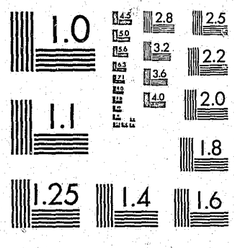

The Law Reform Commission

Annual Report

1981

Publications of the Law Reform Commission

Reports
ALRC 1 Complaints Against Police, 1975
ALRC 2 Criminal Investigation
ALRC 3 Annual Report 1975
ALRC 4 Alcohol, Drugs and Driving, 1976
ALRC 5 Annual Report 1976
ALRC 6 Insolvency: The Regular Payment of Debts, 1977
ALRC 7 Human Tissue Transplants, 1977
ALRC 8 Annual Report 1977
ALRC 9 Complaints Against Police (Supplementary Report), 1978
ALRC 10 Annual Report 1978
ALRC 11 Unfair Publication: Defamation and Privacy, 1979
ALRC 12 Privacy and the Census, 1979
ALRC 13 Annual Report 1979
ALRC 14 Lands Acquisition and Compensation, 1980
ALRC 15 Sentencing of Federal Offenders, 1980
ALRC 16 Insurance Agents and Brokers, 1980
ALRC 17 Annual Report, 1980
ALRC 18 Child Welfare, 1981

Working Papers
WP 1 Complaints Against Police, 1975
WP 2 Alcohol, Drugs and Driving, 1976
WP 3 Consumers in Debt, 1976
WP 4 Defamation, 1976
WP 5 Human Tissue Transplants 1977
WP 6 Complaints Against Police (Supplementary Report), 1977
WP 7 Access to Courts—I Standing: Public Interest Suits, 1977
WP 8 Lands Acquisition Law: Reform Proposals, 1977

Issues Papers
IP 1 Statutory Brain Death, 1977
IP 2 Insurance Contracts, 1977
IP 3 Evidence, 1980

Discussion Papers
DP 1 Defamation—Options for Reform, 1977
DP 2 Privacy and Publication—Proposals for Protection, 1977
DP 3 Defamation and Publication Privacy—a Draft Uniform Bill, 1977
DP 4 Access to the Courts—I Standing: Public Interest Suits, 1978
DP 5 Lands Acquisition Law: Reform Proposals, 1978
DP 6 Debt Recovery and Insolvency, 1978
DP 7 Insurance Contracts, 1978
DP 8 Privacy and the Census, 1979
DP 9 Child Welfare—Children in Trouble, 1979
DP 10 Sentencing: Reform Options, 1979
DP 11 Access to the Courts—II Class Actions, 1979
DP 12 Child Welfare: Child Abuse and Day Care, 1980
DP 13 Privacy and Intrusions, 1980
DP 14 Privacy and Personal Information, 1980
DP 15 Sentencing of Federal Offenders, 1980
DP 16 Reform of Evidence Law, 1980
DP 17 Aboriginal Customary Law—Recognition

Periodicals
Interim Law Reform Digest and Supplements
Reform (Quarterly)

The Law Reform Commission

Annual Report

1981

Australian Government Publishing Service
Canberra 1981

Commission Reference: ALRC 19

The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 for the purpose of promoting the review, modernisation and simplification of the law. The Chairman and first Members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, N.S.W. Australia
(Tel.(02) 231 1733)

Printed by Watson Ferguson and Co., Brisbane

Senator the Honourable P.D. Durack, Q.C.
Attorney-General
Parliament House
Canberra, A.C.T. 2600

Dear Attorney-General,

In accordance with s.35 of the Law Reform Commission Act 1973 we have the honour to present the sixth Annual Report of the Law Reform Commission. The report relates to the period of the Commission's work from 1 July 1980 to 30 June 1981.

M.D. KIRBY (*Chairman*)
G.W.P. AARONS
A.C. CASTLES
B.M. DEBELLE
R.A. HAYES
GORDON HAWKINS
D. ST. L. KELLY
J.A. MAZZA
F.M. NEASEY
B.J. SHAW
T.H. SMITH

The Commission

Commissioners of Law Reform—Full Time

The Hon. Mr Justice M.D. Kirby, B.A, LL.M., B.Ec.(Syd.)
Chairman of the Law Reform Commission
Deputy President of the Australian Conciliation and Arbitration Commission
Member of the Administrative Review Council

Mr Bruce Debelle, LL.B.(Adel.)
Barrister and Solicitor of the Supreme Court of South Australia

Associate Professor Robert Hayes, LL.B. (Melb), Ph.D. (Monash)
Barrister of the Supreme Court of New South Wales
Associate Professor of Law, University of New South Wales

Mr T.H. Smith, B.A., LL.B. (Melb.)
Barrister of the Supreme Court of Victoria

Commissioners of Law Reform—Part-time

Mr G.W.P. Aarons, LL.B. (Melb.),
Solicitor of the Supreme Court of Victoria

Professor A.C. Castles, LL.B.(Melb.), J.D. (Chicago),
Professor of Law, The University of Adelaide

Associate Professor G.J. Hawkins, B.A.(Wales)
Deputy Director of the Institute of Criminology
Faculty of Law, University of Sydney

Professor David St.L. Kelly, B.C.L. (Oxon), B.A., LL.B.
Professor of Law, The University of Adelaide

Mr J.A. Mazza, LL.B. (W.A.),
Barrister and Solicitor of the Supreme Court of Western Australia

The Hon. Mr Justice F.M. Neasey LL.B. (Tas.)
Judge of the Supreme Court of Tasmania

Mr Brian J. Shaw, Q.C., B.A., LL.B.(Melb.), B.C.L.(Oxon)
Barrister of the Supreme Court of Victoria

Officers of the Commission

Secretary and Director of Research

G.E.P. Brouwer, B.A., LL.B.(Melb.), LL.M.(A.N.U.)

Assistant Legislative Draftsman

Stephen Mason, B.A., LL.B., M.T.C.P. (Syd.)

The Commission wishes to acknowledge the legislative drafting assistance provided by Mr J.Q. Ewens, C.M.G., C.B.E., LL.B. (Adel.) formerly First Parliamentary Counsel of the Commonwealth of Australia, and by Mr N.T. Sexton, LL.B. (Syd), Director, Legislative Drafting Institute, on a number of the Commission's references.

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Law Reform Officer

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G.M. Symes
L.M. Walters

Seconded Officer

A. Sowden, B.A. (A.N.U.)
(Seconded from the Department of Administrative Services)
(from 30 June 1980)

Contents

1. Law Reform in Australia

The Law and Economics — Cost/Benefit

1. Law reform, and indeed law making generally, must be alert to the economic implications of their endeavour. The costs as well as the benefits of legal change need to be weighed carefully and, where possible, more scientifically than at present. Competing considerations are involved. Justice does have a price and fairness must be paid for. The value of justice however cannot be measured in absolute terms. Cost/benefit analysis in the law, as in managing a business, cannot reach absolutely correct decisions. It can only provide criteria to be considered in the decision-making process so that decision makers recognise and consider the reasonably foreseeable economic consequences of reform proposals. The difficulty of precisely measuring the cost and benefit of the various factors means that in the context of legal change any analysis must necessarily result in an imprecise equation. There is scope for identifying more clearly than is done at present the social welfare choices and predictable costs of alternative courses of action.[1] The usefulness of this analysis depends largely on the extent to which relevant considerations are factual or are capable of being made factual.[2] From the lawyer's point of view, a difficulty is posed by reducing intangible factors to a money value, for instance, the value of a park to environmentally sensitive people or the value of a transplanted kidney to a dialysed recipient. Yet the difficulty of valuing intangibles and the differing monetary values which individuals would put on obtaining various legal benefits should not discourage lawmakers and law reformers from a cost/benefit analysis of what they are doing and of alternatives open to them. In a number of recent cases, the United States Supreme Court has sought to balance costs and benefits in determining whether particular procedures argued for are required by the United States constitutional protection of 'due process of law'.[3] The Court[4] has developed the proposition that 'due process' does not necessarily and in every case require a trial-type hearing but can be satisfied by less expensive procedural safeguards. In reaching that view, the Court took into account the rate of error, the direct cost of hearings and the fiscal and administrative burdens which additional or substitute procedural requirements would entail.[5] Though the effort of the Court has been criticised by lawyers and economists alike[6], it is significant that the process of approaching the administration of justice in a managerial way has begun in earnest in a common law country and at the highest levels. There may be wrongs, and unfairness which, balancing costs and benefits, we simply choose to do nothing about. In a way, the law has always implicitly acknowledged this formula. But it has done so in a generally unscientific fashion, without any real endeavour to identify even imprecisely the competing costs and benefits. There is a need for a more businesslike and open approach to this equation. That does not mean an equation that ignores the difficult to measure 'value perspectives' or the long run benefits of providing society with institutions and laws that command general acceptance and promote social well being.

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1 D.L. Williams 'Benefit Cost in Natural Resources Decision-Making: An Economic and Legal Overview' (1979) 11 *National Resources Lawyer* 761, 794.

2 H.P. Green 'Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective', 45 *George Washington University Law Review* 901, 910 (1977).

3 The leading case is *Mathews* v. *Eldridge*, 424 US 319 (1976).

4 id., 2166.

5 id., 334–335.

6 See eg. J.L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 *University of Chicago Law Review* 28 (1976).

2. In developing its recommendations for the reform of the law, the Commission undertakes as a matter of course an examination of their costs and benefits. This includes an examination of the costs imposed on the community in having differing State legislation as opposed to uniform legislation. However, it is when the Commission is given a task relevant to business law that the most acute debates about law and economics are bound to arise. Thus, the Law Reform Commission's project on class actions has engendered keen debate in the press, academic circles, industry, public seminars and hearings conducted by the Commission in connection with its reference.

3. The class action is a procedural device, developed particularly in America, by which one litigant can bring proceedings on behalf of many other people similarly affected. In the United States, the device has been developed extensively. In Australia, no similar development has occurred. The proponents of class actions claim that they provide greater equality in litigation. Where a mass produced product or service is defective, inevitably a legal problem may be 'mass produced'. On the other hand, opponents of the procedure in Australia have described class actions as 'business's final nightmare'. The acting director of the Victorian Chamber of Manufactures said they would be 'leeches' which would 'suck away the strength and vitality of manufacturing industry in Australia'. The *Australian Financial Review* even described the class action legal procedure as 'part of a concerted legal thrust to alter significantly the legal framework within which business in Australia operates'. At a time when Australian business is espousing deregulation[7], it is ironic that a number of business opponents of class actions urged that the 'Australian way' of dealing with problems was not to go to court, as in the United States, but to establish regulatory bodies which could provide accessible administrative machinery to stand up for disaffected consumers. American proponents of the class action say that it represents an effective alternative to administrative bureaucracies. By equalising the litigation between government or large corporations, on the one hand, and individuals with a like claim, on the other, law-abiding conduct can be assured without the paraphernalia and expense of administrative agencies, public servants and public expense. The Law Reform Commission is still considering its report on class actions. It has had numerous submissions put to it and all of these are being carefully considered. The economic implications of the introduction of the procedure and the costs and benefits of various alternatives are being evaluated.

4. The Commission's report on *Insurance Agents and Brokers* contains the clearest statement yet of the recognition by the Commission of the need to take into account economic considerations in judging the need for reform and in the design of laws to achieve that reform. One of the guiding principles espoused by the Commission and adapted from the philosophy of the Trade Practices Act 1974 (Cwlth) is that:

> Interference with freedom of competition is to be justified, if at all, by the public benefit which results from a particular form of regulation ... Diminution of competition might have an adverse effect on the cost of insurance, on the range and quality of services offered and on the development of the market in response to the needs of the insuring public ... Any forms of regulation which might have an anti-competitive effect on the insurance industry or on any section of it [should be avoided].[8]

5. The report addressed a number of problems that have been shown to arise in the relationship between the ordinary member of the public seeking insurance and insurance intermediaries, whether agents or brokers. One special problem which came to light in the

[7] Confederation of Australian Industry, *Government Regulation in Australia: Paper 1, Introduction; the Federal Government*, Canberra, CAI, 1980.

[8] The Law Reform Commission, *Insurance Agents and Brokers* (ALRC 16) 1980, 10.

course of the Commission's enquiry was the fact that between 1970 and 1979, 27 insurance brokers collapsed. The known losses amounted to $7.25 million, the actual losses probably exceeded $10 million. Further collapses in the 18 months since the Commission delivered its report to the Government has meant that known losses have increased to $15 million. A large proportion of these losses is ultimately borne by the insuring public. Questions that arise include how such losses should be viewed and the correct response to them. This case provides an almost classic example of the problem for law reform where the decision made must reflect, to some extent, economic as well as legal concerns.

6. Facing up to this problem, the Commission had a number of options open to it:

- Should it simply increase criminal penalties to require proper accounting and to punish speculative investments by brokers?
- Should it introduce a detailed scheme of licensing with compulsory insurance?
- Should it simply permit accreditation of 'reliable' insurance brokers by industry bodies relying on advertisements and persuasion rather than legislative force to uphold good standards?
- Should it provide for a system of registration with a scheme for compulsory professional indemnity insurance?
- Should it do nothing, on the basis that the costs of any intervention would outweigh the admitted benefits?

7. In weighing the costs and benefits none of the first three alternatives appeared entirely satisfactory. The first might punish the broker but would give scant satisfaction to members of the community who had lost as a result of his defaults. The second could remedy the problem of misuse of client funds, speculative investment and so on. But the price might be too high. One of the effects of licensing would be to reduce competition by excluding people from the business of insurance broking and reducing the competition between those remaining. Often licensing results in unnecessary requirements as to 'fitness'. Furthermore, it almost always requires a significant administrative bureaucracy to police the licences. Such an administration may take on a life of its own, concentrating on bureaucratic aims rather than efficient protection of the public. The net result could be an unjustifiable increase in the costs of goods and services.

8. The alternative of accreditation, rather than being a compromise between protection and freedom, may often have the faults of both. It may not offer full protection to the insuring public, but at the same time it may have the effect of lessening competition. Accreditation assumes that members of the public are aware of the distinction between accredited and non-accredited brokers. It assumes that advertising the difference will come to their notice. Research suggests that to be effective, advertisements of this kind must be constantly repeated and prominent. The net cost would be significant if any attempt at genuinely protecting the community were made along these lines.

9. Having considered these various options, and the option of doing nothing, the Commission concluded that the pattern of proved losses justified a modest form of regulation. It recommended a system of registration of insurance brokers as opposed to licensing. No requirements of 'fitness' which would amount to anti-competitive limitations on entry were proposed. No anti-competitive educational pre-conditions were imposed. Moreover, because no detailed procedures of licensing and pre-entry enquiry were suggested, the administrative costs of the Commission's proposals were small. The Commission recommended that these should be paid by brokers themselves, not by the public. The insuring public would be protected by requirements of trust accounting and by a new scheme for compulsory professional indemnity insurance. It was an ironical discovery which the Commission made when it investigated the insurance intermediaries, that more

than 40% of them were not themselves covered by professional indemnity insurance. Many people who were constantly selling insurance and espousing its necessity and benefits did not trouble to get insurance for their own operations. Apart from these minimum requirements of basic regulation, the Commission suggested that no regulation of insurance agents (as distinct from brokers) was necessary. In that area and in much of the discipline of insurance brokers, the Commission urged that self-regulation had an important, vital part to play.[9]

10. In announcing the Government's rejection of the Commission's recommendations[10], the Treasurer made it clear that in undertaking a similar cost/benefit analysis the Government had reached a different conclusion:

> I am conscious that there will be some in the community who will be disappointed that the government has not embarked upon the course of full scale regulatory legislation. However, governments have to justify the cost of regulatory intervention by establishing a clear public interest in so intervening. It is often erroneously claimed that the only answer to default and dishonesty is to pass more legislation. On the contrary, whilst legislation can go some way to reduce bad and inefficient practices, no amount of legislation can provide a guarantee against fraud and business failures. The attempt to provide such a guarantee would ineyitably bring with it an unacceptable level of intervention in the affairs of businesses and individuals'.[11]

Given the complexity and difficulties which are involved in determining accurately the costs of a proposal, differences of view on such matters are not entirely unexpected, as the move by the Western Australian Government to introduce a system of licensing in that State shows.[12] But these differences should not be mistaken for a failure by the Commission to balance the benefits of a proposal for reform against its costs.

11. In the area of administrative law reform, the Administrative Review Council has ventured on an assessment of the costs and benefits of administrative reforms. The provision of review by the Commonwealth Ombudsman, the Administrative Appeals Tribunal, the Federal Court, through the political process and elsewhere involves at least complex assessment of the advantages secured against the inevitable costs of the review process. In its *Second Annual Report,* the Administrative Review Council recognised the need to consider costs as well as benefits when making its recommendations on the review of administrative decisions.[13] In its most recent *Fourth Annual Report,* the Council reverted to this issue:

> There are difficulties in comparing the costs and benefits of particular proposals for administrative review ... Most of the costs of administrative review are, in principle, able to be expressed in monetary terms ... The main benefits however, are not quantifiable in monetary (or other) terms. The non-quantifiable benefits are nonetheless real and substantial. The most general and pervasive benefit is the encouragement it provides to public confidence in the justice of government decision-making ... The administration will also benefit from independent review to the extent that it promotes an improvement in the quality of primary decision-making ... The costs of administrative review are borne by government agencies and their budgets, while the benefits arise mainly outside the government structure and are obtained by the community and the individual members of it. The benefits which accrue to government are less immediate and difficult to quantify. In these circumstances the Council considers that there is a danger that the costs may at times appear to loom larger than the benefits, particularly to the departments and authorities immediately concerned ... However [the Council] recognises that the likely costs of a particular proposal should not be unreasonably high in relation to the benefits of external review. In the final analysis, the weighing of benefits and costs (so far as they can be estimated) is, in the absence of a means of quantitative analysis, a matter of judgment to be exercised by the Government.[14]

It is clear that more will be heard in the future about the needs for and limitations of cost/benefit analysis in law reform.

Law Reform Suggestions

12. On 15 May 1980 the Attorney-General announced the Government's acceptance of the recommendation by the Senate Standing Committee on Constitutional and Legal Affairs that the Commission compile a register of law reform suggestions and report annually to the Parliament on the suggestions received. The Commission's Annual Report 1980 contained the first schedule of suggestions. The suggestions for law reform received in the past year are set out in Appendix A to this Annual Report. This list contains over 40 entries. The Commission wishes to record its appreciation to all those who have assisted it with this task. In particular, the Commission wishes to thank Mr C. Sweeney of the *Federal Law Reports,* Associate Professor Henry Finlay of Monash University and Mr Mark Darian-Smith, Law Reform Editor, *Melbourne University Law Review,* who took special measures to ensure the law reform suggestions were brought to the Commission's notice. Other law reporters and law journal editors may be expected to participate in this system as it becomes established.

13. The list also contains a number of suggestions made by judges. It is to be expected that as this facility becomes better known the number of suggestions from the judiciary will increase.

Law Reform in the A.C.T.

14. A Law Reform Commission was established for the Australian Capital Territory by the Law Reform Commission Ordinance 1971. The first members were appointed in August 1971 and six matters were assigned to the Commission. In due course, the Commission produced reports on these references. Most of these reports are still under consideration by the Australian Federal Government, which has responsibility for the laws of the ACT.

15. In 1973 Parliament passed the Law Reform Commission Act 1973 (Cwlth) establishing this Commission. The first members were appointed in 1975. After its establishment, no further references were given to the ACT Law Reform Commission. The first members

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[9] The issues raised by the Commission's report were the subject of editorial comment in both the *Sydney Morning Herald* and the Melbourne *Age.* The economics editor of the *Sydney Morning Herald* strongly criticised the proposal, which he wrongly perceived to be part of the Commission's recommendations, that brokers should be licensed. The editor said of this proposal:

> It is a highly interventionist remedy, typical of the legal mind. It ignores many of the economic issues involved and falls back on the lawyer's conviction that all of the world's problems could be solved if only we had the right laws. Finding a lawyer who understands and respects market forces is as hard as finding a baby-wear manufacturer who understands and respects celibacy. The legally trained mind cannot grasp that it is never possible to defeat market forces, only to distort them so that they pop up in unexpected ways. *Sydney Morning Herald,* 25 May 1981

Similarly an editorial in the Melbourne *Age,* in discussing draft broker legislation that was said to be under consideration by Federal Cabinet, asserted that the legislation would require the creation of another '50 or 60' public service positions and would cost the tax payer more than $1million a year. If the editorial was referring to the draft legislation attached to the Commission's report, it was a distortion of the Commission's proposal. The Commission rejected calls for an intense form of regulation. It proposed a minimal system of regulation mainly in respect of trust account requirements which would only require one or possibly two public service positions not the 50 or 60 stated in the editorial.

[10] *Parliamentary Debates, House of Representatives,* 10 June 1981, 3417.

[11] id., 3418.

[12] See General Insurance Brokers and Agents Act 1981 (W.A.).

[13] Administrative Review Council, *Second Annual Report,* 1978, para.9.

[14] Administrative Review Council, *Fourth Annual Report,* 1980, 12–13.

of the Australian Law Reform Commission were appointed in 1975. In 1977 the Law Reform Commission Ordinance of the ACT was repealed. Inquiries about the reports or work program of the ACT Law Reform Commission should now be addressed to this Commission.

16. Several Members of the Commission have been appointed from the Capital Territory. A number of the projects of the this Commission have been specifically relevant to law reform in the ACT. The report, *Alcohol Drugs & Driving* 1976 (ALRC 4) was accepted and resulted in the Motor Traffic (Alcohol and Drugs) Ordinance 1977 (ACT). Likewise the report, *Human Tissue Transplants* (ALRC 7) was accepted and resulted in the Transplantation and Anatomy Ordinance 1978 (ACT). Other projects of the Commission upon which it has reported have relevance for the ACT. The report of the Commission, *Child Welfare* (ALRC 18), 1981, deals specifically with the reform of the Child Welfare Ordinance of the ACT. In a number of cases, references have been given to the Australian Law Reform Commission in respect of ACT laws, so that reports may be available to the Australian States for consideration of uniform law reform in a particular area. The reports on Human Tissue Transplants and Child Welfare are cases in point.

17. The first meeting of an A.C.T. Consultative Committee on Criminal Law Reform was held on 30 April 1980. The Committee was established on the initiative of the Chairman of this Commission and a Reader in Law of the Australian National University (Dr. D. O'Connor). The committee comprises a Judge of the Supreme Court of the ACT, the Chief Magistrate in the Court of Petty Sessions, and representatives of the Australian Federal Police, the Bar Association and Law Society, the Departments of Administrative Services, the Attorney-General and the Capital Territory. There are also two members from the Law School of the Australian National University. The committee reports to the Standing Interdepartmental Committee on Law Reform for the ACT. Copies of its reports are sent to the Minister for the Capital Territory and the Attorney-General, each of whom has responsibility for legal reform in the ACT. Meetings of the Committee are convened and chaired by the ALRC Chairman at roughly four week intervals.

18. It is anticipated that the consultative committee will be able to supplement the work of this Commission in smaller projects, involving technical or non-controversial reforms of ACT criminal law. The committee has forwarded a number of recommendations which have been transmitted to the relevant Ministers. Many of these have dealt with the incorporation into the ACT criminal law of legal reforms which have already been adopted in the criminal law of the State of New South Wales, whose territory completely surrounds the ACT. The consultative committee has been informed that such recommendations have been accepted and are now with the legislative draftsman.

19. The committee has before it a number of issues relevant to more general criminal law reform, including notice of alibi procedures, improvement of the law of reparation, costs in criminal cases and the order of addresses to the jury by counsel in criminal trials. The committee is serviced by this Commission. It represents a small but practical and, so far, effective contribution to the improvement of criminal law and procedure in the ACT.

Program of References

20. Table 4 indicates that a number of the Commission's references will be completed within the next year or so. The Commission has drawn this to the Attorney-General's attention and has suggested to the Attorney-General a number of references that would be suitable for inclusion in a general program of references for the Commission. The Commission is awaiting the Attorney-General's response.

2. The Law Reform Commission of Australia

Composition of the Commission

21. On 30 June 1981 there were 11 members of the Commission, four of whom were full-time and seven part-time. The following table sets out the composition of the Commission at the close of the year.

Full Time Members	*Term Expires*
The Honourable Mr Justice M.D. Kirby	3 February 1982
Mr Bruce Debelle	30 June 1981
Associate Professor R. Hayes	16 March 1983
Mr Tim Smith	16 March 1982
Part Time Members	
Mr G.W.P. Aarons	21 July 1983
Professor A.C. Castles	31 December 1981
Associate Professor G.J. Hawkins	31 December 1981
Professor D. St.L. Kelly	30 June 1981
Mr J.A. Mazza	22 August 1982
The Honourable Mr Justice F.M. Neasey	19 October 1982
Mr B. Shaw, Q.C.	30 June 1981

New Appointments

22. ***Mr G.W.P. Aarons.*** On 22 July 1980 the Attorney-General announced the appointment of Mr. G. W. P. Aarons, a Melbourne solicitor as a part-time member of the Commission for a term of three years. Mr. Aarons, a graduate of Melbourne University, was admitted to practise as a solicitor in 1962. His practice has included conveyancing, family law, insurance, commercial, corporate and taxation matters.

23. ***The Honourable Mr Justice F.M. Neasey.*** Mr Justice Neasey was appointed a part-time member of the Commission for a period of two years commencing on 20 October 1980. Mr Justice Neasey, who is a Judge of the Supreme Court of Tasmania, is the first State Judge appointed to the Commission. He practised at the Bar from 1949 until 1963 in Tasmania when he was appointed to the Supreme Court. He was Chairman of the Law Reform Commission of Tasmania from 1974 to 1975 and was formerly a Royal Commissioner into Urban Transport in Tasmania. Mr. Justice Neasey also lectured at the Law School at the University of Tasmania between 1956 and 1962.

24. ***Mr. G.E. Fitzgerald Q.C.*** On 29 June 1981 the Attorney General announced the appointment of Mr Gerald Edward Fitzgerald Q.C. as a part-time member of the Commission. Mr Fitzgerald, a Brisbane barrister, has been appointed from 1 July 1981 for a term of three years. He assisted the Commission in recent years as an honorary consultant on the Defamation reference.

Reappointments

25. ***Professor D. St.L. Kelly.*** Professor Kelly was a full-time member of the Commission between 1 August 1976 and 31 January 1980. He was appointed a part-time member from 1 February 1980 to 31 December 1980 and reappointed as a part-time member for a further period on 29 January 1981 to 30 June 1981. The further extension has enabled Professor Kelly to continue working towards completion of the Commission's References on Consumers in Debt and Insurance Contracts. The Commission is grateful to the University of Adelaide for agreeing to his reappointment.

26. ***Mr B.M. Debelle.*** Mr Debelle, a full-time member of the Commission between 7 August 1978 and 31 December 1980, was reappointed as a full-time member for the period 1 January 1981 to 30 June 1981 to enable him to continue working on the Aboriginal Customary Laws and Access to the Courts References. The reappointment permitted Mr Debelle to conduct extensive public hearings on both References. The Attorney-General has now appointed Mr Debelle as a part-time member for a period of 12 months commencing on 1 July 1981.

Meetings of the Commission

27. During the year 21 meetings of the Commission were held. Of these, three were meetings of the full Commission and 18 were meetings of Divisions of the Commission. Under the Law Reform Commission Act 1973, the Chairman is empowered to constitute a Division for the purpose of a particular Reference.[1] The provision has enabled the Commission to make maximum use of the expertise and available time of part-time Commissioners. It enables them to concentrate on a number of References in which, by their expertise and interest and, within their other commitments, they are able to involve themselves. The following table sets out the number of meetings of the full Commission and Divisions held during the year under report and the number of meetings attended by each member.

TABLE 1 MEETING OF THE FULL COMMISSION AND DIVISIONS

Meetings of the Commission = 3
Meetings of all Divisions = 18
Total number of meetings = 21

	Full Commission Meetings Attended	*No. of Division Meetings Eligible To Attend*	*Divisions Attended*	*Total Meetings Attended*
M.D Kirby (Chairman)	3	18	18	21
G. Aarons	3	2	2	5
A.C. Castles	3	5	4	7
B.M. Debelle	2	7	7	9
G.J. Hawkins	3	15	12	15
R. Hayes	3	11	7	10
D. St. L. Kelly	1	4	4	5
J. Mazza	3	—	—	3
F.M. Neasey	2	2	1	3
B. Shaw	3	4	3	6
T.H. Smith	3	3	3	6

[1] Section 27(1).

Divisions of the Commission

28. The following table sets out the Divisions of the Commission as at 30 June 1981 and their membership.

TABLE 2 COMPOSITION OF DIVISIONS OF THE COMMISSION

Debt Recovery and Insolvency	
Commissioner-in-Charge:	Prof. D.St.L. Kelly
Members:	Chairman
	Mr B. Debelle
Insurance Contracts	
Commissioner-in-Charge:	Prof. D.St.L. Kelly
Members:	Chairman
	Prof. A. Castles
	Mr B. Debelle
	Mr B. Shaw
Access to the Courts (Class Actions and Standing)	
Commissioner-in-Charge:	Mr B. Debelle
Members:	Chairman
	Mr G. Aarons
	Prof. A. Castles
	Mr J. Mazza
	Mr B. Shaw
	Mr T. Smith
Aboriginal Customary Law	
Commissioner-in-Charge:	Mr B. Debelle
Members:	Chairman
	Prof. A. Castles
	Assoc. Prof. G. Hawkins
	Mr T. Smith
Privacy	
Commissioner-in-Charge:	Assoc. Prof. R. Hayes
Members:	Chairman
	Mr G. Aarons
	Prof. A. Castles
	Assoc. Prof. G. Hawkins
	Mr Justice F.M. Neasey
Child Welfare	
Members:	Chairman
	Assoc. Prof. G. Hawkins
	Assoc. Prof. R. Hayes
	Dr J. Seymour
Special Assistance	
Evidence	
Commissioner-in-Charge:	Mr T. Smith
Members:	Chairman
	Mr B. Debelle
	Mr Justice F.M. Neasey
	Mr B. Shaw
Sentencing — Stage II	
Commissioner-in-Charge:	Vacant
Members:	Assoc. Prof. G. Hawkins

Remuneration

29. In December 1980 the Commission was invited by the Chairman of the Remuneration Tribunal to make a submission concerning the adequacy of remuneration payable to members. In its submission the Commission discussed the nature of its References, the nature and responsibility of the work of its members and the difficulty in securing the services of qualified persons particularly from interstate. It argued that there have been changes in the nature and range of the duties of Commissioners as a result of the nature of the References received in recent years. References such as Sentencing, Aboriginal Customary Laws, Access to the Courts, Child Welfare and Evidence contain sociological and economic components which must be fully assessed before any recommendation can be made for changes in the law. The Commission stressed the importance of public consultation and public debate in the search for public values which should be taken into account in formulating new laws. It argued that these considerations place a heavy responsibility upon Commissioners conducting public hearings, a responsibility augmented by the broad-based nature of the References. It also stressed that it was becoming increasingly difficult to recruit lawyers from all Australian jurisdictions as members of the Commission. Practising lawyers accept appointment to the Commission usually at a considerable financial loss. Such loss is increased if the appointment is from interstate and is only partly offset by allowances such as rental subsidy allowances. The Commission argued that salary levels for members should be at least equal to those paid to judges of the Family Court of Australia and, in view of the national responsibilities of the Commission's References, should be comparable with those paid to the full time members of the New South Wales Law Reform Commission, who at present receive $9000 per annum above that paid to the members of this Commission. The salaries of full-time members of the Commission are now equivalent to that payable to Level 5 officers of the 2nd Division of the Australian Public Service, with an additional allowance of $750 per annum. In its most recent determination, the Remuneration Tribunal retained the parity with Level 5 officers and increased the allowance to $825 per annum. It also increased the remuneration payable to part-time members. No action has been taken to remedy the anomaly of the salary payable to the full time members nor to make it easier to recruit lawyers of the highest talent (especially practitioners) for service in the Commission as full time Commissioners.

Staff

30. The Commission's staff ceiling for the year 1979-80 was 20. An increase was sought for 1980-81 of four full-time and one part-time. However the ceiling was reduced from 20 to 18 full-time and one part-time. The Commission was advised that the reduction in staff ceiling was a result of the Government's policy of staffing restraint. The new ceiling will make it increasingly difficult for the Commission to conduct full-time research into its eight References. In addition to its four full-time members, the Commission has six research officers and the Chairman's Associate conducting research. The Commission is at present examining ways in which is can reallocate its work. The reduction in the Commission's already small resources will inevitably mean a slowing down in the Commission's output. This in turn will lead to some waste in terms of reseach resources as research already completed will become out of date because of the longer time it will take for the Commission to complete its references.

Consultants

31. The Law Reform Commission Act 1973 provides that the Chairman may with the approval of the Attorney-General, appoint consultants to the Commission. The Commission has appointed honorary consultants from a wide range of backgrounds on its various References and wishes to record its appreciation for their continued assistance.

32. The following consultants have been appointed, with the approval of the Attorney-General, in respect of the Commission's current references.

Consumers in Debt — Stage II

Mr E.W. Bartlett, Manager, Barcoll Credit Services
Mr J.K. Chippindall, Solicitor, Sydney
Mrs Beryl Coleman, Australian Institute of Credit Management
Mr John Cornish, Director, Statistical Methods Section, Australian Bureau of Statistics
Mr Michael Crozier, former Secretary, A.C.T. Chapter, Institute of Mercantile Agents Ltd.
Mr Colin Dawson, General Manager, Credit, Waltons Limited
Mr A.J. Duggan, University of Melbourne
Mr N.T.F. Fernon, former Inspector-General in Bankruptcy
Mr J.L. Gibson, Assistant Secretary, Department of Business and Consumer Affairs
Mr Peter Kay, Peter Kay and Associates
Mr Bruce Kercher, Macquarie University
Mr John O. Llewellyn, Executive Director, Australian Finance Conference
Mr Anthony P. Moore, University of Adelaide
Mr Kevin Murray, formerly Executive Officer, Australian Federation of Credit Union Leagues Limited
Dr T.C. Puckett, Department of Social Work, LaTrobe University
Mr Peter Timmins, Chief Executive Officer, Australian Federation of Credit Union Leagues Limited
Mr D.J. Trewin, former Director, Statistical Methods Section, Australian Bureau of Statistics
Mr Brian S. Walker, Supervisor, Budgeting Advisory Service, S.A. Department for Community Welfare
The Hon. Mr Justice J.M. White, Supreme Court of South Australia
Mr John E. Willis, Department of Legal Studies, La Trobe University

Insurance Contracts

Mr L.J. Cohn, Deputy General Manager and Chief Actuary, The National Mutual Life Association
Mr John P. Dawson, Executive Director, The Confederation of Insurance Brokers
Mr K.E. Dorrell, Director, W.T. Greig Pty Ltd
Mr A.J. Duggan, University of Melbourne
Mr Stephen France, Mercantile & General Life Reinsurance Co. of Australia
Mr R.G. Glading, A.P.A. Life Assurance
Professor J.L. Goldring, School of Law, Macquarie University
Mr J.G. Green, Director, MCN Australasian Pty Ltd
Professor D.J. Harland, University of Sydney Law School and Chairman, National Consumer Affairs Advisory Council
His Honour Judge D.C. Heenan, District Court of Western Australia
Mr J. Hingley, Federation of Associations of A.M.P. Society Representatives
Mr F. Hoffman, Chairman (N.S.W.), The Corporation of Insurance Brokers of Australia
Mr P.M. Holt, Assistant Commissioner, Trade Practices Commission
Mr R.A. Judge, Deputy Life Insurance Commissioner (Commonwealth)
Mr Peter Kell, Assistant General Manager, General Accident Fire & Life Assurance Co. Ltd
Professor Spencer L. Kimball, Professor of Law, University of Chicago
Mr F.H. Letcher, formerly Assistant General Manager, The United Insurance Co. Ltd; Director, City Mutual General Assurance Co. Ltd
Professor Harold Luntz, George Paton Professor of Law, University of Melbourne
Mr S.I. McDonald, McDonald Benjamin Smyth (N.S.W.) Pty Ltd

Mr A.M. MacGillivray, General Manager, Shield Life Assurance Ltd
Mr E. Madill, Young, Madill & Co. Pty Ltd, Chartered Loss Adjusters
Mr J. Marshall, Cranney Insurance (Aust.) Pty Ltd
Mr G.R. Masel, Messrs Phillips, Fox and Masel, Solicitors
Mr G.L. Melville, Life Insurance Commissioner for the Commonwealth
Mr A.P. Moore, University of Adelaide
Mr I. O'Brien, Secretary, Public Affairs, A.M.P. Society
Mr R.P. Quinn, Queensland Insurance Commissioner
Mr N.E. Renton, Executive Director, The Life Offices Association of Australia
Mr A.J. Robinson, General Manager, R.A.C.V. Insurance Pty Ltd
His Honour Judge Arthur Rogerson, Chairman, Credit Tribunal of South Australia
Mr R. Smith, Executive Director, Insurance Council of Australia
Mr John A. Smythe, Life Underwriters Association
Mr J.K. Staveley, Managing Director, A.M.P. Fire & General Insurance Co. Ltd
Professor K.C.T. Sutton, Professor of Law, University of Queensland
Mr G. Taylor, Assistance Secretary, Department of Treasury
Mr Gordon Taylor, Chief Legal Officer, A.M.P. Society
Mr R. Thomas, Macquarie University
Mr D.P. Wallace, Assistant General Manager, T & G Mutual Life Society Ltd
Mr John G. Wallace, General Counsel in Australia for Lloyds
Mr Timothy M. Webber, Company Solicitor, N.R.M.A. Insurance Limited
Mr John Willis, Department of Legal Studies, La Trobe University

Aboriginal Customary Law

Professor R.M. Berndt, Department of Anthropology, The University of Western Australia
Dr H.C. Coombs, Visiting Fellow, The Australian National University
Mrs Molly Dyer, formerly of the Victorian Aboriginal Child Care Agency
The Hon. Mr Justice Forster, Chief Judge, Supreme Court of the Northern Territory
Mr G.P. Galvin, Chief Stipendiary Magistrate, Northern Territory
Assistant Commissioner A. Grant, Northern Territory Police
Mrs Ruby Hammond, Aboriginal Legal Rights Movement, South Australia
Mr J.P.M. Long, Department of Aboriginal Affairs, Canberra
Mr Andrew Ligertwood, University of Adelaide
Dr Ken Maddock, Macquarie University
Mr John Newfong, formerly National Aboriginal Conference, now editor, Aboriginal Publications Foundation
Dr. S.S. Richardson, Principal, Canberra College of Advanced Education
Mr Silas Roberts, Maningrida Council, Northern Territory
Mr. G. Robinson, Executive and Policy Unit, Department of Law, Darwin
Professor K.W. Ryan, Professor of Law, University of Queensland
Dr P.G. Sack, Fellow, Institute of Advance Legal Studies, Australian National University
The Hon. Mr Justice John Toohey, Judge of the Federal Court of Australia, Supreme Court of the Northern Territory and Aboriginal Land Commissioner

Privacy

Mr Stanley I. Benn, Professorial Fellow in Philosophy, Research School of Sciences, Australian National University, Fellow of the Academy of Sciences in Australia
Professor K.D. Buckley, Head of Department of Economic History, University of Sydney
Mr Roger Clarke, formerly of the N.S.W. Privacy Committee.
Mr W. Clifford, Director, Australian Institute of Criminology
Mr. G. H. Cooper, Management Consultant, Touche Ross and Co., Sydney
Mr R. D'Apice, Vice President, Society of Genealogists
Professor Samuel Dash, Professor and Director, Institute of Criminal Law and Procedure, Georgetown University Law Center, Washington D.C., U.S.A.

Dr D.De Stoop, Head, General Legal Section, Department of Foreign Affairs
Mr A.W. Goldsworthy, Manager, Management Services, State Government Insurance Office (Qld.)
Mr B. Guerin, Chairman, South Australian Data Processing Board
Mr L. G. Lawrence, Management Consultant, Touche Ross and Co., Sydney
Ms Ann Moffatt, Manager, AMPNET Control Office, A.M.P. Society, Sydney
Professor G. McBride, Professor of Social Ethology, University of Queensland
Mr P.P. McGuinness, Australian Financial Review
Professor H.J. McCloskey, Professor of Philosophy, La Trobe University, Melbourne
Professor R. G. Nettheim, Professor of Law, University of New South Wales
Dr John Patterson, N.S.W. Planning and Environment Commission
Dr R.J. Turton, First Assistant Secretary, E.D.P. Division, Department of Defence, Canberra
Mr A. L. Tyree, Lecturer in Law, University of New South Wales

Access to the Courts

Mr A. Aho, formerly of Confederation of Australian Industry, now of Queensland Confederation of Industry
Mr G.D. Allen, Australian Industries Development Association
Mr A.J. Boulton, Legal Officer, ACTU
Mr A. Cornell, Solicitor, Messrs Blake and Riggall
Mr A. Cullen, Federal Secretary, Australian Finance Conference Ltd
Mr P. Gallagher, Commissioner, Department of Consumer Affairs, N.S.W
Mr A.R. Godfrey-Smith, The N.S.W. Institute of Technology
Mr J. Greenwell, First Assistant Secretary, Business Affairs Division, Attorney-General's Department, Canberra
Professor D. Harland, University of Sydney
Mr F Hoffman, National President, Corporation of Insurance Brokers
Mr P. Holt, Assistant Commissioner, Trade Practices Commission
Mr A.G. Kerr, Deputy Commonwealth Ombudsman, Canberra
The Hon. Mr Justice Lockhart, Federal Court of Australia
Dr A. Moore, University of Adelaide
Mr O.D. Sperling, Solicitor, Messrs Higgins, Morgan & Partners, Sydney
Mr M.G. Vernon, Chairman, Consumer Affairs Council (A.C.T.)
Dr G. De Q. Walker, Australian National University
Mr M.R. Wilcox, Q.C., Barrister, Sydney
Professor N.J. Williams, Barrister, Melbourne
Mr J.R.T. Wood, Q.C., Barrister, Sydney
Mr P. W. Young, Q.C., Barrister, Sydney

Sentencing

Dr A.A. Bartholomew, Consultant Psychiatrist, Department of Health, Victoria
Dr T. Beed, Director, Sample Survey Research Centre, University of Sydney
Mr. P. Cashman, Research Officer, Law Foundation of New South Wales
Mr W. Clifford, Director, Australian Institute of Criminology
The Hon. Mr Justice Xavier Connor, Federal Court of Australia and Supreme Court of A.C.T
Mr L.B. Gard, Director, Department of Correctional Services, South Australia
Mr A.R. Green, Prisoners' Action Group
Dr G.M. McGrath, University of New England
Mr J.G. Mackay, Director, Probation and Parole Service, Attorney-General's Department, Hobart
Mr W. Nicholl, S.M., Court of Petty Sessions, A.C.T.
Mr T. Purcell, Director, The Law Foundation of New South Wales
Mr F. Rinaldi, Australian National University, Canberra
The Hon. Mr Justice Roden, Supreme Court of New South Wales

Dr A.J. Sutton, Director, N.S.W. Bureau of Crime Statistics and Research, Sydney
Senior Superintendent W. Williams, Q.P.M., Australian Federal Police, Canberra

Child Welfare

Chief Superintendent A.H. Bird, Australian Federal Police
Mr R.J. Cahill, S.M., Court of Petty Sessions, A.C.T
Dr T. Carney, Monash University, Melbourne
Mr Richard Chisholm, University of N.S.W.
Ms E.Cox, N.S.W. Council of Social Service
Ms H. Gamble, Australian National University
Mr J.M. Hemer, Department of Social Security, Canberra
Dr M. Maloney, Capital Territory Health Commission
Ms H. Nichols, Department of Community Welfare, South Australia
Mr B.W. Prior, Royal Melbourne Institute of Technology
Mr J. Wall, Assistant Secretary, Welfare Branch, Department of Capital Territory

Evidence

Chief Superintendent W. Antill, Australian Federal Police
Mr K. V. Borick, Barrister, South Australia
The Hon. Sir Richard Eggleston, Chancellor, Monash University, Melbourne
The Hon. Mr Justice H.H. Glass, Supreme Court of N.S.W.
Mr C. Hermes, Chief Magistrate, Court of Petty Sessions, Canberra
Mr Dyson Heydon, Barrister, Sydney
Mr D. A. Jessop, Attorney-General's Department, Canberra
The Hon. Mr Justice P.E. Nygh, Family Court of Australia
The Hon. Mr Justice I.F. Sheppard, Federal Court of Australia
Mr D. Sturgess, Barrister, Brisbane
Mr C. Tapper, Reader in Law, Oxford University
Dr D. Thomson, Department of Psychology, Monash University, Melbourne
Mr Frank Vincent, Q.C. Barrister, Melbourne
Mr P. Waight, Lecturer in Law, Australian National University, Canberra
Mr M. Weinberg, Senior Lecturer in Law, University of Melbourne

33. The Commission wishes to record its appreciation to the consultants who freely give of their time in consulting on Commission drafts, attending meetings and otherwise making themselves available for consultation. It also records its thanks to universities, employers and organisations which have consented to the appointment of its honorary consultants.

34. The Commission is also fortunate to have the assistance of Professor J.G. Starke, Q.C. who is assisting the Commission in a consultative capacity with its References on Aboriginal Customary Law, Privacy and Sentencing, and Mr J. Q. Ewens, C.M.G., C.B.E., formerly First Parliamentary Counsel of the Commonwealth of Australia, who is assisting the Commission in the drafting of legislation to accompany its report on Child Welfare and Insurance Law and is also a consultant on the Commission's Sentencing Reference.

Commission Publications

35. The Commission has issued 18 reports (including its Annual Reports) since 1975. They are made to the Attorney-General and are tabled in each House of Parliament. These reports, which are available from the Australian Government Publishing Service, are listed in the front of this report. The Commission also issues working papers, issues

papers, research papers and discussion papers in connection with its References. An explanation of the function of each of these papers follows:

Research Papers– These are prepared by individual officers based on research and field work undertaken by them on a particular aspect of a Reference. They are in the nature of internal papers prepared by a member of the Commission's staff for the Commission's consideration. Accordingly, they do not reflect the Commission's views. They are circulated on a limited basis to persons and organisations who may wish to provide initial comment before the Commission undertakes a more detailed consideration of the issues raised and secures public comment on them. Research papers often form the basis of parts of the Commission's Discussion papers and final report.

Issues Papers– These are usually published in the early stages of a reference. They raise for consideration the principal issues that seem to present themselves. Conclusions and proposals are generally kept to a minimum. The paper is circulated to persons and organisations who are expert in the area and who are able to make suggestions to the Commission about matters arising from the terms of reference and the scope of the issues to be explored.

Discussion Papers– These contain the Commission's tentative proposals or advance various options for reform. They are distributed widely to help focus public and expert debate. The function of discussion papers is frequently misunderstood. They are not draft reports. The proposals are put forward, not as final conclusions but as a basis for discussion – to elicit comments and submissions from the public. The options for reform contained in the paper assist in identifying possible solutions. These are then tested in subsequent public debate. The comments and submissions are considered by the Commission when preparing its final report. Similar consultative papers are now published by the Law Commission of England and Wales.

Summary Discussion Papers– In appropriate cases, a summary discussion paper will also be issued, which will generally have a wider circulation than the full paper. It indicates that persons wishing to comment can obtain a copy of the full discussion paper on request to the Commission. In this way, the Commission hopes to reach as many persons and organisations as possible who have an interest in, or may be affected by, Commission proposals. By arrangement with the *Australian Law Journal*, the *Legal Service Bulletin* and relevant specialized journals (e.g. *The Valuer*, the *Insurance Broker* etc.), arrangements are made for the general distribution of the pamphlet throughout the legal profession and other professions or industries specially affected. As a result, many helpful informed comments are received and sugges-

tions and criticisms made which are of specific help to the Commission.

Working Papers— A discussion paper may or may not be supported by a detailed working paper. This will depend upon the nature of the subject matter and the requirements of the Reference. Where a working paper is prepared, it will generally be available on a limited basis because of its bulk and the cost of production. Because of its detailed and technical nature, a working paper is intended for persons who have a particular expertise in the subject under consideration and who are able and willing to comment in detail.

36. The following list sets out the Research Papers issued by the Commission:

Privacy

Research Paper 1	Employment Records: Commonwealth Employment Service (K. O'Connor)
Research Paper 2	Employment Records: Australian Public Service (K.O'Connor)
Research Paper 3	Statistical Records: Census of Population and Housing (M. Richardson)
Research Paper 4	Statistical Records: Production of Statistics in the Commonwealth Government (M. Richardson)
Research Paper 5	Health Insurance Records (M. Richardson)
Research Paper 6	Final Storage of Personal Information: Archival Practices (M. Richardson)
Research Paper 7	Medical Records (B. Keon-Cohen)
Research Paper 8	Federal Police Records (K. O'Connor)
Research Paper 9	Credit Records (W. Tearle)
Research Paper 10	Educational Records (S. Patterson)
Research Paper 11	Taxation and Privacy (P. Stewart)
Research Paper 12	Social Security and Privacy (P. Stewart)
Research Paper 13	Banking and Privacy (R. Hayes)

Sentencing

Research Paper 1	An Analysis of Penalties Provided in Commonwealth and Australian Capital Territory Legislation (J. Gilchrist)
Research Paper 2	Minimum Standards for Treatment of Federal Offenders (M. Richardson)
Research Paper 3	Alternatives to Imprisonment: The Fine as a Sentencing Measure (J. Scutt)
Research Paper 4	Community Work Orders as an Option for Sentencing (J.Scutt)
Research Paper 5	Sentencing the Federal Offender: Jurisdictional Problems (R. Davies)
Research Paper 6	Federal Parole Systems (M. Richardson)
Research Paper 7	Limiting Sentencing Discretion: Strategies for Reducing the Incidence of Unjustified Disparities (I.Potas)
Research Paper 8	Probation as an Option for Sentencing (J. Scutt)

Public Consultation

37. The Commission places great importance on public consultation. Its public consultation processes are outlined in its 1980 *Annual Report*.[2] The main public consultation processes i.e. public hearings, seminars, media releases, interviews with the press, radio and television, and addresses to conferences, organisations, professional bodies and universities continue to be used to stimulate public debate and help the Commission to formulate its ideas and conclusions before final reports are drafted. Some References such as the reference on Aboriginal Customary Law require special consultative processes. Details of the special public consultations carried out in connection with this Reference are set out in paragraph 83.

[2] ALRC 17, 19.

3. Work of the Commission

Clearing House Functions for Australia

38. The Commission is continuing its functions as a clearing house of law reform information in Australia. The services provided include the publication of its quarterly bulletin *Reform* and the issue of the Law Reform Index and its half yearly supplements. To this will be added shortly the Australasian Law Reform Digest. The Commission also has responsibility for collecting suggestions for law reform made by persons and organisations in respect of matters within Commonwealth responsibility.[1]

39. ***Reform.*** The quarterly bulletin *Reform* continues to be read widely both in Australia and overseas. The current circulation of the bulletin exceeds 1,500 copies. The subscription readership continues to grow. The bulletin contains information on law reform developments both in Australia and overseas. It also contains details of reports completed or in preparation by Australian law reform agencies as well as agencies in a number of overseas countries.

40. ***Law Reform Index.*** Details of the Law Reform Index were set out in the Commission's Annual Report 1979.[2] The first issue of the index was published in April 1981. It contained a consolidation of references to law reform reports and reports of official bodies contained in the Interim Digest and Supplements up to and including December 1980. Supplements to the Index will be issued in January and July of each year.

41. ***Australasian Law Reform Digest.*** The Australasian Law Reform Digest will be completed in manuscript form in the next few months. It will contain a summary of law reform proposals made by law reform agencies throughout Australia, New Zealand and Papua New Guinea up to the end of 1980. The text is complete, subject to some minor amendments that will be made after the agencies whose reports appear in the Digest have provided their comments on the draft of the Digest. The index to the Digest is in the course of preparation and should be completed within the next few months. It is hoped to submit the manuscript to the printer by August 1981. The Digest is expected to be published early in 1982. It will almost certainly be of great use in common law countries throughout the world in bringing to notice in a single, convenient volume, the essential proposals of the Australasian law reform agencies concerning improvement of the legal system. It should spread the influence of the reports of the agencies and contribute to the work of law reform, particularly in developing countries.

42. ***Law Reform Suggestions.*** Following the Government's acceptance of the recommendation by the Senate Standing Committee on Constitutional and Legal Affairs that the Commission should compile a register of law reform suggestions and report on them annually to Parliament, the Commission included in its 1980 Annual Report a schedule of suggestions. A schedule of suggestions received since the last Annual Report is at Appendix A. This schedule contains suggestions for law reform which have come to the Commission's notice in the past year. The list is not meant to be exhaustive nor does it include proposals made by other law reform agencies. Although some suggestions are not new and may have been made previously, they are nevertheless included as giving an indication of concern about aspects of the law. Inclusion of a suggestion does not imply any opinion by the Commission about the merits or otherwise of the suggestion.

[1] Annual Report 1980 (ALRC 17), 6–7; 21.
[2] ALRC 13, 22.

Completed Projects

43. Table 3 sets out in summary form the reports completed by the Commission and action taken in respect of those reports. Further details are set out in the paragraphs following the table.

TABLE 3 COMPLETED REFERENCES AND ANNUAL REPORTS

Reference	*Date received*	*Consultative papers*	*Report*	*Action*
Criminal	15 May 1975	Working Paper No. 1 *Complaints Against Police* — June 1975	ALRC 1 *Complaints Against Police* tabled 7 Aug. 1975	Complaints (Australian Federal Police) Bill 1981 (Cwlth) and Australian Federal Police Amendment Bill 1981. Passed 24 March 1981. Also adopted in N.S.W. in Police Regulation (Allegation of Misconduct) Act 1977 (N.S.W.)
			ALRC 2 *Criminal Investigation* tabled 8 Nov. 1975	Criminal investigation Bill, 1977 Presented 24.3.77. Lapsed 8.11.77. Under further consideration by the Attorney-General's Department and Inter Departmental Committee
Annual Report 1975			ALRC 3 *Annual Report* 1975 tabled 11 Nov. 1975	Senate Standing Committee on Constitutional and Legal Affairs report *Reforming the Law.* Ministerial Statement May 1980
Alcohol, Drugs and Driving	22 Jan. 1976	Working Paper No. 2 *Alcohol, Drugs & Driving* — February 1976	ALRC 4 *Alcohol, Drugs & Driving* tabled 23 Sept. 1976	Motor Traffic (Alcohol & Drugs) Ordinance 1977 (A.C.T.) implemented December 1977
Annual Report 1976			ALRC 5 *Annual Report* 1976 tabled 11 Nov. 1976	Senate Standing Committee on Constitutional and Legal Affairs report *Reforming the Law* Ministerial Statement May 1980

TABLE 3 COMPLETED REFERENCES AND ANNUAL REPORTS CONT.

Consumers in Debt Stage I — Insolvency: The Regular Payment of Debts	10 May 1976	Working Paper No. 3 *Consumers in Debt* November 1976	ALRC 6 *Insolvency: The Regular Payment of Debts* tabled 4 Nov 1977	Amendments to s.149 Bankruptcy Act 1966 based in part on Commission's recommendation. Other aspects of Commission report under consideration by the Department of Business and Consumer Affairs. Cf. Debts Repayment Act, 1978 (S.A.)
Stage II Debt-Recovery & Insolvency				See Table on current References
Human Tissue Transplants	15 July 1976	Issues Paper No. 1 *Statutory Brain Death* — November 1976	ALRC 7 *Human Tissue Transplants* tabled 21 Sept. 1977	A.C.T. Transplantation and Anatomy Ordinance 1978 implemented December 1978.
		Working Paper No. 5 *Human Tissue Transplants* — January 1977		Legislation based on Commission's report enacted in Queensland and Northern Territory. Under specific study in Victoria. Select Committee has recommended redrafting of legislation in South Australia in the light of this report. Under consideration in other States
Annual Report 1977			ALRC 8 *Annual Report* 1977 tabled 8 Nov. 1977	Senate Standing Committee on Constitutional and Legal Affairs report *Reforming the Law.* Ministerial Statement May 1980.
Complaints Against Police (Supplementary Report)	7 Jan. 1977	Working Paper No. 6 *Complaints Against Police (Supplementary Report)* — March 1977	ALRC 9 *Complaints Against Police (Supplementary Report)* tabled 9 June 1978	As ALRC 1

TABLE 3 COMPLETED REFERENCES AND ANNUAL REPORTS CONT.

Annual Report 1978			ALRC 10 *Annual Report* 1978 tabled 24 Nov. 1978	Senate Standing Committee on Constitutional and Legal Affairs report *Reforming the Law.* Ministerial Statement May 1980.
Defamation	23 Jun. 1976	Working Paper No. 4 *Defamation* November 1976	ALRC 11 *Unfair Publication: Defamation and Privacy* tabled 7 June 1979	Referred by the Commonwealth Attorney-General to the Standing Committee of Commonwealth and State Attorneys-General. Under consideration by officers servicing the members of the Standing Committee.
		Discussion Paper No. 1 *Defamation: Options for Reform* January 1977		
		Discussion Paper No. 2 *Privacy and Publication: Proposals for Protection* April 1977		
		Discussion Paper No. 3 *Defamation and Publication Privacy — A Draft Uniform Bill* October 1977		
Privacy and the Census	25 May. 1976	Discussion Paper No. 8 *Privacy and the Census* (May 1979)	ALRC 12 *Privacy and the Census* tabled 15 November 1979	Government's response to Commission recommendations indicated on 20 November 1979, 10 September 1980 and 30 April 1981.
Annual Report 1979			ALRC 13 *Annual Report* 1979 tabled 22 November 1979	Considered by Senate Standing Committee on Constitutional and Legal Affairs
Lands Acquisition	7 July. 1977	Working Paper No. 8 *Lands Acquisitions Law Reform Proposals* Dec. 1977	ALRC 14 *Lands Acquisition and Compensation* tabled 22 April 1980	Under consideration by Department of Administrative Services.
		Discussion Paper No. 5 *Lands Acquisition Law — Reform Proposals,* January 1978		

TABLE 3 COMPLETED REFERENCES AND ANNUAL REPORTS CONT.

Sentencing Stage I	11 Aug. 1978	Sentencing: National Survey of Judges and Magistrates (interim report), March 1979 Discussion Paper No. 10 *Sentencing Reform Options*, June 1979	ALRC 15, *Sentencing of Federal Offenders* tabled 21 May 1980	Under consideration by Attorney-General's Department
Insurance Contracts Stage I	9 Sep. 1976	Issues Paper No. 2 *Insurance Contracts* June 1977 Discussion Paper No. 7 *Insurance Contracts*, October 1978	ALRC 16, *Insurance Agents and Brokers* tabled 16 September 1980	Treasurer announced on 10 June 1981 that the Government had not accepted the Commission's recommendations. Questions of extended credit to brokers to be kept under review.
Annual Report 1980			ALRC 17 *Annual Report* 1980 tabled 3 December 1980	
Child Welfare	18 Feb. 1979	Discussion Paper No. 9 *Child Welfare: Children in Trouble*, May 1979 Discussion Paper No. 12 *Child Welfare: Child Abuse and Day Care*, May 1980	ALRC 18, *Child Welfare*	To be tabled soon

Complaints Against Police (ALRC 1 and 9)

44. On 26 February 1981 the Commonwealth Attorney-General introduced legislation into the Australian Parliament based substantially on the Commission's reports.[3] The legislation followed the basic scheme proposed by the Commission:

- establishment of an Internal Investigation Division of Police;
- provision for the Commonwealth Ombudsman to be a neutral recipient and, in some cases, investigator of complaints; and
- establishment of a Police Disciplinary Tribunal whose president will be a judge.

[3] Complaints (Australian Federal Police) Bill 1981 Hansard Senate, 26 February 1981, 170.

There is provision for notification of all complaints to the Ombudsman. If the Ombudsman is dissatisfied with the report of the Police Investigation Division on a complaint, he may ask for further investigations or he may carry out investigations by his own office. In special circumstances, the Police Commissioner and the Ombudsman may agree that either the Ombudsman or a person outside the investigation division should make initial investigation of a complaint. If the Ombudsman and the Police Commissioner cannot agree on this matter, the responsible Minister is to decide. The Ombudsman is empowered to recommend that criminal disciplinary proceedings be brought against a policeman about whom a complaint has been made. If the Commissioner does not agree with this recommendation, the matter is to be referred to the Attorney-General for decision. Criminal charges against a police officer may continue to be brought in the ordinary courts. Disciplinary charges are to be dealt with by the new Federal Police Disciplinary Tribunal.

45. In his Second Reading Speech, the Attorney-General indicated the points of variance from the Commission's proposals. The two more important differences were as follows:

- The Commission had proposed that the Ombudsman should have a general power to conduct his own investigations in specified cases. The legislation envisages a slightly more limited role for the Ombudsman with the Minister as the umpire where the Ombudsman and the Police Commissioner disagree.
- The Commission envisaged the Ombudsman having a power in extreme circumstances to ensure that a charge was laid against a police officer by making a formal recommendation to such effect. The legislation provides that, where the Ombudsman and the Police Commissioner do not agree about whether changes (either criminal or disciplinary) should be brought against a member, the question is to be determined by the Attorney-General.

Coinciding with the Complaints Bill, the Attorney-General introduced a further Bill to amend the Australian Federal Police Act 1979 in order to implement two further recommendations of the ALRC.[4] These dealt with:

- provision for vicarious liability by the Commonwealth for the conduct of police officers in the course of their duties; and
- provision requiring identification numbers and address of police in uniform.

The origin of the rule that the Commonwealth was not liable, as an ordinary employer is, for the acts or omissions of police officers was described, analysed and criticised in the Commission's reports. In advance of federal legislation, the Queensland Police Act was amended to provide for vicarious liability for police. Legislation has since been introduced in other States.

46. The Complaints (Australian Federal Police) Bill 1981 and the Australia Federal Police Amendment Bill were passed on 5 March 1981 in the Senate and on 24 March 1981 in the House of Representatives. The Bills were assented to on 9 April 1981 but, have still to be proclaimed.

Criminal Investigation (ALRC 2)

47. The Criminal Investigation Bill 1977 was introduced into the Parliament on 24 March 1977. When the Parliament was dissolved in November 1977 the Bill lapsed. However, the Attorney-General announced on 15 July 1978 that he was reviewing the Bill

[4] Hansard, Senate, 26 February 1981, 172.

in light of public comments, the views expressed and discussions that had been had with persons and organisations having a relevant interest. In a statement at a conference in Sydney in 1979 the Attorney General indicated that an interdepartmental committee had been set up, comprising those departments concerned with the problems presented by the Bill and chaired by an officer of his Department.[5] The Commission understands that the interdepartmental committee is close to finalising its deliberations on the revised Bill. A number of the provisions of the Commission's report have been adopted in legislation enacted by State and Territory legislatures. Details of these are set out in the 1979 Annual Report.[6] The decision of the High Court of Australia in *Bunning* v. *Cross*[7] adopted a new common law test for the exclusion of evidence wrongfully obtained by the police which is materially similar to that proposed by the Commission and reflected in the Criminal Investigation Bill. The Bill, and in particular the Commission's proposals concerning the use of tape recording in the investigation part of police work, was the subject of a recent editorial in the Criminal Law Journal.[8] Referring to statements made on this subject in October 1980 by Mr. Justice McGarvie of the Victorian Supreme Court, the editor made the following comment:

> These references by Mr. Justice McGarvie are a timely reminder of the importance that ought to be attached to a thorough investigation of use of tape recording, particularly in the investigative part of police work. It is hoped that when the matter comes squarely before the Federal Parliament when it considers the Criminal Investigation Bill, that Parliament will give a lead by introducing statutory control over investigations at least to the extent of requiring the use of sono recording equipment in circumstances to be defined in the statute. There is probably nothing quite so unedifying as the constant attacks and counter attacks on confessional statements tendered by the police in the courts and the strong suggestion coming through in many of the trials that what are popularly called verbals are in fact a form of perjured evidence, at least in the assertion of the defendant. If anything can be done at all to avoid the harm that such suggestions must do to police investigators and to the criminal justice system itself then very few police or defence counsel would raise objections to the use of this obviously necessary facility in investigation.

Alcohol, Drugs and Driving (ALRC 4)

48. The Motor Traffic (Alcohol and Drugs) Ordinance 1977 (A.C.T.) No.17 of 1977, based with minor exceptions on the Commission's fourth report, is now in force in the Australian Capital Territory.

Insolvency: The Regular Payment of Debts (ALRC 6)

49. The Commission's sixth report, *Insolvency: The Regular Payment of Debts,* was tabled in Federal Parliament on 4 November 1977. The Commission proposed that a regular payment of debts program be established to enable non-business debtors to pay their debts by instalments over a period of up to three years. Arrangements of a similar nature have operated successfully in the United States for over forty years. Further

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5 Proceedings of the Institute of Criminology No.41, The Problem of Crime in a Federal System, University of Sydney, September, 1979, 77.
6 ALRC 13, 7.
7 (1978) 52 ALJR 561.
8 Crim LJ Vol.5, No.3, June 1981, 125–127.

particulars of the Commission's recommendations can be found in the *Annual Report* 1977.[9] The report is under consideration by the Department of Business and Consumer Affairs. It has also been noted by the Standing Committee of Ministers for Consumer Affairs.

50. Some of the basic recommendations of the Commission's report were enacted in South Australia in the Debts Repayment Act 1978, noted in the *Annual Report* 1979.[10] The Act has not come into force. In 1980, following a change of Government at the general election, the Government of South Australia announced that it had decided not to proclaim the Act at present. Speaking in the Estimates Committee, the Minister of Community Welfare and Minister of Consumer Affairs, the Hon. J.C. Burdett, indicated that the Government wished to examine the operation of the most recent amendments to the federal Bankruptcy Act[11] before proclaiming the Debts Repayment Act 1978. The Minister added that the Act will not be repealed. It will be left on the Statute Book so that the opportunity is clearly there to proclaim it if it does appear to be appropriate at some time.[12]

Human Tissue Transplants (ALRC 7)

51. The A.C.T. Transplantation and Anatomy Ordinance 1978, came into effect in December 1978. The Ordinance is based on the draft Ordinance proposed by the Commission in its report. Legislation based on the Commission's recommendations has now also been enacted in Queensland and the Northern Territory. In South Australia, a Legislative Council Select Committee has recommended the redrafting of the Transplantation of Human Tissues Act 1974 (S.A.) and the adoption of a uniform definition of 'death' as proposed in ALRC 7. The draft legislation proposed by the Commission is also under consideration in several other States. It seems that such legislation will be adopted in Victoria in the near future.

Unfair Publication (ALRC 11)

52. The Commission's report, which was tabled on 7 June 1979 has been under consideration by the Standing Committee of Commonwealth and State Attorneys-General. Details of the Commission's proposals are set out in the 1979 Annual Report.[13] On 18 March 1981, the Commonwealth Attorney-General indicated that it was the Goyernment's belief that it was desirable that defamation laws should be uniform throughout Australia. As defamation law was primarily a matter for the States, the co-operation and agreement of the States was needed before uniformity could be achieved. The Attorney-General indicated that the issue of uniform defamation laws had been raised at the Standing Committee in 1979 shortly after the report by the Australian Law Reform Commission was presented. At the July 1980 meeting the Ministers had agreed that each government should determine its attitude to the major issues that would be involved in making the law uniform throughout Australia. The Attorney-General went on to say that

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9 ALRC 8, 27–8.
10 ALRC 13, 26
11 Bankruptcy Act 1980. See *Annual Report* 1980, ALRC 17, 26.
12 *Parliamentary Debates,* South Australia, 9 October 1980, 437 (House of Assembly, Estimates Committee B). *Cf.* 26 November 1980, 2209 Legislative Council.
13 ALRC 13, 27–28.

he understood that most States had carried out this exercise and it was hoped that the next meeting of the Standing Committee would be in a position to discuss the question in detail again and resolve areas of difficulty identified by the States. Senator Durack said that he believed that the present unsatisfactory state of defamation laws in Australia should not be allowed to continue. He said that he would give high priority to the task of achieving uniformity and while that might some time off, it was a goal worth striving for.[14]

53. At the meeting of the Standing Committee held in Canberra in April 1981, the Attorneys-General agreed that they would give priority to the examination of proposals for uniform defamation law in Australia. All Ministers agreed that there was a need for a uniform law and that they would work towards it. They felt that while it might not be possible to achieve full uniformity on a defamation code it should be possible to reach early agreement on a number of the issues. Officers had been asked to prepare a paper for the next meeting identifying these issues.[15]

Privacy and the Census (ALRC 12)

54. The Commission's report on this subject was tabled in Parliament on 15 November 1979. Details of the Commission's proposals are set in the Commission's Annual Report 1980.[16] Details of the Government's response to some of the proposals made by the Commission are also set out in the Annual Report 1980.[17] On 10 September 1980 the Treasurer made a further statement on other aspects of the Commission's report.[18]

55. The Treasurer referred to the Government's decision not to accept the Commission's recommendation that information on identified persons and households should be transferred to archives with access for most purposes forbidden for 75 years. As a result, census forms and information relating to identified individuals and households would exist only for the period required to process data. The Treasurer said that during that period it would be difficult and costly for the Australian Bureau of Statistics to locate a particular form and, since this time will be quite short, it would be difficult to see that the granting of access to individuals would serve a useful purpose. The Treasurer said that for these reasons the Government had decided not to accept the Commission's recommendation that provision be made for such access. The Treasurer added that for similar reasons, the Government had not accepted the Commission's recommendation that individual information should be able to be disclosed with the written authorisation of the person or persons concerned. Other points made by the Treasurer in his statement were as follows:

- The Government agreed with the Commission's proposal that the Statistician should be authorised to release for statistical purposes samples of coded census data from which all personal identification has been removed and for which the Statistician is satisfied that individuals or households cannot be identified.
- In respect of the Commission's recommendation, that the precise wording of census questions should be included in regulations, the Government decided that census regulations will continue to contain only a description of topics to be included in

[14] Press Release by the Attorney-General, Canberra, 18 March 1981 (19/81).
[15] Release by the Attorney-General, Standing Committee of Attorneys-General, Canberra, 10 April 1981 (20/81).
[16] ALRC 17, 27–28.
[17] ALRC 17, 28–29.
[18] Parliamentary Debates, House of Representatives, 10 September 1980, 1081.

the census. However, in recognition of the need for members of parliament to be as fully informed on such matters as possible, the Government would ensure that detailed background information on topics and near final questions will be tabled at the same time as regulations.

- The Government recognised the need to inform the public of the importance of the census, to explain the uses to be made of the statistics and to make known the measures taken to ensure the confidentiality of information provided in order to encourage co-operation in answering census questions completely and accurately. For this reason, the Government agreed with the Commission's recommendation that a statement concerning the importance and value of the census should be delivered to each household on, or shortly before, census day and that a substantial public awareness campaign should be conducted prior to the census.
- The Government accepted the Commission's view that procedures should be available, for those persons who wish to use them to ensure that personal information is not seen by either the occupier of the house or the collectors. The existence of a personal form (for people who do not wish the occupier of the house to be able to see their information) and a special envelope system (which the collector is not allowed to open) will be made widely known.
- The Government agreed with the Commission that certain aspects of the Census and Statistics Act 1905 concerning penalties, prosecution procedures and some other administrative aspects require amendment.
- In respect of the Commission's proposal that a Parliamentary Committee be established to conduct a detailed examination of the likely cost and effectiveness of using a mail-back system for censuses after 1981, the Government decided not to accept this proposal but to ask the Statistician to carry out the type of investigation proposed by the Commission and to report his findings to the Treasurer.
- The Government agreed with the view of the Commission that a detailed examination needs to be undertaken of the problems encountered by Aboriginals and people of overseas origin in completing census returns. The Government considers this to be a matter for the Statistician to continue to investigate as part of his preparations for the taking of the census. On 30 April 1981 the Treasurer introduced into Federal Parliament the Census and Statistics Amendment Bill 1981[19] to amend the Census and Statistics Act 1905 to incorporate the decisions announced in his statements of 20 November 1979 and 10 September 1980. The Bill was passed on 7 May 1981.

Lands Acquisition and Compensation (ALRC 14)

56. The Commission's fourteenth report, *Lands Acquisition and Compensation* was tabled in Parliament on 22 April 1980. Details of the Commission's proposals are set out in the Annual Report 1980.[20] The report has been under consideration by the Department of Administrative Services. A number of the Commission's proposals have been implemented in the Northern Territory.[21] This legislation was based on the proposals set out in the Commission's discussion paper *Lands Acquisition Law: Reform Proposals*.[22] Many of the proposals in the discussion paper were incorporated in the Commission's report and are now under consideration for adoption as Commonwealth legislation.

[19] 1981 Parliamentary Debates, House of Representatives, 30 April 1981, 1854.
[20] ALRC 17, 29–30.
[21] Lands Acquisition Act 1978.
[22] ALRC DP 5

Sentencing of Federal Offenders (ALRC 15)

57. The Commission's interim report *Sentencing of Federal Offenders* was tabled in Parliament on 21 May 1980. Details of the Commission's proposals are set out in the Annual Report 1980.[23]

58. Response to the Commission's Interim Report was mixed. Disproportionate attention was given in some media coverage to the results of the judicial survey on the issue of capital punishment. The Commission's proposals were discussed at a meeting of State Ministers in charge of Prisons, Probation and Parole held on 30 May 1980. The conference resolved that the various administrators of the Prisons, Probation and Parole systems meet at an early date to make a detailed co-operative assessment of the full impact of the implementation of the Commission's proposals as they relate to Correctional Services matters and to lay the foundation for a common State/Territory position.

59. Resources permitting, the Commission proposes to hold public hearings and close consultation with State officials, and interested groups throughout Australia on the issues raised by the interim report before presenting its final report. A number of further issues will be dealt with in the final report. These are outlined in Chapter 13 of the report on the *Sentencing of Federal Offenders*.[24] For a summary of these issues see the *Annual Report* 1980.[25] Although the Commission's report was an interim one, the Commission made final recommendations and tendered draft legislation attached to the report:

- to establish an adequate Commonwealth victim compensation scheme;
- to give guidance in the use of imprisonment in the case of convicted federal offenders; and
- to facilitate the use of non-custodial sentencing options where appropriate for persons convicted for offences against Commonwealth laws, including, as a long term aid, the establishment of a day fine system, modified to meet the needs and conditions of Australian society.

Insurance Agents and Brokers (ALRC 16)

60. The Commission's report was tabled in Parliament on 11 September 1980. Details of the Commission's recommendations are set out in the Commission's Annual Report 1980.[26] On 10 June 1981 the Treasurer announced in Parliament that the Government did not propose to implement the recommendations contained in the report.[27] The Treasurer did, however, foreshadow the possibility of legislation to deal with one particular problem discussed in the report. At present brokers are able to invest or otherwise use premiums and other moneys entrusted to them for their own benefit. The Treasurer said that this problem warranted special attention and indicated that he would be making a further statement on the matter following consultation with the insurance industry.[28] In the meantime, the Western Australian Parliament has passed legislation implementing a system of occupational control of brokers engaged in selling general insurance.[29] Unlike the draft legislation attached to the Commission's report, the Western Australian legislation requires brokers to be licensed and makes professional indemnity insurance a condition of obtaining a licence. The legislation departs from the Commission's proposals in approaching regulation by way of licensing rather than registration and in allowing the Licensing Board to refuse a licence on the basis of the applicant's character or lack of qualifications. The legislation also requires agents who sell general insurance to register with the Board. The governments of New South Wales, Victoria and South Australia have indicated that they intend to introduce legislation regulating insurance brokers. A private Members' Bill, Insurance (Agents and Brokers) Bill 1981, was introduced by Senator G. Evans on 28 May 1981.[30]

[23] ALRC 17, 30–33.
[24] ALRC 15, 305–320.
[25] ALRC 17, 38–39.
[26] ALRC 17, 33–34.
[27] Parliamentary Debates, House of Representatives, 10 June 1981, 3417.
[28] id., 3418
[29] General Insurance Brokers and Agents Act 1981 (W.A.).

Child Welfare (ALRC 18)

61. ***Background to Report.*** The Commission's report arises out of a reference given to the Commission by the Commonwealth Attorney-General on 18 February 1979. The Commissioner in charge of the Reference was Dr Seymour who was appointed a part-time member for the period 19 March 1979 to 30 June 1980. The Commission is grateful to the Australian Institute of Criminology for allowing Dr Seymour to continue his association with the Commission beyond 30 June 1980 to bring the Child Welfare report to conclusion.

62. Under the terms of reference the Commission was to inquire into child welfare law and practice in the A.C.T. Although the report deals only with the A.C.T., many of the issues which are addressed in the Territory are the same as those being considered elsewhere in Australia and overseas. The issues raised by the reference are numerous and complex, and the Commission is engaged in extensive consultation with relevant members of the local community. In preparing the report the Commission placed special emphasis on children's views. Obviously, it was of the utmost importance to endeavour to obtain the views of the most affected. Accordingly the Commission arranged a series of visits to a number of A.C.T. schools in order to obtain the opinions of young people. Discussions were also held with children in homes run by organisations such as Dr Barnardos and in the Quamby Children's Shelter.

63. ***Scope and Arrangement of the Report.*** The terms of reference specifically required an examination of child welfare laws and practice in the A.C.T. Hence the report is not confined to an analysis of the relevant legislation. In undertaking the task delineated by the terms of reference, the Commission concentrated on the problems of children in trouble. Most of the report is concerned with procedures for dealing with young offenders, neglected, abused and uncontrollable children. Because reforms in these procedures will be of little value unless the supporting welfare services are functioning satisfactorily, it was necessary to combine recommendations regarding children in trouble with an analysis of the operation of A.C.T. welfare agencies. Accordingly, a chapter of the report has been devoted to an examination of the organisation and integration of welfare services. In addition to reviewing methods of dealing with children in trouble, the report also considers child care and the employment of children. The report includes proposed new child welfare legislation for the A.C.T.

64. ***The Commission's Proposals.*** The Commission's principal reform proposals include:

- ***Young offenders.*** The law relating to police powers and Court procedures should be clarified and simplified. Provision should be made for the monitoring of court

[30] Parliamentary Debates, Senate, 28 May 1981, 2258.

orders and for these orders to be reviewed by the court. The court should have greater control over its orders and so reduce administrative discretion. It should also have the power to appoint a legal representative for a child if it thinks fit. Finally, the range of measures available to the court should be increased. Also a closed institution should be established in the A.C.T. as an ultimate measure for dealing with children in trouble.

- ***Children in need of care.*** A new form of procedure, to be known as care proceedings, is recommended for dealing with children previously dealt with as neglected or uncontrollable. New procedures and special new measures are necessary in order to separate these children, for whom the sole consideration is their welfare, from young offenders. Here too, there should be opportunity for court review, and an obligation on the Childrens Court to review its care orders annually. The necessity of avoiding court action for non-offenders requires the development of pre-court services. It also requires that the grounds for declaring a child to be in need of care be narrowed. The definitions should focus on harm, or the likelihood of harm to the child. A new, independent official, the Youth Advocate, should be created. It should be his duty to consider whether to initiate care proceedings, and to assist the court by monitoring its orders.
- ***Child abuse.*** There should be provision for voluntary notification of suspected cases of child abuse by anyone, and for compulsory notification by certain professionals. A holding order is recommended in emergency cases of suspected abuse.
- ***Child care.*** A clarification and simplification of the licensing of child care facilities is recommended.
- ***Employment of children.*** Recommendations are made regarding a new system of limited intervention in the employment of children. Those recommendations recognise the need for children to be protected from exploitation while not diminishing unduly their scarce employment opportunities.
- ***Welfare services.*** Proposals are made which aim to achieve a more integrated and coordinated welfare system in the A.C.T.

Current Projects

65. The following table sets out in summary form details of the Commission's current references. Additional details about these references are set out in paragraphs 66 to 93 below. The Terms of Reference at present before the Commission are set out at the end of this report in Appendix B.

TABLE 4 CURRENT REFERENCES

Reference	*Date received*	*Consultative papers*	*Expected date of completion*
Privacy	9 April 1976	Discussion Paper No. 2 *Privacy and Publication — Proposals for Protection* April 1977 Discussion Paper No. 8 *Privacy and the Census* April 1979 Discussion Paper No. 13 *Privacy and Intrusions,* June 1980	Early 1982. Reports completed on *Unfair Publication: Defamation and Privacy* and *Privacy and the Census*

TABLE 4 CURRENT REFERENCES CONT.

		Discussion Paper No. 14 *Privacy and Personal Information* June 1980	
Consumers in Debt Stage II — Debt Recovery and Insolvency	10 May 1976	Discussion Paper No. 6 *Debt Recovery and Insolvency* July 1978	Early 1982
Insurance Contracts Stage II	9 Sep. 1976	Issues Paper No. 2 — *Insurance Contracts* June 1977 Discussion Paper No. 7 *Insurance Contracts* — October 1978	End 1981. Report on *Insurance Agents and Brokers* completed June 1980 (See Table 3)
Access to the Courts (Standing to Sue and Class Actions)	1 Feb. 1977	Discussion Paper — No. 4 *Access to the Courts — I Standing: Public Interest Suits* — November 1977 Working Paper No. 7 *Access to Courts — I Standing: Public Interest Suits* November 1977 Discussion Paper No. 11 *Access to Courts — II Class Actions* June 1979	Report on Standing: late 1981 Report on Class Actions: mid 1982
Aboriginal Customary Laws	9 Feb. 1977	Discussion Paper published November 1980	Late 1982
Sentencing Stage II	11 Aug. 1978	*Sentencing: National Survey of Judges and Magistrates* March 1979 Discussion Paper No. 10 *Sentencing Reform Options* — June 1979 ALRC 15 *Sentencing of Federal Offenders (Interim)* tabled 21 May 1980	1983

TABLE 4 CURRENT REFERENCES CONT.

Evidence	18 July 1979	Discussion Paper No. 16 *Reform of Evidence Law 1980,* October 1980; Issues Paper No. 3 *Reform of Evidence Law,* October 1980	1983

Debt Recovery and Insolvency

66. In its discussion paper *Debt Recovery and Insolvency*[31] the Commission advanced tentative proposals for the reform of the debt recovery procedures in the Australian Capital Territory. The paper also contained an outline of the principles which the Commission felt should apply to debt recovery procedures throughout Australia.

67. The principal activity in relation to this reference during the year concerned the New South Wales Debt Recovery Survey. In order to gain a more detailed knowledge of the operation of existing debt recovery systems and to provide comparative information to assist in estimating the costs of the Commission's reform proposals, the Commission conducted a detailed survey of the debt recovery procedures available under New South Wales law. The survey was undertaken with the assistance of the New South Wales Government and the New South Wales Law Reform Commission. The survey involved a detailed examination of the 'life' of some 2570 debt recovery actions commenced in New South Wales during the year 1975. The Australian Bureau of Statistics provided formal advice in the design of the survey sample and the survey form, the manner in which the survey was to be undertaken and confirmed that the sample of files actually obtained could be regarded as reliable.

68. Because of the complexities of the debt recovery procedures, it took quite a long time to make satisfactory arrangements for the preparation of data for analysis by computer. The possible stages of a debt recovery action are sequential to the point of entry of judgment but can then involve a series of loops and branches if multiple post judgment enforcement steps are taken. The difficulties were resolved and the preliminary results of the computer processing were delivered to the Commission early in 1981.

69. Further progress on this reference from that point has been severely hampered by the staff ceilings imposed on the Commission. Two outstanding references, Insurance Contracts and Debt Recovery, were due for completion at approximately the same time. Staff numbers were and are such that it is was simply not possible to proceed to a final report on each reference. The Commission decided to give priority to the reference on Insurance Contracts. Accordingly, work on the Debt Recovery Reference was suspended at the end of January and is not expected to resume until mid July 1981. As a result of this interruption, a certain amount of momentum will have been lost.

Privacy

70. ***Public Consultation.*** Following publication in June 1980 of Discussion Papers

[31] ALRC DP 6, 1978.

(Nos.13 and 14) dealing with two broad issues raised by the Privacy Reference, namely *Privacy and Intrusions* and *Privacy and Personal Information,* the Commission embarked upon a circuit of public hearings and seminars on privacy laws. These took place in all parts of Australia during November 1980. Their purpose was to receive the opinions and comments of government officials, the professions, persons involved in health care delivery, educators, academics, computer professionals, experts in areas which might be affected by privacy laws generally, and of ordinary citizens who have experienced or who fear invasions of privacy in various aspects of their lives. In Western Australia, the Commission sat jointly with the Western Australian Law Reform Commission in the public hearing in Perth. A Commissioner of the Western Australian Commission also attended the public hearing in Sydney. The Western Australian Commission has terms of reference for a State law on privacy substantially identical to that given to this Commission. In other States there was close co-operation with State colleagues examining privacy laws. In May 1981 a meeting took place in Sydney with members of the Victorian Statute Law Revision Committee which has a reference on privacy law. As a result of the public hearings, and of publicity given to the Commission's work over the period of the reference, the Commission has received hundreds of submissions, the overwhelming number in writing, covering an enormous number of issues in the area of Privacy.

71. ***Consultation with State and Commonwealth Agencies.*** Since its public hearings in November 1980, the Commission has continued its program of consultation with State and Commonwealth colleagues working in areas bearing upon privacy. Meetings and discussions have taken place with two State agencies examining privacy law, namely the Western Australian Law Reform Commission and the Victorian Statute Law Revision Committee. In addition, discussions have taken place with Mr Peter Bailey, OBE, Director of the Human Rights Bureau in the Commonwealth Attoney-General's Department. Discussions with Mr Bailey have concentrated upon an exchange of views about a possible privacy protection role for the proposed Human Rights Commission. Discussions with State agencies have considered progress reports on the Privacy Reference prepared by the Chairman and the Commissioner in charge, an outline of the draft report, recurring issues as indicated by the public consultation process and the international debate on privacy protection, guidelines for an approach to machinery for privacy protection in Australia, and the overall approach of the Commission to the reference as it draws to its closing stage. In addition to discussions with State agencies and with the Commonwealth Human Rights Bureau, informal discussions with Commonwealth and State Government officials at various levels occur on a regular basis as the Commission settles the final details of its work on privacy.

72. ***Overall Approach and Guidelines for Machinery.*** The research program of the Commission, which is almost completed (see below) indicates that current laws for the protection of privacy in Australia in federal jurisdictions are inadequate, that a general tort remedy would neither be adequate nor appropriate, and that what may be needed is accessible, cheap administrative machinery, supplemented, in certain special cases, by access to the courts. To cut costs, and to make maximum use of existing Commonwealth initiatives in the area of administrative law reform, freedom of information and human rights, the Commission is considering the desirability of recommending that a Privacy Commissioner be created within the framework of the Human Rights Commission. The Terms of Reference to the Law Reform Commission contemplate a limited privacy law dealing, in the Commonwealth sphere, basically with the federal public sector and in the Australian Capital Territory, with remedies in certain public and private sector areas. Within the public sector, a critical decision has already been made by the Government in the Freedom of Information Bill, namely, the decision to allow the private citizen access

in certain circumstances to classes of government information. In the area of information privacy, the Commission's Discussion Papers highlight this as the key provision adopted in North American and European information privacy legislation. The fact that the Commonwealth Parliament is moving towards adoption of this principle and that this is supported by all parties, assists the Commission in developing the principle of access to personal information in the possession of government. As for the purposes of meeting the requirements of the Freedom of Information legislation, government departments and agencies will be required to implement changes in their organisation and administrative procedures associated with private citizen access, costs associated with introducing information privacy protections at Commonwealth Government level will be minimal.

73. ***Scheme of Legislation.*** The exact scheme of the legislation to implement the Commission's proposals for privacy protection is not yet clear. Draft legislation implementing various alternative approaches and directions is being prepared. It is clear in the Commission's mind that any legislation should include general provisions which confer privacy protection powers on a Commonwealth commission or agency for instance, the Human Rights Commission, establish a Privacy Commissioner, confer rights of access in the public sector, provide for annual reports, public education, review of standards and practices in certain designated areas and which might also include provisions relevant to intrusions by Commonwealth officers in certain areas. In addition there will be a need for amendment of some existing legislation.

74. ***Further Research.*** At a later stage, meetings will be arranged with consultants selected for appropriate issues, State colleagues working on privacy protection and State officers nominated by Ministers for liaison with the Commission. The Commission's program of research on privacy will continue and will be conducted concurrently with the writing of the final report. It will be necessary in the second half of 1981, to spend time in Canberra for public consultations on issues raised by private sector practices in the Capital Territory, in particular, intrusive business practices. Discussions will also be necessary with representatives from various quarters of the private sector whose activities are regulated, in varying degrees, in the States but not in the Capital Territory and with government officials in Canberra to obtain advice about the final design of any legislation and to seek information on the impact of particular legislative requirements in various areas of record-keeping and investigative activity. The computer search and analysis of Commonwealth statutory provisions begun in 1979, and mentioned in the 1980 Annual Report was continued throughout this year, with particular emphasis on provisions relating to powers of entry and power to demand production of documents. As a result of the research completed information received through the public consultation process, and discussions with State and Commonwealth government officials, the Commission has developed an approach to such powers in government officials which might involve recommendations for amendment to existing legislation. In certain areas of official activity known to be particularly productive of privacy abuse, specific controls might be necessary. But there will be no attempt to cover the field through general legislation controlling official investigative power. The key recommendation, that a Commonwealth body be invested with privacy protection powers, including the functions: of conducting on-going research; of making recommendations to government isolating areas of concern as they arise; and proposing particular legislative proposals directed at precisely identified areas of concern, would seem to make it unnecessary and undesirable to attempt, in the Report, to cover every existing power of entry and powers to demand production of documents and to analyse such powers in the abstract, with a view to their modification in the light of generally expressed privacy protection principles. Research papers in the areas of social security and taxation have been settled and thoroughly discussed with

Commonwealth officials from those departments. A detailed background paper on Banking and Privacy has been completed and will shortly be circulated to representatives of the banks and other interested persons and organisations for comment. The Commission hopes to complete the final report by the end of 1981.

Insurance Contracts

75. In 1980 the Commission tabled its report on the first stage of the reference. Details of the report *Insurance Agents and Brokers*[32] were set out in the 1980 Annual Report.[33] The Commission is continuing its work on the second stage of the reference. This will cover:

- the provision to the insuring public of comprehensible information of insurance
- the review of the law of insurable interest and the principle of *uberrima fides;*
- the commencement, renewal and cancellation of insurance;
- under-insurance, average, over-insurance, double insurance and subrogation;
- exclusions from cover;
- discrimination in the provision of insurance.

The Commission's tentative views on the reform of the law in this area can be found in the discussion paper *Insurance Contracts.*[34]

76. During the year the Commission has consulted widely with interested parties, especially from within the insurance industry. The Commission has met with its consultants to discuss a working draft of the final report. The draft final report is nearing completion and arrangements are being made for the consultants to provide their comments and criticisms in time for the Commission to formulate its recommendations. In assessing the contracts of insurance currently in use, the Commission has been greatly assisted by one of its consultants, Mr F.H. Letcher, who provided a system for the analysis of each type of insurance contract falling within the Terms of Reference. The final report will draw upon this research by calling to the attention of Parliament those terms which operate unfairly, given the reasonable expectation of a purchase of insurance.

Sentencing

77. The Commission's interim report *Sentencing of Federal Offenders* was tabled in Parliament on 21 May 1980. Details of the interim report are set out in the 1980 *Annual Report.*[35] Before proceeding to the preparation of its final report, the Commission intends to hold public hearings on the issues raised in the interim report. In view of the Commission's limited resources, it is not known when it will be able to proceed to a final report. The final report will also deal with a number of questions not covered in the interim report. These are set out in Chapter 13 of the interim report and include:

- correctional facilities for the Australian Capital Territory;
- non-custodial options for the Australian Capital Territory;
- plea bargaining;
- judicial review of prosecution decisions;
- fines and means inquiry;

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[32] ALRC 16.
[33] ALRC 17, 33–34.
[34] ALRC DP 7, 1978.
[35] ALRC 17, 30–33.

- deportation;
- restitution and compensation orders;
- criminal bankruptcy;
- pecuniary penalties payable to the Commonwealth;
- non-custodial sentences such as work release, day training centres, disqualification, confiscation and forfeiture, periodic detention, half-way houses, publicity of convictions;
- pardons;
- special offender groups such as migrant offenders, white collar offenders, mentally ill offenders, women offenders, Aboriginal offenders, children and young persons, military, drug and dangerous offenders;
- rights of prosecutors to address the court on sentence;
- pre-sentence reports.

Aboriginal Customary Law

78. ***The Reference.*** This reference requires the Commission to enquire whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas, or only to those living in tribal conditions. Some of the issues perceived to arise from the reference and previous research and field trips are noted in earlier Annual Reports.[36] The Commission has taken the view that the question of land rights, which is one aspect of Aboriginal customary law, has been dealt with in the reports of the Aboriginal Land Rights Commission[37] so that its attention should primarily focus on other aspects of customary law.

79. ***Discussion Paper.*** On 30 November 1980 the Commission published a Discussion Paper calling for comment from interested persons.[38] After drawing attention to some fundamental differences between Aboriginal law and Australian law, the paper describes traditional Aboriginal society and its law. It then deals with Aboriginal society in Australia today and notes some of the problems facing the Commission when considering the question of recognition. These include the problem of recognition of those aspects of customary law which are secret and the question of harsh punishments. Another difficulty is the substantial variation in the extent to which traditional law today affects the manner in which Aborigines live. Aborigines and part Aborigines throughout Australia have adjusted in varying degrees to European contact. There is, in effect, a spectrum ranging from Aborigines living in remote and relatively inaccessible places whose life is still traditionally oriented to those Aborigines who have been living for some time in cities and other urban areas whose behaviour patterns and social organisation have a minimum of elements which could be described as traditional. Although there are probably no Aborigines today living a fully traditional life, the Discussion Paper suggests that there are a relatively large number of Aborigines who still have regard to aspects of customary law in their daily lives.

80. The Discussion Paper suggests that the rule which has long existed that the same law should apply both to Aborigines and non-Aborigines in Australia has led to difficulties and that these difficulties could be avoided by reform in two broad areas. The first is to

[36] ALRC 10, 38–40; ALRC 13, 36–37; ALRC 17, 39–41.
[37] Aboriginal Land Rights Commission, First Report, July 1973, Parliamentary Paper No.138, Second Report, April 1974. Parliamentary Paper No.69.
[38] ALRC DP 17

make legislative provision so that aspects of Aboriginal customary law could be recognised by Australian law in both the civil and criminal fields. This could be effected by:

- Extending existing defences under the criminal law to take account of aspects of customary law which might affect the degree of guilt.[39]
- Adjusting the rules of evidence and manner of conducting trials to cope with problems confronting Aborigines during a trial.[40]
- Permitting judges to have regard to aspects of customary law when imposing sentence upon convicted Aborigines.[41]
- Providing for recognition in the civil area, for example, enabling courts to have regard to tribal marriages in such matters as claims by spouses against the estate of a deceased Aborigine, status of children, and payment of damages to the spouse of a deceased Aborigine pursuant to either workers' compensation legislation or legislation providing for compensation to victims of motor accidents. In the area of social welfare and the adoption of children there is also scope for recognition of customary law.[42]
- Extending the ambit of the criminal law to make breaches of customary law offences under Australian law.[43]

On the question of punishments, the Discussion Paper expresses the tentative view that recognition should not permit traditional punishments such as killing, spearing and other forms of physical wounding. However, when assessing of the degree of guilt or when considering the sentence, the court could consider whether the wounding was the result of a customary punishment.[44]

81. The questions in the reference will not be solved merely by changes to the substantive law or to the laws of evidence or procedure. Aboriginal communities are experiencing problems with offences often occurring daily. For that reason, consideration should also be given to providing means whereby Aborigines may administer justice in their communities. While magistrates' courts and other courts should continue to exercise their existing jurisdiction, a limited authority to deal with minor matters may help to restore a greater degree of law and order in these communities. The Commission suggests two alternatives for consideration. The first is a scheme which seeks to utilise traditional authority structures. The second is an Aboriginal court with a limited jurisdiction similar to that exercised by justices of the peace in the general community.[45] Consideration will also have to be given to the process of determining which communities should be entitled to administer such a scheme.[46] Because of the critical role police play in the criminal justice system, the Discussion Paper also contains a number of suggestions upon matters designed to improve Aboriginal-police relations.[47]

82. The Commission has also published a summary of the Discussion Paper. Copies

[39] ALRC DP 17, para.141–145.
[40] id., para.132–140.
[41] id., para.97.
[42] id., para.146.
[43] ibid.
[44] id., para.89–99.
[45] id., para.118–126.
[46] id., para.127.
[47] id., para147–159.

were sent to all Aboriginal communities in Australia, to councils and advisors in those communities and to Government officials. The Commission was anxious to communicate its proposals to both men and women in more remote communities. It therefore prepared a further summary of its proposals in a simple English version. Tape cassettes spoken in both a male and female voice were made. Separate copies of the tape for men and women were sent to 157 communities whose population numbered more than 100. Additional copies were sent to regional offices of the Department of Aboriginal Affairs and the Aboriginal Legal Service in remote areas. The simple English version was translated into three Aboriginal languages, Pitjantjatjara, Warlbiri, and Gupapuyngu, and sent to communities in those language groups. The Commission is grateful to Mr Stephen Muecke, a linguist at the Hartley College of Advanced Education, Adelaide for his expert assistance in the preparation of the simple English version, the Reverend Vernon Turner at radio station 2CBA FM for making the master tape, and to Ms Vanessa Elwell of the Institute for Aboriginal Development at Alice Springs and Dr. P. McConvell at the School of Australian Linguistics at Batchelor for assistance in arranging the translations. It also expresses its gratitude to Mr Gordon Lanyipi, Mr Robert Robertson, Mr Jeffrey Wheeler, Mrs Faye Bell and Mrs Iris Taylor for work on the translations.

83. ***Public Hearings.*** In March, April and May 1981 the Commission held the most extensive round of public hearings it has yet conducted. In addition to hearings in capital cities in all States and in the Territories, the Commission visited many country towns and Aboriginal communities throughout Australia. In all, 35 centres were visited over a period of nine weeks. The communities visited included traditional Aboriginal communities, those which had experienced a considerable degree of European contact, and those in urban environments. In order to obtain the views of both men and women in traditional areas Ms Ainslie Sowden, one of the Commission's research officers working on this project, assisted Commissioner Debelle, the Commissioner in charge of the inquiry, in conducting the meetings. In many communities, separate meetings of men and women were held.

84. The Commission has received many submissions both in writing and at the public hearings which reflect differing and sometimes irreconcilable points of view. There was considerable support for much of what is contained in the Discussion Paper, although the suggestion that spearing and other forms of physical assault should continue to be prohibited in traditional areas is resisted both by Aborigines in remote areas and by some white advisers in those communities. The proposal for some kind of community court system has received considerable support, although there are differences of opinion as to the most suitable form of procedure. On a number of occasions, particularly in more traditional communities, the Commission was asked to consider means by which Australian law could provide support for, or create rules embodying, some aspects of customary law.

85. The Commission will be continuing its research and consideration of the submissions received. It is anticipated that the report will be delivered in 1982 or early 1983.

Access to the Courts

86. ***The Reference.*** Details of this reference are set out in the Commission's *Annual Report* 1977.[48] It requires the Commission to examine the law relating to the standing of persons to sue in Federal and other courts while exercising Federal jurisdiction or in

[48] ALRC 8, 33–36.

courts exercising jurisdiction under any law of a Territory. It also requires consideration of the desirability of introducing class actions in such courts. The Commission has dealt separately with each aspect of the reference. In 1977 it published both a Working Paper and a Discussion Paper dealing with issues for consideration in the context of standing. Those papers are noted in greater detail in the Commission's *Annual Report* 1978.[49] On 30th June 1979 the Commission published a discussion paper on class actions. The Commission's *Annual Report* 1979 contains a summary of that paper.[50] The Commission will be publishing two reports on this reference, dealing separately with standing and class actions.

87. ***Standing.*** The 1980 *Annual Report* noted the considerable interest generated in the question of standing by the decision of the High Court in *Australian Conservation Foundation Inc.* v. *The Commonwealth*[51], when the High Court by a majority refused to permit the Australian Conservation Foundation to bring proceedings to enforce the provisions of the Environment Protection (Impact of Proposals) Act, 1974 (Cwlth). Since then the High Court has had to consider the question on subsequent occasions.[52] The issue arose most recently in *Onus and Frankland* v. *Alcoa of Australia Ltd.*[53] The appeal was argued in March 1981 and, at the time of writing, judgment is still reserved. The appeal is from the Supreme Court of Victoria refusing standing to Aborigines seeking to enforce the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic).

88. Between March and May 1981 the Commission conducted public hearings in capital cities throughout Australia. The Law Council of Australia expressed the view that the rules should remain in their existing form but, if the Attorney-General refused to grant his fiat to a relator action, it should be possible to seek leave of a court to institute the proceedings. This view was not, however, representative and most submissions (which included many by conservation groups) supported more liberal rules as to standing. The draft report on standing is being considered by the Commission and it is anticipated that the final report will be published later in 1981.

89. ***Class Actions.*** In August 1980, at the extension meeting in Sydney of the Annual Conference of the American Bar Association, Commissioner Debelle delivered a paper analysing the representative action in Australia.[54] He compared the representative action with the class action and suggested that an alternative to the class action which might be more suitable for Australian needs could be an extension of the representative action. Comments have since been made to the Commission suggesting that this might be a more suitable course than to implement the class action. At hearings on the question of standing conducted in Brisbane on 11 May, 1981 representatives of the Law Council of Australia submitted that extension of the representative action was more appropriate for Australia than the class action. The Commission continues to receive submissions on the view expressed in that paper and on its Discussion Paper. It has been necessary to suspend further research on this aspect of the reference because of the commitment of research staff to other projects. Further research is yet to be completed before the final report can be published. At this stage, it would appear that the final report will not be

[49] ALRC 10, 37–38.
[50] ALRC 13, 37–39.
[51] (1979) 54 ALJR 176.
[52] E.g. *Ingram* v. *The Commonwealth and Peacock* (1979) 54 ALJR 395 and *Day* v. *Pinglen Pty. Ltd.* (unreported) delivered 26 May 1981.
[53] Unreported at the time of writing.
[54] The paper is reprinted in 54 ALJ 508.

published until 1982. In the meantime the Commission continues to monitor all developments both in Australia and overseas.

Evidence

90. ***Progress of Initial Research Program.*** The program for the reference was outlined in the 1980 *Annual Report*.[55] The following progress can be reported:

- ***Comparison of Evidence Laws.*** The comparison of legislation of States and Territories has been completed. The comparison of the decisions of the courts of the States and Territories is nearing completion.
- ***Analysis of Federal and Territory Courts.*** Background information has been obtained about the nature of the jurisdictions of the relevant courts, their use of juries, and the extent to which and the circumstances in which judges of Federal Courts sit in more than one State or Territory.
- ***Identification of Problems.*** A discussion paper was issued in October 1980.[56] It attempted to identify problem areas and was circulated among judges and magistrates, legal practitioners, and university lecturers and tutors.
- ***Issues Paper.*** An issues paper was completed in October 1980. It raised a number of conceptual issues.[57] The paper has been circulated for comment to interested persons and organisations.
- ***Psychological Assumptions.*** The Commission has been collecting material from the substantial body of literature that is available and which is relevant to the psychological assumptions behind the laws of evidence. A Melbourne psychologist, Dr. Thomson, has been appointed a consultant for the reference.
- ***Ethnic Issues.*** The reference has been publicised through the ethnic media.
- ***Impact of Technology.*** Discussions have been held with persons involved in the computer industry and the micrographic industry.

91. ***Discussions and Submissions.*** Following the distribution of the discussion paper and the issues paper, extensive discussions have been held with a large number of people and organisations including State and Federal judges and legal practitioners.

92. ***Preparation of a Comprehensive Draft Evidence Act.*** Work has commenced on preparing a comprehensive draft Bill. The draft will enable the Commission to report, as the terms of reference require, upon:

- whether there should be uniformity and if so to what extent in the laws of evidence to be used in the High Court, the Federal Court, the Family Court, and the courts of the relevant Territories; and
- the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.

93. ***Consultants.*** During the year consultants were appointed (see paragraph 32). A meeting has been held with consultants to discuss the matters raised in the discussion paper and issues paper. Further meetings are planned as work on the reference progresses.

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[55] ALRC 17, 43.
[56] ALRC DP 16 – *Reform of Evidence Law.*
[57] *Annual Report* 1980 ALRC 17, 44.

Visits and Appreciation

94. The Commission is maintaining its policy of reciprocal exchange arrangements with similar organisations in Australia and overseas. It is continuing its close links with such international organisations as the Commonwealth Secretariat, the Council of Europe and the Organisation for Economic Co-operation and Development. The many visitors which the Commission receives from within Australia and overseas enables it to strengthen its contacts with organisations and persons whose work is relevant to projects before the Commission.

95. ***Appreciation.*** The Commission expresses its appreciation for the assistance provided by government departments, both Commonwealth and State, Australian Embassies and High Commissions and law reform bodies and universities in Australia and overseas. The Commission has also had the benefit of consultations with many distinguished judges, legal and other scholars, Parliamentarians, members of the legal profession, representatives of industry and community organisations, government officers and officials of international organisations. These are greatly appreciated and assist the Commission in the effective discharge of its functions.

Auditor-General's Report

8 October 1981

The Honourable the Attorney-General
Parliament House
CANBERRA A.C.T. 2600

Dear Attorney

LAW REFORM COMMISSION
FINANCIAL STATEMENTS 1980-81

In compliance with section 35(2) of the Law Reform Commission Act 1973 the Commission has submitted for my report financial statements, in the form approved pursuant to the provisions of section 35(1) of the Act, comprising—

Statement of Receipts and Payments for the year ended 30 June 1981; and
Statement of Assets and Liabilities as at 30 June 1981.

Copies of the statements are attached for your information.

I now report that the accompanying statements are in agreement with the accounts and records of the Commission and in my opinion—

(a) the statements are based on proper accounts and records; and
(b) the receipt and expenditure of moneys, and the acquisition and disposal of assets, by the Commission during the year have been in accordance with the Act.

Yours faithfully
D. J. Hill
Acting Auditor-General

Financial Statements

THE LAW REFORM COMMISSION

STATEMENT OF RECEIPTS AND PAYMENTS FOR THE YEAR ENDED 30 JUNE 1981

1979–80 $		1980–81 $
2 379	Cash on hand and at bank 1 July 1980	11 862
	RECEIPTS	
906 800	Appropriation from the Commonwealth Government	1 050 600
2 498	Other	3 417
911 677		1 065 879
	PAYMENTS	
499 415	Salaries and payments in the nature of salaries	610 243
37 908	Part-time members' remuneration	45 871
3 099	Consultants' fees	10 400
51 403	Fares	61 923
25 210	Travelling allowance	29 515
55 250	Rental of premises	55 250
82 738	Printing and stationery	78 332
10 970	Office equipment	11 125
44 895	Telephone and postage charges	45 289
25 426	Library books and subscriptions	26 765
8 133	Advertising	13 538
21 009	Car hire	22 676
11 345	Freight and removal expenses	10 831
23 014	Incidentals	33 632
899 815		1 055 390
11 862	Cash on hand and at bank 30 June 1981	10 489
911 677		1 065 879

We certify that, to the best of our knowledge, the above Statement of Receipts and Payments correctly reflects the cash transactions and is in agreement with the accounts and records of the Commission.

M.D. Kirby
CHAIRMAN

B.A. Hunt
EXECUTIVE OFFICER

THE LAW REFORM COMMISSION
STATEMENT OF ASSETS AND LIABILITIES AS AT 30 JUNE 1981

1979–80 $		1980–81 $
	ASSETS	
	Current Assets	
150	Cash on hand	150
11 712	Cash at Reserve Bank	10 339
	Fixed Assets	
137 918	Office furniture and equipment at cost	149 043
155 444	Library books and subscriptions at cost	182 209
3 343	Other fixed assets	6 445
308 567	Total Assets	348 186
	LIABILITIES	
9 683	Accounts payable	3 408
9 683	Total liabilities	3 408

We certify that, to the best of our knowledge, the above Statement of Assets and Liabilities is in agreement with the accounts and records of the Commission.

M.D. Kirby
CHAIRMAN

B.A. Hunt
EXECUTIVE OFFICER

Appendix A
LAW REFORM SUGGESTIONS *

Aboriginals

Suggested need for the legislature to consider whether tribal aboriginals ought to be tried under ordinary (European) law.

> It is, no doubt, a question of high legislative policy whether tribal aboriginals, who are unable to understand the concepts of the ordinary law, ought to be tried under that law. As the law stands, they can be so tried if they are capable of understanding the proceedings at the trial so as to be able to make a proper defence. In the present case the matters stated by counsel for the applicant did not provide any ground on which a reasonable jury could hold that the applicant was not capable of understanding the proceedings so as to be able to make a proper defence. His obvious lack of sophistication, the gap between his manner of thinking and that of the European, and his inability to understand the legal principles involved are matters that will be relevant to the consideration which the executive of Western Australia will be called upon to give to this case.
>
> *(Ngatayi* v. *The Queen* (1980) 30 ALR 27, 34, Mr Justices Gibbs, Mason and Wilson)[1]

Accident Compensation

National Compensation Scheme. Suggested need for the implementation of a comprehensive national compensation scheme which would cover, amongst other things, personal injuries due to sporting activities.

> [The] study of one small area of the accident problem, namely personal injuries due to sporting activities, illustrates how the whole field is bedevilled with technicalities and distinctions not related in any way to the needs or deserts of the victims. Many injured persons would have no remedy at all in tort and few would be covered under the alternative compensation systems. In New Zealand, on the other hand, since 1 April 1974 1974, every member of the community, whether injured as a result of a sporting activity or any other type of accident, would be entitled to the benefits payable under the Accident Compensation Act 1972 (NZ). The proposals for a comprehensive national compensation scheme put forward in 1974 by the National Committee of Inquiry into Compensation and Rehabilitation in Australia (the Woodhouse Committee) have been pigeon-holed too long; it is time they were taken out, dusted off and put into operation in this country.
>
> (Professor H. Luntz, 'Compensation for Injuries Due to Sport', (1980) 54 *Australian Law Journal* 588, 601)

Periodical Payments. Suggested need for a system of periodical payments to be instituted, when awarding damages, instead of the present system of lump sum payment.

> I am usually disinclined to give unsought advice to the legislature but this case constitutes in itself a strong plea for some system of awarding damages on a periodic basis similar to that which exists in South Australia. Because of the numerous uncertainties which exist here, the amount of damages, which I ultimately assess, is very likely to be proved to be wrong and therefore unjust either to the plaintiff or to the defendants and this will be shown as the plaintiff's life unfolds.
>
> *(Jabanardi* v. *A.M.P. Fire and General Insurance Company Limited,* unreported, Supreme Court of the Northern Territory, 19 November 1980, Chief Justice Forster)

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*This schedule contains suggestions for law reform which have come to the Commission's notice in the past year. The schedule is not meant to be exhaustive nor does it include proposals made by other law reform agencies. Although some suggestions are not new and may have been made previously, they are included because they give an indication of concern about aspects of the law. Inclusion of a suggestion does not imply any opinion by the Commission about the merits or otherwise of the suggestion.

[1] Cf. Australian Law Reform Commission, *Aboriginal Customary Law — Recognition?* (ALRC DP 17) (1980), para. 133.

Adoption

Suggested need for the establishment in the A.C.T. of an adoption register, along the lines of those which exist in N.S.W., Victoria and South Australia, in order to facilitate reunions of adult adoptees and their natural parents. Legislation should also stipulate the rights of access to information on that register of the parties concerned (including adoptees and natural parents).

(Adoption Triangle, A.C.T.)

Bill of Rights

Suggested need for a Bill of Rights to be incorporated into the Australian Constitution.

> It may be that Australia, like the United Kingdom, needs a Bill of Rights. My conclusion is that, to avoid irretrievable breakdown in modern conditions, the common law must come to grips with the statute law and the constitution. A written Constitution incorporating a Bill of Rights provides the opportunity. But the judges must seek out and support the policy of statute law, rejecting a literal construction, if a statute's policy is better served by such rejection. They must approach the Constitution in the same way, drawing support from the principles of the common law in favour of life and liberty. If they do so, the common law, which is the judge's contribution to law-making, will survive. But, if the opportunity is not given them, or if they fail, the common law will join the collection of interesting antiquities chronicled by Sir William Holdsworth in his *History of English Law*. The British Museum, not the living world, will be its appropriate resting-place.
>
> (Lord Scarman, 'Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century – Happy Marriage or Irretrievable Breakdown?', (1980) 7 *Monash University Law Review* 1, 15–16)

Constitutional Law

Suggested need for comprehensive reform of the Australian Constitution.

> [T]here is now widespread recognition of the inadequacy of the present constitution . . . [A] top priority for reformers should be to continue to press for the alteration of section 128 to permit constitutional amendment by majority vote. A next priority should be to clarify the Senate's powers, particularly the power, directly or indirectly, to bring down a government having the support of the popular House, i.e. to remove the Senate's asserted power to withhold supply. . . . [T]he problem could be circumvented and defused . . . if a system of fixed-term parliaments were to be adopted . . . with elections for all parliaments to be held simultaneously. . . . [T]here will continue to be a need for an 'umpire' i.e. Governors-General or Governors. Thus, the next priority should be the preparation and adoption of a statement – or a codification? – of the power and the discretions of these 'umpires'. . . . The principal feature of the proposed codification should be a requirement that the fate of governments prior to the due election is a matter to be determined by the Lower House of each parliament and not otherwise. . . . [N]owhere in the present constitution is the citizen assured of his right to vote. . . . The right to vote, and the concept of one vote, one value should be enshrined in the constitution itself as a guarantee of the citizen's status and rights in this regard.
>
> (Mr A. Farran, Monash University, 'An Order of Priorities for Constitutional Change', (1980) 2 *Change*, 2–3)

Contempt of Court

Suggested need for reform of the law of contempt of court.

> In criminal cases the rule has been that the media must refrain from publishing material that could prejudice a fair trial by a jury. This role should continue, and indeed could be strengthened with more prosecutions, though there is scope for limiting its initiation to the Attorney-General and limiting penalties. But the same rule should not apply to civil cases being tried by a judge alone. The reason is that juries have not had the same training as judges and are not as capable of shutting out prejudicial material ... The other area of contempt that causes problems is the confidentiality of sources. ... The new English Bill ... provides that journalists can protect their sources except when this conflicts with the interests of justice, national security or the prevention or disorder of crime ... the thrust of the provisions is on the right track. ... The law of contempt as it stands is inhibiting free discussion, and needs to be reformed. The reform is needed not only to enhance the freedom of the Press to publish, but to enhance the right of the citizen to be informed.
>
> ('The *Canberra Times*', 15 June 1981, 2 ('Contempt of Court'))[2]

Courts

Suggested need for a review of the jurisdiction of Australian courts and the problems stemming from the dual Federal/State system.

> It is at the beginning and the end a property dispute. Each of the parties believe they have advantages in the court of choice. Of course, in any sensible system of law there would be no choice. There being under our system as at present a choice of forum, the wife insists upon the case proceeding in this court and the husband insists upon the case proceeding in the other court [the Family Court of Australia].
>
> (*Jarvinen* v. *Baba*, Supreme Court of N.S.W., 7 October 1980, Mr Justice Holland)
>
> At a time when there are long delays in all Courts, valuable judicial and professional manpower is devoted to the determination of sterile jurisdictional argument. On no view can this be justified as a proper allocation of resources or be thought to enhance the community's respect for the administration of justice. Further, I think it right to mention that the amounts in issue in both *Fletcher's case* and the instant case are relatively small and that members of the public are required to incur comparatively heavy legal costs to vindicate their rights to small sums. It gives me no satisfaction whatever that the apprehensions which I have expressed in a recent issue of the Australian Law Journal (54 ALJ 278) have materialised at such early date. I would be derelict in what I consider to be my judicial duties if I did not say as clearly as I can that there is a danger that problems stemming from the dual Federal/State system of Courts will arise with increasing frequency unless the Legislatures intervene. With the greatest respect, I draw the attention of the Attorneys-General for the States and the Commonwealth to this entirely unsatisfactory state of affairs which has been apprehended by the Chief Justice of New South Wales as long ago as 1978 (Sir Laurence Street, 'The Consequences of a Dual System of State and Federal Courts', (1978) 52 ALJ 434).
>
> (*Zalai* v. *Col Crawford (Retail) Pty. Ltd.*, (1980) 32 ALR 187, 189, Mr Justice Rogers)

Criminal Law

Accessories. Suggested need to review the law relating to accessories:

> When in reality the so-called accessory is so central a figure that he can be held to have caused the prohibited act or event, he should no longer be treated as an accessory with liability dependent on that of the immediate actor but as the principal offender in his own right.
>
> (Professor D. Lanham, 'Accomplices, Principals and Causation', (1980) 12 *Melbourne University Law Review* 490, 515)

---

[2] Cf. The *Age*, 9 July 1981, 13 ('Murders and contempt').

Computer Crime. Suggested need for specific legislation to be developed dealing with dishonest behaviour facilitated by computers.

> [C]omputer abuse, like any socially unacceptable behaviour, is a legal problem as well as a social or industry problem. ... The low rate of reporting of computer abuse, and the even lower rate of successful prosecution or civil action, demonstrates the proposition that the legal aspects of computer abuse are, in many cases, ignored for too long. ... The key factors of most computer abuse are readily identified. Most forms of computer abuse will involve one or more of the following:
>
> – unauthorised use of hardware
> – unauthorised use of software
> – unauthorised corruptions of software or data
> – introduction of unauthorised software or data
> – use of a system in an unauthorised manner.
>
> ... Starting with these five categories, it is not too difficult to imagine a code of computer legislation which prohibits any activity involving any of these elements. . . . Each offence would be complete without the perpetrator having taken the further step of using his preparatory work to steal money, or alter a credit rating or in any other way capitalise on his unauthorised activity. . . . Under present law, it is unlikely that a subtle invader, poised ready to profit by his ingenuity, has committed an offence. Yet he poses the same threat as a burglar in the bank vault with his kit-bag open, or the sniper taking aim. It is unreasonable . . . that the preparatory work for computer abuse can be carried out without any significant legal risk.
>
> (J. Burnside, Barrister, Melbourne, 'Legal Characterisation of Computer Abuse', a paper given at seminar on 'Legal Aspects of Computer Abuse', 3 June 1981)

Custody and Security of Evidence. Need for reform of the law concerning the custody and security of evidence in criminal trials.

> One of the first steps towards reform in the Magistrates Court should be, to not allow any member of the Police Prosecution Branch to act as Court Constable. The exhibits should remain the property of the Court and protected so that allegations of police tampering with exhibits would not be possible. If this were done it would do much to restore the trust of the public in our judicial system because it would remain a province purely for the Justices.
>
> (Mr S. Sellers, H.M. Gaol, Parramatta)

Drugs. Suggested need to review the common presumption in Australian drug legislation that a person is in possession of proscribed drugs for the purpose of trafficking if that person has in his possession a quantity of such a drug in excess of that prescribed by the relevant legislation.

> There are strong reasons for believing that it is impossible to establish with any acceptable degree of accuracy quantities for each drug which would be an accurate determinant of a possessor's intention. Moreover, even if such estimates were possible, it is very doubtful whether trafficable quantity provisions serve any valid purpose. For very large amounts of drugs, the presumption is unnecessary; for amounts not far above the trafficable quantity, the presumption can produce injustice. Put simply, if a large amount of the drug is involved, the jury will convict of trafficking; if an amount is only slightly over the trafficable quantity, on that evidence alone the jury should not convict.
>
> (Mr J. Willis, Latrobe University, 'The Trafficable Quantity Presumption in Australian Drug Legislation', (1980) 12 *Melbourne University Law Review* 467, 489)

Investigation by Police. Suggested need for the police to be given a general power to require a person's name and address.

> It is suggested that the police should have a generalised name – and – address power . . . the wider power recommended by the Australian Law Reform Commission is preferable and should be used as a model for reform . . . a name – and – address power is necessary in police work, it is a power often asserted irrespective of the technicalities of the law and the present mishmash of statutory provisions is unhelpful to both the police and public.
>
> (Mr D.C. McKelvey, University of Queensland, 'Red Indians, and Police Power to Demand Names and Addresses in Queensland', [1980] 4 *Criminal Law Journal* 347, 358, 360, 361)

Defamation

Suggested need for review of the law of defamation to make plain the proceedings, in relation to which a fair, accurate and contemporaneous report, if made, may be the subject of privilege.

> In my opinion s.6 [of the Wrongs Act 1936 (S.A.)] does protect a fair accurate and contemporaneous report of proceedings publicly heard before a Court exercising judicial authority anywhere in Australia and that point therefore fails. This point would not be tenable today if Parliament had seen fit to act on the Fifteenth Report of the Law Reform Committee of South Australia dated as long ago as 11th November, 1971 which recommended the enactment of a Section in terms of Section 7 of the English Act of 1952 and of the First Schedule to that Act, which provides for privilege in relation to 'a fair and accurate report of any proceedings before a Court exercising juridiction throughout any part of Her Majesty's dominions outside the United Kingdom . . .'. One might hope that now the matter has come for decision, that the attention of Parliament might be drawn again to this report.
>
> (*Bunker* v. *James & Dowland Publications Limited* (1980) 88 L.S.J.S. 478, 481, Mr Justice Zelling)[3]

Disabled Persons

Enforcement of Rights. Suggested need for reform in the areas of disability and human rights, legal provision for disabled persons and special education.

> (Resolutions at a Public Seminar on Disability, Human Rights and Law Reform, at Institute of Special Education, Burwood State College, 11–12 April 1981.)

Legal Representation. Suggested need for legal representation to be provided at hearings for involuntary committal to mental health institutions.

> [W]ithout representation patients in these hearings are quintessentially disadvantaged, far more so than those other groups who do suffer disadvantage in courts of law, people such as prisoners in visiting justice hearings, aboriginals, ethnic minorities. Decisions affecting the basic freedoms of patients are being made against their wishes and without adequate hearing of their views or testing of the reasons for those decisions. I believe that injustices are occurring and that however benevolent we are, we parties to that state of affairs exercising power over others must move urgently for change. The provision of adequate legal representation for patients is an essential reform and I hope that it is achieved in the near future.
>
> (Mr K.S. Anderson S.M., Deputy Chairman (Legal), Bench of Stipendiary Magistrates (N.S.W.). Transcript of remarks made at seminar, 'Legal Rights for Mental Patients – Towards a New Mental Health Act', Sydney, 30 May 1981)

Uniform Law. Suggested need for uniform legislation throughout Australia dealing with disabled people.

> What we need in Australia is a uniform set of laws dealing with disabled people. . . . In particular the problems of access to buildings, getting on and off public transport, education and employment opportunities.
>
> (E. Grant, cited The *Canberra Times*, 2 March 1981, 3)[4]

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[3] See also Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11) (1979), para.157.

[4] See also Australian Law Reform Commission, *Annual Report 1980*, 51.

Family Law

Changes to Children's Surnames. Suggested need to amend the Family Law Act 1975 (Cwlth) to clarify the powers and rights of a custodial parent of a child in relation to unilateral changes to the child's surname.

> As cases involving unilateral changes of children's surnames are becoming more frequent . . . I endorse the remarks of Lusink J. in *Putrino and Jackson* (1978) FLC 90–441 that there should be an amendment to the Family Law Act 1975 to clarify the powers and rights of the custodial parent in such circumstances, though still leaving the final decision a matter of discretion to the court. In the meantime the regulations should be amended to acquire a notation being added to the decree nisi and to all custody orders to the effect that the surname of a child in the custody or care and control of a parent should not be changed without the prior consent of the other parent or the leave of the court.
>
> (*Kelley and Kelley* (1981) FLC 91–002, 76, 071, 76, 075, Mr Justice Ross-Jones)

Contempt of Court. Suggested need for amendment of the Family Law Regulations concerning the protection of children.

> It seems to me the regulation [116 of the Family Law Regulations] does not go far enough. It does not cure the mischief of a party's solicitor taking proofs from children and thereafter preparing an affidavit. . . . While a handful of solicitors remains sufficiently insensitive to the conciliation and investigatory procedures of this court to indulge in such practices, further amendment of reg. 116 may be necessary. I request the Principal Registrar to call the attention of the Attorney-General to this matter – preferably reg. 116(6) should be amended to provide that no affidavit shall be prepared, sworn or affirmed without the leave of the court.
>
> (*In the Marriage of Cooper,* (1980) FLC 90–870, 75, 509, Mr Justice Watson, Senior Judge, Family Court of Australia)

De Facto Relationships. Suggested need for examination of the law on informal marriages, in particular the rights of persons to property owned by their de facto spouse.

> If seeing that justice is done is the proper role of the law there can be no justification for a refusal to exercise that role where the parties by their conduct have indicated that a relationship in the nature of a marriage exists between them, merely because they have not chosen to make use of a particular ritual or evidentiary formula. It is too late in the day for the law to continue a discrimination between the legal and the informal marriage.
>
> (Associate Professor H.A. Finlay, 'Defining the Informal Marriage', (1980) 3 *University of N.S.W. Law Journal 279*)
>
> I can therefore see no way in which it is within my power to grant any remedy to the plaintiff [de facto spouse], notwithstanding the obvious merit of her position. [There is] no doubt the Crown will give proper consideration to the merits of the plaintiff's situation, and to the fact that it flows from what is generally acknowledged to be a defect in the present law. The case is one of a significant number that come before the courts in which injustice results from the failure of the law to adapt to changing patterns of co-habitation. . . . For an increasing number of purposes the law has been amended to allow proper consideration to be given to such de facto relationships. Earlier in this judgment I referred to a line of authority in the English Court of Appeal which allowed courts to do a substantial measure of justice in situations such as the one now before me. This avenue is, however, at least for the time being, closed by the decision of the Court of Appeal in *Allen* v. *Snyder.* That decision, I think it may fairly be said, reflected considerations of consistency of legal principle, and was in no way concerned with the social merits of any change in the law. That is the matter to which the legislature might well give consideration now that the avenue of judicial solution has been closed.
>
> (*Blanchfield* v. *The Public Trustee,* Supreme Court of N.S.W., 10 April 1981, Mr Justice Wootten)

Property Distribution. Suggested need for review of matrimonial property law in Australia.

> The Committee recommends that arrangements for the introduction of a full Matrimonial Property Regime should be preceded by . . . a full study carried out by the Law Reform Commission of the legal implications of the introduction of such a scheme.
>
> (Australian Parliament, *Family Law In Australia: Report of the Joint Select Committee on the Family Law Act* (July 1980))[5]

Recognition of Foreign Divorces. Suggested need for review of the law relating to the recognition of foreign divorces.

> [T]he new Family Law Act 1975 (Cth) set out quite new recognition rules in s.104. In addition to the prescribed recognition rules there set out, the common law rules were expressly saved. Under the statutory rules it is quite clear that the applicant's possession of nationality in the overseas country where the decree was obtained is not by itself a sufficient basis for recognition. . . . The common law recognition rule enunciated in *Travers* v. *Holley* would . . . seem to require the recognition of foreign divorces decreed on the basis of the applicant's nationality alone. This of course is implicitly inconsistent with the express wording of the new statutory rules.
>
> (Dr M. Pryles, 'The Time Factor in Private International Law', (1980) 6 *Monash University Law Review,* 225, 239.)

Superannuation. Suggested need to amend the provisions of the Superannuation Act 1976 (Cwlth) which disentitle a married spouse of a person receiving a pension under the Act (a 'pensioner') from receiving benefits under that Act on the death of the pensioner –

- where the marriage took place after the pension became due; and
- where
  - the marriage had taken place not more than 5 years before the death of the pensioner; or
  - there had not been a substantial de facto relationship immediately preceding the marriage.

  (Mrs J. Blain, Kirribilli, N.S.W.)

Firearms

Legislative Reform. Suggested need to amend firearms laws, so as to embody the following features:

- All jurisdictions should have efficient registration systems for handguns, shotguns and rifles . . .
- All jurisdictions should have licensing systems for persons wishing to own registerable firearms . . .
- It is essential that all jurisdictions co-ordinate their legislation and licensing systems.

  (Professor R. Harding, *Firearms and Violence in Australian Life,* University of W.A. Press (1981) 159–63)

Licensing. Suggested need to review the Gun Licence Ordinance 1937 (ACT).

- [A]n applicant [for a gun or pistol licence] should at least be required to specify the purpose for which the gun or pistol is sought and the measures proposed for ensuring the safe keeping of the firearm and any ammunition.
- A specific power for the Registrar to impose appropriate conditions at the time of granting or renewing a licence, such as conditions restricting the use to which the

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[5] ibid.

firearm may be put and imposing requirements as to the safe keeping of the firearm and ammunition, seems to be desirable.

- [T]he important obligations which certain of [the various offence provisions in s.18–24 inclusive] inferentially impose upon licence holders may appropriately be reflected as conditions of the grant of the licence . . .
- [A]s the Ordinance specifies criteria by reference to which other forms of licences or approvals may be granted, and as the requirement that an applicant for a gun or pistol license must be a 'fit and proper person' to hold such a licence appears, quite properly in my view, to be fundamental to the administration of the gun and pistol licensing provisions, it may be more satisfactory if that requirement, and any other appropriate requirements were specified in the Ordinance rather than being left to implication.

(*Hollands* v. *Commissioner of Police; Hollands* v. *Registrar of Gun Licences*, Administrative Appeals Tribunal, 22 May 1981, Mr A.N. Hall, Senior Member)

Homosexuality

Suggested need for the repeal of laws against homosexuality.

> The [Royal] Commission [on Human Relationships] drew its support from social attitudes as revealed in submissions to us, and in surveys of attitudes which showed strong support for the repeal of laws making homosexual behaviour criminal. We also found that those who opposed law reform held very strong views and it does seem to me that the forceful expression of those views has been allowed in the minds of our legislators to cloud the reality that these laws serve no useful social function, and that they do not command general support. One can only hope that the forces of reason will assert themselves and the long overdue reforms will soon eventuate. Repeal of laws against homosexuality is, in my view, a necessary first step towards understanding, tolerance and acceptance.
>
> (Justice E. Evatt, 'Homosexuals and the Law', an address to a seminar organised by the Gay Rights Lobby, Sydney, 23 June 1981)

Insurance Law

Legislative Balance. Suggested need for balancing of the rights of the respective parties to the insurance contract.

> Anglo-Australian law must move in the direction of providing a legislative balance in the insurance contract under the banner of 'the insurer's duty of good faith'.
>
> (Mr P. Latimer, Monash University, 'Extra-contract Recovery in Insurance Law', (1980) 3 *University of N.S.W. Law Journal* 381)[6]

Protection of Insured. Suggested need to review the protection afforded an insured person where he fails to disclose all the material facts.

> Had the obligation to make full disclosure of all material facts been an implied term of contracts of insurance, s.18 of the Insurance Act [1902 (N.S.W.)] could have been invoked to provide relief in appropriate cases against the failure to observe this implied term or condition. However, since the obligation is one resting on the common law, it can hardly be said with any claim to accuracy that it is 'a term of condition' of the contract . . . I have to consider the words of the section as best I can and no doubt if the interpretation that I ascribe to it is correct and fails to fulfil the legislative intention, the Parliament will take the necessary steps to rectify that situation. . . . In the result, I am of the view that even if the proposal and the declaration are part of the policy of insurance, there continues to subsist a duty of disclosure on the part of the insured which is not supplanted or destroyed by the terms of the declaration. That duty cannot be described as a 'term or condition of a contract of insurance' and accordingly, s.18 does not deal with the consequence of failure to discharge that duty.
>
> (*Kolokythas and Anor.* v. *The Federation Insurance Ltd*, [1980] 2 NSWLR 663, 674, 676, Mr Justice Rogers)[7]

[6] Cf. Australian Law Reform Commission, Second Report on Insurance Contracts (forthcoming).

Legal Interpretation

Suggested need for comprehensive legislation relating to the interpretation of Acts of Parliament by courts.

> . . . [the] proposed Federal legislation . . . could conflict with other established rules of construction . . . [it] would give priority to one established rule of construction to the possible detriment of others. The Council would prefer legislation which embodied all accepted rules of construction in the form of a code.
>
> (Law Council of Australia, *Press Release*, 3 June 1981)

Legal Representation

There should be an enforceable right to legal representation, at least in serious criminal cases.

> The right to counsel derives from the disadvantage of being unrepresented in a judicial system which claims to dispense equal justice in accordance with the rule of law. Whatever the position in minor cases may be, it is fundamental to the administration of justice in serious cases (which undoubtedly include rape) that an accused has the right to legal representation, even if he has no means to engage counsel. Counsel is necessary for the protection of an accused and desirable for assistance to a court in the administration of justice. It is no longer tolerable that persons accused of serious crime who are too poor to pay for legal representation can be forced to trial without representation. . . . Often courts cannot remedy denial of human rights which occur outside the judicial system, but there is no excuse for tolerating it within the system. It is useless to pretend that the rule of law operates throughout Australia when a basic human right is denied in a State Supreme Court, its denial confirmed there on appeal, and then tolerated by this court. The case is of general public importance because an indigent accused has been convicted of serious crimes after a trial which was unfair because he was denied representation.
>
> (*McInnes* v. *R.* (1979) 27 ALR 449, 458–9, 464, Mr Justice Murphy (dissenting))

Married Status

Suggested need to abandon the practice of referring in legal documents to persons by reference to their married status or otherwise, except where such a reference has relevance to the matter concerned.

> (Union of Australian Women (N.S.W. Branch))

Medical Law

Artificial Insemination Consideration should be given to the legal questions raised by artificial insemination by donor.

> Artificial insemination by donor raises a number of legal problems and also practical bio-

[7] ibid.

logical problems which may require a legislative solution. ... The simplest course [for reform] would appear to be to amend the Status of Children Act 1974 to make it clear that an A.I.D. child born to a married couple where the mother has conceived with the consent of the husband, will be deemed to be a child of that couple for all purposes as if it were their natural child. The Registration of Births, Deaths and Marriages Act 1959 should be amended to permit the husband to be nominated as the father of the A.I.D. child. ... The Medical Practitioners Act 1958 and or the Health Act 1958 should be amended to provide a detailed code for artificial insemination. It should be made an offence for anyone other than a qualified medical practitioner to carry out the procedure. A standard form of consent should be prescribed by regulation, and would have to be signed by both the mother and the husband. The consent should also contain a release against claims against the medical practitioner and or the hospital in which the procedure is carried out, (except perhaps in clear cases of gross negligence). There should also be clear legal standards as to collection and preservation of semen and as to genetic screening tests to be carried out. Laws may also have to be enacted to ensure the privacy of donors of semen, and as to keeping private the identities of the recipients.

(C.C.H. Wray, 'Artificial Insemination – Some Legal Problems', (1981) 6 *Law Institute Journal* 347, 349–50)[8]

Prescription Drugs Suggested need for legislation concerning information on prescription drugs.

- ***Practitioner information controls*** ... The implementation of positive disclosure legislation in Australia modelled on the American regulations would greatly improve the quality of product information addressed to the medical profession by the pharmaceutical industry.
- ***Patient information controls*** ... The American Food and Drug Administration has stated that patients have a right to be informed of the benefits and risks associated with the drugs they take. There appears to be no good reason why a similar right should not be acknowledged on behalf of Australian consumers. Because the provision of such information is clearly in the public interest, it should not be the responsibility of a voluntary scheme but should be subject to legislative control.

(Mr L.W. Darvall, Latrobe University, 'The Pharmaceutical Industry: Prescription Drug Information Controls in Australia and the United States', (1980) 7 *Monash University Law Review* 39, 47, 51)

Practice and Procedure

Adversarial Procedure Suggested need for various reforms to the adversary system.

[T]here are numbers of reforms that could be made usefully to the adversary system. To give just a few limited examples, the judge should have some right to call witnesses, or to require them to be called. All too often a key witness is not called, or critical evidence is not adduced, for a variety of reasons ranging from an intricate game of tactics to sheer ineptitude. Again there should be some more effective power to control over-long or repetitive cross-examination, or cross-examination which is only of peripheral relevance. And the profession, including the judges, must be educated in the exercise of a restraint intended, without impeding a just result, to achieve a speedier and less expensive justice. The precise terms of reforms such as these cannot be formulated easily, but I would suggest that the time has come when something should be done about them, leaving the fine tuning to be effected in the light of experience.

(Mr Justice R.M. Hope, Occasional Address to the Law Graduation Ceremony, University of N.S.W., Sydney, 30 April 1981)[9]

[8] See also Australian Law Reform Commission, *Annual Report 1980*, 49.

[9] See, generally, Australian Law Reform Commission, *Reform of Evidence Law* (ALRC DP 17) (1980). Cf. G.E.P. Brouwer, 'Inquisitorial and Adversarial Procedures – a Comparative Analysis', (1981) 55 *Australian Law Journal* 207.

Application for Special Leave to Appeal Suggested need for legislation to be enacted to alleviate the 'particularly vulnerable condition of a person in custody', in relation to an application for special leave to appeal to the High Court of Australia in criminal cases.

It was held [in *Hass* v. *The Queen* (1976) 50 ALJR 400] that an applicant for leave or special leave to appeal is not a party to proceedings. ... The whole court took the view that the High Court was, in cases other than ordinary proceedings *inter partes*, master of its own practice and procedure. Accordingly, an applicant for special leave to appeal in a criminal case is not entitled to make such application for special leave in person. The decision totally ignores the particularly vulnerable condition of a person in custody. The difficulties of a person in custody represented by counsel are well recognised. How much more difficult is the situation for unrepresented accused?

(Mr G. Zdenkowski, University of N.S.W., 'Judicial Intervention in Prisons', (1980) 6 *Monash University Law Review* 294, 304)

Issue of Subpoenas Suggested need for review of the law relating to the issue of subpoenas.

It seems to me that the whole problem to which the issue of subpoenas for the production of documents gives rise should be looked at. Tentatively I would think that:–

(a) Rules of court ought to be amended to permit the recovery of some part at least of the amount incurred by strangers to litigation in looking out [sic] and producing documents ...
(b) Subpoenas should include a statement that they may be set aside if they are oppressive.
(c) Subpoenas to produce documents ought not to be served without the leave of a judicial or court officer unless they are returnable not earlier than, say, 14 days after service.

(*Bank of New South Wales* v. *Withers*, Federal Court of Australia, 11 May 1981, Mr Justice Sheppard)

Property Law

Delivery of Deeds Suggested need for 'remedial legislation which would fall short of abolishing the delivery requirement, but which would be sufficient to rectify the proven deficiencies in the present law'. Suggested reforms appear under the following headings:

- The interrelationship between the laws on delivery and exchange should be clarified.
- The authorisation required by the common law to be given by a client to his solicitor before the solicitor is empowered to deliver a deed on behalf of his client should not be required to be under seal.
- The Presumption of Delivery should be abolished.
- Delivery should be required in the case of corporations notwithstanding the Property Law Act 1958 (Vic.), s.74.
- Delivery in escrow by corporation should be permitted.
- The minutes of the meeting at which the seal is affixed should be conclusive of the question whether or not delivery by a corporation is made in escrow.

(Dr A.J. Bradbrook, 'The Delivery of Deeds in Victoria', (1981) 55 *Australian Law Journal* 267)

Joint Tenancy Suggested need for legislation to provide that severance by declaration is an acceptable means of severance of a joint tenancy.

If legislation is introduced ... it should ensure that before any declaration is effective, it must be communicated to the other joint tenants and it must be in writing. It would remove any problem of proof that the declaration had been made.

(Ms S. MacCallum, University of Melbourne, 'Severance of a Matrimonial Joint Tenancy by a Separated Spouse', (1980) 7 *Monash University Law Review* 17, 34, 35)

Sentencing

Jurisdictional Problems Suggested need for review of the problems of sentencing Commonwealth prisoners to State institutions. *Attorney-General* v. *Riordan* (Supreme Court of N.S.W., Court of Appeal, 19 November 1980) illustrates the complexitities which can arise where a Commonwealth prisoner escapes from a State institution.

Term of Imprisonment Suggested need for review of sentencing practice.

> The thesis propounded in this article, however, suggests that the imposition of heavy sentences may be not only ineffective, but actually counter-productive. The evidence suggests that severe sentences neither increase the likelihood that the offender on whom the punishment is imposed will himself be deterred, nor, because of the probable adverse effects of increasing severity on the certainty of punishment, do they result in an enhanced deterrent effect on the potential offender. On the contrary, while it may be 'premature to draw policy conclusions', it seems possible that in some situations deterrence is more likely to be achieved by *reducing* penalties than by increasing them.
>
> (Dr L. Sebba, 'Mitigation of Sentence in Order to Deter?', (1980) 6 *Monash University Law Review* 268, 292–3)

Standing in the Courts

Suggested need for legislation to extend the rules relating to standing in public interest litigation.

> Given the reluctance of Australian courts to extend standing in public interest litigation, the decisions in *Stow* and *Australian Conservation Foundation* being prime examples, it would seem that any change must come from legislation ... Having accepted a 'real concern' standing test, it would seem simpler to go the whole way and allow standing to 'any person' along the lines of the Michigan Environmental Protection Act ... Section 80 (1)(c) of the Trade Practices Act 1974 (Cth) allowing any person, as well as the Minister and the Trade Practices Commission, to take proceedings to restrain a breach of the Act does not appear to have caused much difficulty. To borrow an expression of Lord Edmund-Davies in *Gouriet*, 'the heavens have not fallen and the stars stay in their courses'.
>
> (L.Pearson, 'Locus Standi and Environmental Issues', (1980) 3 *University of N.S.W. Law Journal* 307, 317, 319)[10]

Workers' Compensation

Suggested need for review of the Workman's Compensation Ordinance 1951 (A.C.T.), to bring the costs of domestic assistance, which are directly attributable to an injury the subject of a worker's compensation claim, within the category of recoverable costs.

> Section 11 [of the Workman's Compensation Ordinance] makes the cost of 'medical treatment' recoverable; and this is defined in s.6 to include, amongst other things, 'nursing attendance'. It has been held by the New South Wales Court of Appeal in *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Insurances Pty. Ltd.* [1977] 2 NSWLR 827 and in *Thomas* v. *Ferguson Transformers Pty. Ltd.* [1979] 1 NSWLR 216 that domestic assistance as such does not come within nursing services and is not recoverable even though it may be rendered necessary by the workman's disability. It seems strange that an outlay such as this, which is directly attributable to the injury, should be regarded by the legislature as more properly payable by the workman or the taxpayer rather than by the insured employer. That, however, appears to be the law ...
>
> (*McGale* v. *Glad*, (1980) 33 ACTR 25, 31, Mr Justice Connor, Acting Chief Justice, Supreme Court of the A.C.T.)

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[10] See, generally, Australian Law Reform Commission, *Access to the Courts – I Standing: Public Interest Suits* (ALRC DP 4) (1978).

Appendix B

TERMS OF REFERENCE

PRIVACY

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO –

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely –

  (i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

  (ii) any other laws, includings laws of the Territories, that the Parliament has power to amend or repeal;

(b) the provisions of section 7 of the Act which provides that, in the performance of its functions, the Commission shall review laws to which the Act applies, and consider proposals, with a view to ensuring –

  (i) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

  (ii) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights; and

(c) the provisions, in particular, of Article 17 of the Covenant which provides, inter alia, that 'no one shall be subjected to arbitrary or unlawful interference with his privacy':

HEREBY REFER the following matters to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO INQUIRE INTO AND REPORT UPON –

(1) the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of the Commonwealth Parliament or of the Territories, and the extent to which procedures adopted to give effect to those laws give rise to or permit such intrusions or interferences, with particular reference to but not confined to the following matters:

  (a) the collection, recording or storage of information by Commonwealth or Territory Departments, authorities or corporations, or by persons or corporations licensed under those laws for purposes related to the collection, recording, storage or communication of information;

  (b) the communication of the information referred to in sub-paragraph (a) to any Government Department, or to any authority, corporation or person;

  (c) without limiting the operation of sub-paragraphs (a) and (b), the collection, recording, storage and communication of information obtained pursuant to the Health Insurance Act 1973–1975 and the Health Insurance Commission Act 1973;

  (d) powers of entry on premises or search of persons or premises by police and other officials; and

  (e) powers exercisable by persons or authorities other than courts to summon the attendance of persons to answer questions or produce documents;

(2) (a) what legislative or other measures are required to provide proper protection and redress in the cases referred to in paragraph (1);

(b) what changes are required in the law in force in the Territories to provide protection against, or redress for, undue intrusions into or interferences with privacy arising, inter alia, from the obtaining, recording, storage or communication of information in relation to individuals, or from entry onto private property with particular reference to, but not confined to, the following:

(i) data storage;
(ii) the credit reference system;
(iii) debt collectors;
(iv) medical, employment, banking and like records;
(v) listening, optical, photographic and other like devices;
(vi) security guards and private investigators;
(vii) entry onto private property by persons such as collectors, canvassers and salesman;
(viii) employment agencies;
(ix) press, radio and television;
(x) confidential relationships such as lawyer and client and doctor and patient;

(3) any other related matter;

but excluding inquiries on matters falling within the Terms of Reference of the Royal Commission on Intelligence and Security or matters relating to national security or defence.

IN MAKING ITS INQUIRY AND REPORT the Commission will:

(a) have regard to its function in accordance with section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States; and

(b) note the need to strike a balance between protection of privacy and the interests of the community in the development of knowledge and information, and law enforcement.

R.J. Ellicott, Q.C.,
Attorney-General

DATED this ninth day of April 1976

CONSUMERS IN DEBT

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO –

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely –

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and
(ii) any other laws, includings laws of the Territories, that the Parliament has power to amend or repeal; and

(b) the desirability of avoiding injustice to and oppression of debtors and of facilitating the collection of debts,

HEREBY REFER the following matters to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO REPORT UPON –

(1) whether the Bankruptcy Act in its application to small or consumer debtors makes adequate provision to enable such debtors to discharge or compromise their debts from their present or future assets or earnings;

(2) if the answer to (1) is no, whether any and what measures could be adopted by way of legislation to achieve that objective; and

(3) what measures could be adopted by way of legislation to provide financial counselling facilities to small or consumer debtors.

IN MAKING ITS REPORT the Commission will have regard to

(a) the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them; and

(b) the function of the Commission in accordance with section 6(1) of the Law Reform Commission Act to consider proposals for uniformity between laws of the Territories and laws of the States.

DATED this tenth day of May 1976

R.J. Ellicott, Q.C.,
Attorney-General

INSURANCE CONTRACTS

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely –

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, includings laws of the Territories, that the Parliament has power to amend or repeal,

(b) the lack of uniformity between the laws of the Territories and the laws of the States in the field of insurance;

(c) the relative bargaining power between insurer and insured;

(d) the need for contracts of insurance to strike a fair balance between the interests of insurer and insured;

(e) the desirability of ensuring that the manner in which insurance contracts are negotiated and entered into is not unfair;

(f) the desirability of ensuring that there are no unfair provisions in insurance contracts,

HEREBY REFER the following matters to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO REPORT UPON

(1) the adequacy of the law governing contracts of insurance (excluding marine insurance, workers compensation and compulsory third party insurance) having regard to the interests of insurer, insured and the public, and in particular –

(a) whether terms and conditions presently found in contracts of insurance operate unfairly;

(b) whether certain, and if so what, terms and conditions should be mandatory in contracts of insurance;

(c) whether certain, and if so what, terms now found in contracts of insurance should be prohibited;

(d) whether the practice of incorporating statements made in proposal forms into contracts of insurance provides an equitable basis of contract between the insurer and the insured;

(e) whether it should be mandatory for an insurer to supply to a person seeking insurance written information as to that person's rights and obligations under the proposed contract;

(f) whether arbitration clauses in contracts of insurance are operating unfairly to the parties or are otherwise undesirable;

(g) whether the principles of the law of agency in pre-contractual negotiations should be modified to provide greater fairness to the insured;

(2) what, if any, legislative or other measures are required to ensure a fair balance between the interests of insurer and insured; and

(3) any other related matter.

IN MAKING ITS REPORT the Commission will have regard to its function in accordance with section 6(1) of the Law Reform Commission Act to consider and present proposals for uniformity between laws of the Territories and laws of the States with a view to such proposals being considered by the States.

DATED this ninth day of September 1976

R.J. Ellicott, Q.C.,
Attorney-General

ACCESS TO THE COURTS

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO –

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely –

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, includings laws of the Territories, that the Parliament has power to amend or repeal,

with a view to the systematic development and reform of the law, including, in particular –

(i) the modernisation of the law by bringing it into accord with current conditions;

(ii) the simplification of the law; and

(iii) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;

(b) the provisions of section 7 of the said Act which provide that, in the performance of its functions, the Commission shall review such laws with a view to ensuring that such laws do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(c) criticism of the restrictions in the present law upon the capacity and right of persons to be heard in courts and proposals which have been made relating to class actions,

HEREBY REFER to the Law Reform Commission, as provided by the Law Reform Commission Act 1973, for REVIEW of the laws to which the said Act applies relating to –

(a) the standing of persons to sue in Federal and other courts whilst exercising federal jurisdiction or in courts exercising jurisdiction under any law of any Territory; and

(b) class actions in such courts,

AND TO REPORT UPON –

(a) the adequacy thereof;

(b) any desirable changes to the existing law in relation thereto but having regard to any constitutional limitations on Commonwealth power; and

(c) any related matter.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with section 6(1)(d) of the said Act to consider and present proposals for uniformity between laws of the Territories and laws of the States with a view to such proposals being considered aby the States.

DATED this first day of February 1977

R.J. Ellicott, Q.C.,
Attorney-General

ABORIGINAL CUSTOMARY LAWS

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO –

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, of considering proposals for the making of laws to which that Act applies and of considering proposals for uniformity between laws of the Territories and laws of the States;

(b) the special interest of the Commonwealth in the welfare of the Aboriginal people of Australia;

(c) the need to ensure that every Aborigine enjoys basic human rights;

(d) the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style;

(e) the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and

(f) the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.

HEREBY REFER the following matter to the Law Reform Commission, as provided by the Law Reform Commission Act,

TO INQUIRE INTO AND REPORT UPON whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:

(a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and

(c) any other related matter.

IN MAKING ITS INQUIRY AND REPORT the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane.

DATED this ninth day of February 1977

R.J. Ellicott, Q.C.,
Attorney-General

SENTENCING

I, PETER DREW DURACK, Attorney-General, HAVING REGARD TO –

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing Commonwealth and Territorial laws to which the Law Reform Commission Act 1973 applies;
(b) the costs and other unsatisfactory characteristics of punishment by imprisonment;
(c) the desirability of ensuring that offenders against a law of the Commonwealth are treated as uniformly as possible throughout the Commonwealth in respect of the sentences imposed on them;
(d) the need for a revision of laws of the Commonwealth and the Australian Capital Territory, with particular reference to the questions –
  (i) whether principles and guidelines for the imposition of sentences of imprisonment should be formulated; and
  (ii) whether existing laws providing alternatives to imprisonment are adequate;
(e) the conclusions of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders concerning the use of imprisonment, as set out in the report of the United Nations Secretariat in relation to the Congress (E.76.IV.2); and
(f) the matters to be considered at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held in Australia in 1980, with particular reference to the agenda topic relating to the de-institutionalisation of corrections,

HEREBY REFER the following matter to the Law Reform Commission, as provided by the Law Reform Commission Act, 1973,

FOR REVIEW AND REPORT ON the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and any related matters.

IN ITS REVIEW AND REPORT the Commission –

(1) shall collaborate with the Australian Institute of Criminology;
(2) shall have particular regard to –
  (a) the formulation of principles and guidelines for the imposition of a sentence of imprisonment;
  (b) the question whether legislation should be introduced to provide that no person is to be sentenced to imprisonment unless the court is of the opinion that, having regard to all the circumstances of the case, no other sentence is appropriate;
  (c) the adequacy of existing laws providing alternatives to sentences of imprisonment;
  (d) the need for new laws providing alternatives to sentences of imprisonment, with particular reference to restitution orders, compensation orders, community service orders and similar orders;
  (e) the need for greater uniformity in sentencing, with particular reference to laws with respect to the grading of offences and orders and with respect to processes designed to structure discretion in sentencing by means of the establishment of guideline sentences and the use of a sentencing council, institute or commission for this purpose;
  (f) the laws that would be required to give effect to the recommendations of the Commission;

  (g) the provisions of Section 7 of the Law Reform Commission Act providing that, in the performance of its functions, the Commission shall review laws to which the Act applies, and consider proposals, with a view to ensuring –
    (i) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
    (ii) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights; and
  (h) its function in accordance with Section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States;
(3) shall –
  (a) consider the question whether, in the determination of the punishment for an offence, an emphasis should be placed on –
    (i) the state of mind of the offender in the commission of the offence; or
    (ii) the personal characteristics of the offender and the need for treatment; and
  (b) take into account the interests of the public and the victims of crime.

THE COMMISSION IS REQUIRED to submit by 1 June 1979 an Interim Report on the subject matter of the reference dealing in particular with those aspects of the reference that are relevant to expediting and maximising de-institutionalisation of punishment.

DATED this eleventh day of August 1978

Peter Durack
Attorney-General

CHILD WELFARE

I, PETER DREW DURACK, Attorney-General of the Commonwealth of Australia, HAVING REGARD TO the following:

(a) the need to review the Child Welfare Ordinance 1957 of the Australian Capital Territory and other laws of the Territory relating to the welfare of children;
(b) the intention of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held in Sydney in 1980 to discuss as Agenda Item 2 – 'Juvenile Justice: Before and After the Onset of Delinquency' and so focus world attention on Australian laws and practices in this field; and
(c) the declaration by the United Nations General Assembly of 1979 as the International Year of the Child with the aims of encouraging programs for the promotion of the wellbeing of children and of heightening awareness of the needs of children,

HEREBY REFER to the Law Reform Commission

FOR INQUIRY AND REPORT as provided by the Law Reform Commission Act 1973 the law and practice relating to child welfare in the Australian Capital Territory including a consideration of the rights and obligations of children, of parents and other persons who have or assume rights or obligations in respect of children and of the community, and in particular

(a) the treatment of children in the criminal justice system;
(b) the position of children at risk of neglect or abuse by their parents or caretakers;
(c) the roles of welfare, education and health authorities, police, courts and corrective services in relation to children;
(d) the regulation of the employment of children;
(e) any other related matter.

IN ITS INQUIRY AND REPORT the Commission will

(a) keep in mind the importance of viewing child welfare in the context of general community welfare;
(b) keep in mind its obligation under paragraph 6(1)(d) of the Law Reform Commission Act 1973 to consider proposals for uniformity between laws of the Australian Capital Territory and laws of the States (in particular in this context, New South Wales); and
(c) note that the Standing Committee on Housing and Welfare of the A.C.T. Legislative Assembly has prepared a Report on Child Welfare in the Territory,

THE COMMISSION IS REQUIRED to report not later than 31 October 1979.

DATED this eighteenth day of February, 1979

Peter Durack
Attorney-General

EVIDENCE

I, PETER DREW DURACK, Attorney-General of the Commonwealth of Australia, HAVING REGARD TO –

(a) the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs, made in its Report on the Reference: The Evidence (Australian Capital Territory) Bill 1972 that:
  (i) a comprehensive review of the law of evidence be undertaken by the Law Reform Commission with a view to producing a code of evidence appropriate to the present day; and
  (ii) a Uniform Evidence Act be drafted:
    – to apply the same law of evidence to A.C.T. and to the external Territories;
    – as far as is appropriate, to apply the same law of evidence in all Commonwealth courts and tribunals; and
    – to include the matters now covered in the Evidence Act 1905 and the State and Territorial Laws and Records Recognition Act 1901; and
(b) the need for modernisation of the law of evidence used in Federal Courts, the Courts of the Australian Capital Territory and the external Territories and Federal and Territory tribunals by bringing it into accord with current conditions and anticipated requirements;

HEREBY REFER to the Law Reform Commission as provided by the Law Reform Commission Act 1973 TO REVIEW the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements AND TO REPORT:

(a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts; and
(b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.

IN MAKING ITS INQUIRY AND REPORT the Commission will have regard to its functions in accordance with sub-section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States.

DATED this eighteenth day of July 1979

Peter Durack
Attorney-General

Index

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