law relating to bodies incorporated under the Companies Act 1955 and to report on the form and content of a new Companies Act. The Commission outlined the operation of the Companies Act and related legislation, and suggested a number of reforms. These were based on an approach that held that company law should concentrate

on matters of company structure and should permit as much flexibility as is consistent with the integrity of the registration system and the prevention of abuse. An ideal would be a self-enforcing Act under which access to the courts is improved.

The Commission suggested reforms in a number of particular areas:

- separation of company law and securities law
- abolition of the private company/public company distinction
- a streamlined system of registration
- reassessment of aspects of the company constitution, including;
  - the roles of the directors and shareholders in company decision-making
  - duties of directors and shareholders to the company and to shareholders.
- substantial reform of the capital maintenance rules and the rules relating to payment of dividends
- an effective and useful system of charges registration
- reassessment of the disclosure requirements of the Act.

LAW REFORM EDITORS