southern reforms

> O tell her, Swallow, thou that knowest each,
> That bright and fierce and fickle is the South,
> And dark and true and tender is the North.
>
> Tennyson, *The Princess*, 1847

the zelling committee. South Australia has always been a rather special State. Proud of its free settler origins, untainted by early shiploads of convicts, socially progressive under successive governments of differing political persuasions and with large German and other minorities before being 'ethnic' became fashionable, South Australia is indeed special.

In the field of law reform, the State has much to boast. Though it is now the only State in Australia without a statutory law reform agency, two busy part-time Committees work away at the reform of the law, producing reports of originality. The South Australian Law Reform Committee (SALRC) is chaired by Mr. Justice Howard Zelling. The Criminal Law Reform Committee is chaired by Justice Roma Mitchell. Both are justices of the State Supreme Court, but other law reform agencies also bear the mark of South Australian legal reformers. In the New South Wales Law Reform Commission, Commissioner Julian Disney is a past Rhodes Scholar, educated at the Adelaide Law School. And when it comes to the ALRC, there was at one stage almost an Adelaide majority. Commissioners Bruce Debelle and Professors Alex Castles and David St.L. Kelly, together with Mr. J.Q. Ewens (formerly First Parliamentary Counsel) ensured a strong Southern voice in national law reform.

Speaking in September 1980 to the Australian College of Health Service Administrators in Adelaide, Mr. Justice Zelling reviewed the work of the SALRC. The beginning of his speech is, characteristically, a special mixture of direct expression, historical knowledge and irony:

> Did you know that every inner-spring mattress in South Australia is illegal? Well it is. There is a statute of 1551 of Edward VI (5 and 6 Edw. VI, c.23) which says that all mattresses are to be made of wool and that any made of any other material are illegal and forfeitable to the Crown. So don't blame me if the Solicitor-General calls at your home and takes away your prized inner-spring mattress. ... Did you know that they had women's liberation as early as 1452? There is a statute of Henry VI (31 Henry VI c.9) which says that women, because of their great weakness and simplicity, are compelled to enter into contracts wrongfully, and the statute provides for the avoidance of such contracts. I am afraid that would never do for women's liberationists today. I cannot think of any in that strident group who would admit to great weakness and simplicity!

Almost single-handedly, Mr. Justice Zelling has undertaken and nearly completed a statute-by-statute analysis of English legislation from the year 1225 to 1836 when the application of all English public general statutes to South Australia ceased. The task is an enormous enterprise, especially for members of the Committee which includes three busy Supreme Court judges (Justices Zelling, White and Legoe), the State Solicitor-General (Mr. Malcolm Gray), a leading Adelaide barrister (Mr. Derek Bollen Q.C.), Mr. John Keeler of the Adelaide Law School and Mr. D.F. Wicks, a busy commercial solicitor. Presently, during Mr. Keeler's absence on study leave, Mr. A. Ligertwood is a member. Yet despite their other duties, the output of the SALRC is undiminished. It ranges from reports on computers and data protection law to reports on suicide, illegitimacy, damages for widows, class actions and battered babies. Explaining the work of the SALRC, Mr. Justice Zelling said that, like Gaul, it fell into three parts:

- First, it has to deal with all those statutes we inherited in 1836 and reduce them into a form where such as are still useful can be easily found as part of our law in South Australia.
- Secondly, it has to deal with the fact that laws have been made in South Australia now for a period of nearly 154 years and many of those are obsolete today and do not meet the needs and aspirations of the 1980s.
- Thirdly, with the growth of science and knowledge generally, completely new areas of law have to be created, as for example with the request to my Com-

mittee to create a completely new legal system to regulate the use of solar energy in South Australia.

Mr. Justice Zelling said that since the Committee was formed in 1968 it has sent 62 reports to the Attorney-General. A number have been followed by legislation. The question of computers has come before the Committee several times. In 1969 the Committee had to consider the law reforms necessary to make computer evidence admissible. More recently, it delivered a report on data protection: a subject which overlaps the ALRC inquiry into privacy.

A most influential report was the 18th report dealing with the stigma of illegitimacy. The report was followed by laws in South Australia, now replicated in most parts of the country. Because of the advance in medical tests now possible to establish paternity, it is interesting to note that the State Attorney-General has referred aspects of the illegitimacy report back to the SALRC for further consideration, in the light of increased knowledge gained in the last eight years.

Another SALRC project that overlaps the ALRC program was its 36th report on Class Actions. On this topic too, Mr. Justice Zelling pulled no punches:

> [It was] one of the most important reports we have ever turned in, and one which is consistently misrepresented by the business community of Australia because it would be a very effective check to mis-statements, negligence and dishonesty in business transactions and the business community does not wish to be deprived of this freedom to mislead, be negligent or be dishonest and get away with it. With the rise of big corporations, individual plaintiffs are at a very great disadvantage. With the growth of the multi-nationals and of the diversified and multi-faceted corporations within Australia, it was obvious that, sooner or later, plaintiffs would have to join in large numbers to provide the necessary resources and the necessary evidence to combat all the experts that the multi-nationals or multi-faceted corporations were going to call to escape liability for their sins. ... We want to even up the balance so that the ordinary man has some hope of taking on the multi-national or multi-faceted corporation. On the other hand, I stress that honest, careful businessmen have nothing to fear from this reform. I regret to tell you that parliament has not up to this date legislated to enable this very necessary reform to become law.

One task on the list is the reform of evidence law. The SALRC is designing a new civil code of evidence:

> The profession has moved away from [jury trial] today. ... The result is that the law of civil evidence is completely archaic. I have already referred to one small area of it, hearsay in connection with computers, but this is only one limited area of a much larger problem which is to alter the law of evidence so that it becomes applicable to trial before a judge alone, as every civil case is so tried in South Australia today, instead of holding back all sorts of matters which it was thought ought not to have been mentioned before a jury.

Mr. Justice Zelling ended with an appeal for what Prime Minister Fraser has called 'participatory law reform':

> The real way of getting the law made a proper system of law for the 1980s is for the ordinary man to interest himself in law reform, to throw the whole of his weight behind proper reforms of the law and to see that we have a legal system fit for today's world.

other initiatives in S.A. Law Reform Committees are not the only bodies examining S.A. laws. A report tabled in the South Australian Parliament in September 1980 calls attention to many laws and regulations which need review or reform. The report by Ms. Dianne Gayler of the Premier's Department is titled '*Deregulation: A Plan of Action to Rationalise South Australian Legislation*'. After examining the problem of improvement or reduction of legislation, the report turns to government and parliamentary machinery for tackling the problem. On the South Australian Law Reform Committee the report says:

> The Committee is likely to continue to deal mainly with 'lawyers' law' such as highly complex and technical legal questions and matters relating to citizens' legal rights and liabilities. ... The Committee is unlikely to deal with broad administrative law matters such as overlaps and conflicts between legislation of different portfolios or government legislative policies generally, but may be an appropriate body to deal with controversial matters requiring objective review and consultation.

The report recommends that efforts should be made to ensure that the work of the SALRC is not duplicated by other agencies. It notes:

> The government has undertaken to establish a permanent Law Reform Commission, when govern-

> ment finances allow. It is envisaged that such a Commission would undertake research into particular law reform matters, act as a watchdog and initiate inquiries, and have its recommendations considered by parliament.

Other controversial subjects touched on in the Gayler report are:

- Sunset clauses in legislation.
- Simplification of legislative style.
- Spread of community legal education.

Outside the SALRC, significant steps of recent days in South Australia include:

- The Attorney-General, Mr. Griffin, has said that unsworn statements in criminal trials should be 'abolished as soon as possible'. However, the Legislative Council has established a Select Committee to examine the subject.
- A new scheme called the 'Court Companion Scheme' has been initiated by the Director of the Victims of Crime Service, Mr. R.W. Whitrod, former Commissioner of Queensland Police. Mr. Whitrod said that people appearing in court were often nervous and frightened, even as witnesses. Volunteers would be trained by the Police Department and recruited through his Service to help such people.

tasmanian reform. Another southern law reform agency has just distributed its Annual Report. The Fifth Annual Report of the Law Reform Commission of Tasmania has now become available. After noting the extension of the life of the TasLRC (itself subject to a 'sunset' clause) and the new constitution and composition of the Commission, the report points out that there has now been added to the mandate of the TasLRC provisions equivalent to those contained in s.6 of the Act establishing the ALRC. The TasLRC is required to perform its functions 'with a view to ensuring that the law which is applicable in the State does not trespass unduly on personal rights and liberties and does not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions'. Secondly, new responsibility has been conferred on the Commission to advise the Attorney-General 'on a confidential basis' when requested by him 'on any legal matter that involves inter-government relations'.

The closing paragraphs of the Annual Report reflect on 'procedures and methods of work'. The TasLRC is to issue discussion papers and to make arrangements for public hearings or seminars in appropriate cases so that different points of view can be publicly presented and discussed:

> Without wishing to criticise previous procedures, further experience has shown that some of the Law Reform Commission Reports have been presented without sufficient contribution of individuals and organisations particularly affected by the proposed law reform. It is hoped that the new procedures will result in the Attorney-General being able to be satisfied that most interested parties have had a fuller opportunity to express their views before a final Report with Recommendations is submitted to him.

To secure quick law reform for 'minor' matters, the Commission is considering categorising smaller matters which are 'apolitical and non-controversial' as law reform miscellaneous provisions. But the Annual Report points out that care would have to be taken to ensure that all persons affected have been advised of the measure. The report refers to the busy program of work of the TasLRC and to the good co-operation with other law reform agencies, including the ALRC in its work on debt recovery, insolvency and debt counselling.

Law reform in southern Australia is indeed alive and well.

aboriginal law?

> If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

Mr. Justice Blackburn, *Milirrpum* v. *Nabalco Pty Ltd & The Commonwealth* (1971) 17 FLR 141, 267

problems of recognition. During the last quarter, the ALRC has issued a discussion paper, *Aboriginal Customary Law - Recogni-*