ment of Criminology, Melbourne University) and Mr John Van Groningen (Special Adviser, Law Department – Secretary). The Committee is established in rooms at the Royal Mint Building, 280 William Street, Melbourne. The terms of reference are:

- a review of the current sentencing policy and practice in Victoria, other Australian States and overseas including a review of recent relevant literature in respect of such policy and practice,
- an examination of the purposes of sentencing including a consideration of
  - sentencing guidelines,
  - 'just deserts' concepts,
  - presumptive sentences,
  - other sentences,
- the impact of custodial and non-custodial sentences and the length of such sentences on
  - correctional administration including members in custody,
  - police administration,
  - prisoner morale,
  - staff morale,
  - victims,
  - the offender and his family,
- the impact of remissions, pre-release, parole, temporary leaves and other sentences shortening practices on
  - correctional administration,
  - the courts,
  - police administration,
  - the community,
  - the victim,
  - the offender and his family,
- the framework for prisoners held during the Governor's Pleasure,
- sentencing to Youth Training Centres,
- role of the media,
- information available to the courts and the impact of such information or lack of it on sentencing decisions and services and support available to persons sentenced by the Courts,
- to draft, if thought desirable, legislation to embrace all sentencing procedures within the State of Victoria,
- to make recommendations in respect of the matters raised in these terms of reference.

A wide range of Australian and overseas publications on the subject are being collected and studied by members of the Committee. It is proposed that during the year each State will be visited by some members of the Committee for the purpose of investigating local practices. It is possible that later in the year it will be necessary or desirable to arrange an overseas trip. Mr Justice Nicholson and Mr Joh Van Groningen have already visited Canada and the United States. The Committee is at present engaged in interviews with selected experts and more will be approached in the near future. In addition the terms of reference have been widely advertised in the daily press and elsewhere and members of the public are invited to make submissions. This Committee is working in close cooperation with the ALRC which is currently investigating a reference on the same subject in respect of Federal law. All members of the Committee attended the Seminar on Sentencing arranged by the Australian Institute of Criminology in Canberra in March 1986, referred to earlier in this issue. At present the research staff is preparing issues papers and research papers and it is hoped that a discussion paper will be prepared and distributed at the end of this year. The first part of next year will be devoted to public consultation in respect of the discussion and research papers. The aim is to have a first draft of the report prepared by 1 October 1987. It is hoped the final report will be released in December 1987.

## odds and ends

■ ***natural justice, judicial style and law reform by interdepartmental committee.*** Some media attention was given to the High Court's rejection on 21 February 1986 of the approach taken by Mr Justice Kirby in the administrative law case of the *Public Service Board of New South Wales v Osmond.* In the Court of Appeal Kirby P and Priestley JA combined (Glass JA dissenting) to rule that the Public

Service Board was obliged to give reasons to Mr Osmond for its decision to dismiss an appeal he had made in relation to a promotion. Chief Justice Gibbs said that Justice Kirby had based his conclusion that the Board was bound to give reasons for its decision on the broad principle that the common law required those entrusted by statute with the discretionary power to make decisions which would affect other persons to act fairly in the performance of their statutory functions. Justice Kirby had said that the principle included an obligation to state reasons, save in certain exceptional cases. The High Court disagreed with Justices Kirby and Priestley on their reading of the law. In his judgment Chief Justice Gibbs said most people would agree with Justice Kirby that it is desirable that bodies exercising discretionary powers of the kind that were under consideration in that case should as a general rule give reasons for the decisions. But he mentioned a number of considerations which he said may be advanced in opposition to the suggestion that there should be a general rule requiring the giving of reasons. Chief Justice Gibbs went on:

> However, even if it be agreed that a change such as [Mr Justice Kirby] suggests would be beneficial, it is a change which the court ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts.

The day before the High Court handed down its decision, Justice Kirby presented a paper on 'Accountability and the Right to Reasons' to a seminar on judicial review of administrative actions in Auckland. The seminar was conducted by the Legal Research Foundation of New Zealand. Justice Kirby referred to Lord Diplock's caution in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited* that any 'statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today'. Justice Kirby said that his paper was about the triumph of the common law over its tendency to formalise. 'It is about the efforts of the judges of the common law, in a number of its jurisdictions, to address a very relevant and modern question of power. It is a tale illustrating how fecund is the common law and how useful and relevant it has proved itself in the field of public law generally and a review of administrative action in particular'.

Kirby P in his judgment in *Osmond* said:

> Where a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course.

Chief Justice Gibbs drew a distinction between the courts following a trend set by the legislature in that same jurisdiction, and doing so in relation to trends in other jurisdictions. He quoted with apparent approval Lord Simon of Glaisdale:

> I do not think that this is a 'law reform' which should or can properly be imposed by judges; it is on the contrary essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary systems – the sort of review compassed by an interdepartmental committee.

Justice Kirby's decade at the Law Reform Commission brought him into close contact with that peculiar bureaucratic animal, the interdepartmental committee. While not itself winning a place as one of Justice Kirby's 'seven deadly constraints' on law reform (see Kirby, *Reform the Law,* 1983, 12) the spectre of the interdepartmental committee hangs over the sixth constraint: the legislative log-jam. In his book Justice Kirby quotes with approval from Sir Michael Kerr, former Chairman of the English Law Commission, on the subject of this log-jam'. Sir Michael referred to the slowing down of law reform by the permanent public service, and to its

> 'passive resistance to reform. The prospects of implementation by legislation at present depend almost entirely on the interest and efforts of Ministers and their Departments. However, the De-

> partments are inevitably primarily concerned with their day to day work in the areas of the law which they are administering and are reluctant to devote time and resources to the consideration of reforms. . . . Generally it is only after a final Report and draft Bill have been laid before Parliament that the Departments feel able to embark upon any real consideration of the policy implications, and then usually only after further consultation within Whitehall. It is therefore often only at that stage, when the Commission is effectively *functus officio,* that points of departmental policy may emerge of which the Commission would have wished to take account during the stage of consultation. The trouble, to put it bluntly, is that . . . the Commission sometimes meets with varying degrees of passive resistance to its proposals by lawyers and administrators in Government Departments; one sometimes feels that the views of even a single person in a key position may determine the future of many months of work, at any rate for the short or medium term'. Sir Michael Kerr 'Law Reform in Changing Times', 2nd Edward Bramley lecture 19 June 1980 LQR 515 (October 1980).

■ ***new zealand law reform commission.*** February 1 1986 marked a milestone for law reform in New Zealand. It was the day when the Law Commission Act 1985 (NZ) came into force giving to New Zealand for the first time permanent, full-time law reform machinery independent of the executive government. The Commission's President is the Rt Hon Sir Owen Woodhouse KBE, DSC, who has retired from the presidency of the Court of Appeal. The members are Mr Bruce James Cameron, who is shortly retiring as Deputy Secretary for Justice, Ms Sian Elias, an Auckland Barrister, Mr Jack Edward Hodder who practices as a Barrister in Wellington, and Professor Kenneth James Keith, Professor of Law at Victoria University of Wellington.

While the Commission's object is to promote the systematic review, reform and development of law in New Zealand, it may also advise on the review of any aspect of the law conducted by a government department. 'An additional responsibility of the Commission', Mr Palmer, the Justice Minister, said, 'is to advise on ways in which the law can be made as understandable and accessible as practicable'.

In making its recommendations, the Commission is to take into account the Maori dimension and to have regard to the multicultural character of New Zealand socety. According to the Justice Minister, 'For the first time, bi-culturalism and multiculturalism are written into the ground rules of a body charged with promoting legal change'. As well, the Law Commission is expressly required by its Act to seek to simplify the law, both in its content and its expression. It is intended that, by doing away with unnecessary legislation, the Commission will help to reduce the size of the statute book.

The Law Commission replaces five part-time law reform committees covering the fields of contracts and commercial law, criminal law, evidence, property law, equity and public and administrative law. It marks a commitment from the New Zealand Government seriously to encourage the process of law reform.

■ ***the right of peaceful protest.*** As part of the International Year of Peace, the Human Rights Commission is organising a seminar on the Right of Peaceful Protest. It is to be held in Canberra at University House, the Australian National University, on Thursday 3rd and Friday 4th of July 1986. The HRC said that peaceful protest is a major mechanism for the attainment and maintenance of peace. It enables ordinary men and women to speak out on issues they believe important, thereby helping to bring about social and political change by peaceful means.

The seminar will be an occasion to explore the human rights significance of peaceful protest in law and in practice. It will investigate the conditions under which peaceful protest takes place and the restrictions placed upon it, the problems associated with it and the ways it can be made effective. However the seminar is not intended to serve as a venue for statements on behalf of particular causes.

■ ***the community law reform program for the act***. The Community Law Reform Program for the Australian Capital Territory has been operating now for two years. Under the terms of reference, the Commission is able to deal with relatively small matters without receiving a specific reference from the Attorney-General. Larger matters require a specific reference which can be requested by the Commission. Under the program the Commission has reported (ALRC28) on three small matters:

- abolition of contributory negligence in fatal accident cases,
- abolition of contributory negligence in breach of statutory duty cases,
- clarifying and broadening the entitlement to funeral and related costs in fatal accident cases.

The Commission's report on Domestic Violence in the ACT (ALRC30) was tabled in Parliament on 12 March 1986.

A report on abolition of the loss of consortium action in the ACT is being prepared.

One of the main purposes of the Community Law Reform Program was to clear up small anomalies in the law, brought to the Commission's attention by members of the public. The Commissioner in charge of the Community Law Reform Program, Nicholas Seddon, has found that suggestions for reform of relatively small areas of the law are not plentiful. Advertisements on the television (Community Bill Board – Capital 7) and in the newspapers have produced only a few responses.

Mr Seddon decided that he would try and get the message home. An advertisement was designed for the one litre milk carton. It proclaimed that 'THE LAW IS NOT AN ASS – most of the time'. A judicial donkey, complete with wig and half-moon spectacles, accompanied this message. The message went on to say: 'But sometimes it is' and asked members of the public to write to the Commission with suggestions for law reform.

The response was modest but generally useful. Suggestions ranged in the criminal sphere from a complete overhaul of the criminal justice system which would reintroduce capital punishment, never let people out of gaols and would, in bad cases, eliminate the time-wasting and expensive business of conducting a trial, to more modest proposals such as: how can you produce your licence to a police officer if it is in the mail?

Suggestions in the non-criminal sphere included possible abuses of caveats in land dealings, access to information when engaged in litigation with government departments or instrumentalities, problems with the law relating to powers of attorney and the problem of sending letters by registered mail (a requirement in some statutory provisions) when Telecom has introduced a new procedure called 'security post'.

The idea of using the milk carton has been generally well-received, though, it must be acknowledged, it is not a Commission innovation. Mr Jack Richardson, the first Commonwealth Ombudsman, was the first to do it.

■ ***aija breakthrough.*** By an historic decision of the Standing Committee of Attorneys-General in May 1985, Australian Governments agreed to fund the Australian Institute of Judicial Administration Incorporated (AIJA). This enables it to establish a permanent secretariat and expand its work. The amount for the first year is almost $200000, half paid by the Commonwealth and the balance by State and Territory Governments in proportion to population.

A pan-Australian association with a membership mainly of judges, legal practitioners, academic and government lawyers and court administrators, the AIJA aims to introduce modern methods of research, management and operation to the court system.

The work of Dr Ross Cranston on the AIJA Report, *Delays and Efficiency in Civil Litiga-*

*tion* and of Mr Peter Sallmann on the Report of the Shorter Trials Committee on *Criminal Trials* emphasise the vital contribution of academic lawyers to research in this area.

In January the Institute signed an agreement with the University of Melbourne for the location of its secretariat in offices provided rent-free by the University. The Executive Director and other members of staff, while employed and controlled by th Institute, will have a close association with the Law School. A joint Selection Committee of the University and Institute is advertising world-wide for an Executive Director who will have the status of a Professor of the University. The Victoria Law Foundation has guaranteed the Institute's payment of the salary and incidental costs of the Executive Director for a five year term.

Besides managing Institute affairs, the Executive Director would lead or organise research and teach or organise the teaching of the principles of judicial administration. Although based on the University of Melbourne, research and teaching activities will be organised and encouraged throughout Australia at universities and elsewhere.

The Institute has agreed to accept from the Standing Committee references for research projects. One of the Attorneys-General, the Honourable Jim Kennan of Victoria has joined its Council.

Co-ordination with the Australian Law Reform Commission has always been seen as important. The Commission was one of the earliest corporate members of the AIJA. Last August the President of the Commission, the Honourable Xavier Connor AO QC was elected a member of the AIJA Council. The Annual Seminar of the Institute in Hobart on 23 August 1986 will have a session based on the current project of the Commission on the extension of representative actions.

■ ***alrc insolvency reference.*** Since the release of the issues paper in January1985 8 working papers have been produced under the general insolvency reference. They are: policy isues, unification of individual and corporate insolvency, general bankruptcy procedure, ompany voluntary procedure, involuntary bnkruptcy procedure, secured creditors, anteedent transactions, and trading trusts. Tiese papers have been considered by consulants to the reference and the response to the Cmmission's tentative proposals, in the nain, has been most favourable. It is planned hat there will be 20 such working papers ir all. When they have been considered by conultants, it is envisaged that the Commisson's tentative proposals will be released for pblic debate in early 1987.

■ ***insolvency and creditor responsibility.*** Trading banks have come to play a major roe in financing the rural sector compared wit 20 years ago, according to Mr John Chatteton, the New South Wales General Manage of the Westpac Banking Corporation. Mr Chatterton told the National Agriculural Outlook Conference earlier this year tha not only had rural borrowers turned away rom pastoral finance companies and life insurance companies as a source of credit but farms were becoming increasingly reliart on credit, farm debts now comprising 20.14% of the lending portfolios of trading banks – almost double the level of farm debts five years ago.

Figures provided by the Bureau of Agricultural Economics have confirmed the seriousness of the situation. The Bureau identfied the proportion of 'at-risk' farmers (farmers operating with a negative cash margin and less than 70% equity) – as up from 5% to 7%. The real rate of return of the average farming family was -6%. The Bureau's figures reveal that the wheat farmers of Western Australia are worst affected – 20% of whom, it was said, were at risk of insolvency.

Mr Chatterton was reported as saying that the increased dependence by farmers on bank loans can be traced back to the particular lending policies of bank managers who al-

low their judgment to be 'overruled by pressure from a borrower'. Mr Chatterton was quoted as saying that although the banks would continue to support the rural sector, it was preferable for the banks to pursue a tougher lending policy rather than making further loans which would only delay the inevitable. He recognised that that would inevitably mean that some farmers would have to make the painful decision to move out of the industry.

The Australian Law Reform Commission in its general Insolvency reference has been made aware of the importance of this issue of 'creditor responsibility'. Some submissions to the reference have even suggested restricting or deferring the right of recovery of a person or institution which extends credit recklessly or without sufficient appraisal of the debtor's ability to repay. It has also been suggested to the Commission that practices such as aggressive advertising by financial institutions for customers should also be curtailed.

It was considerations such as these which lead the English Review Committee on Insolvency Law and Practice headed by Sir Kenneth Cork to suggest that within the framework of an insolvency law it would be appropriate to devise a system which:

> gives the creditor confidence to extend credit, while at the same time does not encourage the potential debtor to act recklessly or irresponsibly.

However, the resulting English reforms have paid little or no attention to this policy.

But in Belgium this work has reached the stage where serious consideration is being given to a legislative proposal whereby banks and other like financial institutions who continue to lend funds to a borrower who is clearly insolvent would not only lose the right to claim payment of those additional loans but might also be held liable for the unpaid debts incurred by the borrower subsequent to the date of the additional funding.

■ ***review of law reform commission.*** *The Age* of 13 February 1986 reported that four federal government research agencies, including the Law Reform Commission, which had been examined by a federal review had been given a clean bill of health. The agencies, apart from the Law Reform Commission, were the Human Rights Commission, the Institute of Criminology, and the Institute of Family Studies. The Review Committee included the Departments of Finance and the Attorney-General and Victorian Labor Senator Zakharov. *The Age* reported that the review report had concluded that the work of the four bodies was worthwhile and that they should be given greater financial freedom, particularly the control of income from sources such as publishing which now goes direct to the Government.

A fuller account of the finding of the Review was contained in the Canberra Times of 22 March 1986. *The Canberra Times* obtained a copy of the report under the Freedom of Information Act. According to the *Canberra Times* the review report suggested that when another minister asks the Attorney-General to refer a matter to the Australian Law Reform Commission, the other minister's portfolio should be asked to meet at least some of the cost on the user-pays principle. 'There is a mechanism available to enable such an allocation to be made from one portfolio to another' the report said.

According to the *Canberra Times,* the review report noted dissatisfaction by some of the agencies being reviewed about the processes of allocation of funds. Without making any judgments about these complaints, the review team concluded that they did point to a need for better communications. The report said: 'The problems, particularly in times of tight fiscal restraint, in determining within the portfolio priorities and allocations among a number of separate agencies with disparate functions, and with varying degrees of independence, are very real.' It recommended that consideration be given to setting up a

portfolio consultative group to smooth the process of allocating the budget.'

■ ***car buyer protection.*** Consumer protection measures governing car sales have been toughened by the New South Wales Government. The main features of the amendments to the Motor Dealers' Act are

- A general increase in penalties. The present maximum of $2000 has been lifted to $50000.
- A lifting of the warranty levels for both new and second-hand cars.
- The introduction of a 'pink slip' verifying the roadworthiness of vehicles sold either by auction or privately, or for vehicles not covered by a warranty.
- New requirements forcing the disclosure of actual vehicle prices in car advertisements (*Sydney Morning Herald,* 31 January 1986).

The Motor Traders' Association had requested the government to introduce tough penalties for unlicensed used car dealings. In February 1986 the penalty for unlicensed dealing is close to a maximum of $50000. Courts will now also be able to order proceeds derived from the unlicensed dealing to be forfeited to the Crown. Illegal interference with odometers will also carry a fine of $10000.

The amendments to the Motor Dealers Act 1974 also provide for tougher licensing and disciplining procedures based on those in the Credit (Administration) Act 1984. Regulations relating to a variety of issues, including a code of conduct for the industry on such matters as advertising practices, may be introduced. Company directors may be held personally liable for certain consumer losses caused by illegal conduct by their company and in which they have personal involvement under the new legislation. (*Fair Dinkum, Consumer Affairs Department Newsletter* Jan/Feb '86, Vol1, No1)

A new vehicle encumbrance register i expected to open by July 1 1986. It will protect consumers from buying a car and discovering later that it is to be repossessed because of the previous owner's debt, for example under hire purchase. The register will complenent existing registers in Victoria and Tasmania. (*Sydney Morning Herald,* 31 January 1986)

■ ***compensation for land acquisition.*** The decision of the Commonwealth government on the site for the new Sydney airport at Badgerys Creek – has created renewed interest in the Australian Law Reform Commission's report on Lands Acquisition and Compensation (June ALRC14). The Commissions report was tabled in 1980. Legislation based on the Commission's 1980 report is expected to be tabled in Federal Parliament this year. The report recommended reformed procedures for compulsory acquisition of land by the Federal Government and in the assessment of compensation that should be payable.

In a joint statement on 30 September 1983 (1983) 8 *Commonwealth Record* 1585, the Attorney-General and the Minister for Administrative Services announced the Government's intention to introduce legislation picking up many of the recommendations made by the Commission including:

- new acquisition procedures, whereby owners will be notified of their rights and be able to seek valuation and legal advice at Commonwealth expense;
- review by the Administrative Appeals Tribunal of acquisition decisions and offers of compensation; and
- expansion of the categories of compensation for compulsory acquisition to include:
  - a solace payment where the principal place of residence is acquired;
  - more generous compensation for disturbance;
  - compensation for principal private residence to be based on the cost of a replacement property where compensation is otherwise insufficient

to purchase a replacement property; and
- the reasonable prospects of renewal to be taken into account in assessing compensation for leasehold interests.

The Government has, for the time being, deferred a decision on recommendations of the Commission regarding compensation for injurious affection to interests in land caused by use of land vested in the Commonwealth. Further discussions on this matter are continuing with the States.

The Defence Department appearing before the Senate Foreign Affairs and Defence Committee conceded on 22 March 1986 that it may have to compulsorily acquire land for its new training facilities in New South Wales. The army plans to acquire 70000 hectares in the Bathurst/Orange area for a new artillery and infantry school and 963000 hectares west of Cobar for brigade-level manoeuvres. The Army's Chief of Logistics, Major-General John Stein told the Committee that promises made earlier that the government would not compulsorily acquire private land holdings had been 'superseded by events'. He said that the army was now operating on the assumption that compulsory acquisition was an option. (*Sydney Morning Herald,* 22 March 1986)

## new publications

**Australia**

ALRC : Annual Report 1985, No29.

: Report on Domestic Violence, 1986, No30.

: Discussion Paper on Criminal Records, 1985, No 25, issued January 1986.

: Discussion Paper on Contempt and the Media, 1986, No26.

: Service and Execution of Process Research Paper on Discussion of Reference Draft of Interstate Procedure Bill and Regulations, 1986, RP7.

: Law Reform Digest, 1980–1985, Vol2, 1985.

NSWLRC : Report on Attachment of Moneys Deposited with Building Societies and Credit Unions, 1985, No46.

QLRC : Report on a Bill to alter the Civil Jurisdiction of the District Court of Queensland, 1986, No36.

SALRC : Report on Quitam and Penal Actions, 1986, No94.

VLCC : Discussion Paper on Human Rights, 1986, No1.

**Canada**

CLRC : Report on Obtaining Forensic Evidence, 1985, No25.

: Report on Independent Administrative Agencies, 1985, No26.

: Working Paper on Criminal Law: Omissions, Negligence and Endangering, 1985, No46.

: Working Paper on Criminal Law: Secondary Liability, 1985, No45.

: Working Paper on Protection of Life: Crimes Against the Environment, 1985, No44.

: Working Paper on Protection of Life: Behaviour Alteration and the Criminal Law, 1985, No43.

BCLRC : Study Paper on Family Property, prepared by TG Anderson and M Karton, 1985.

Manitoba LRC : Report on Small Projects, 1985, No62.

: Report on the Testators Family Maintenance Act, 1985, No63.

: Report on 'The Married Women's Property Act' and Related Matters, 1985, No64.