

*D. St. L. Kelly\**

## THE SOUTH AUSTRALIAN LAW REFORM COMMITTEE

### 1. *The Institution of the Law Reform Committee in South Australia*

The Law Reform Committee of South Australia, which was established by Proclamation on 19th September, 1968<sup>1</sup> is the first such committee to be created by government action in this State. As in the case of equivalent bodies in other Australian States<sup>2</sup>, its formation owes a considerable amount to the prior existence within South Australia of unofficial, voluntary law reform bodies, including one established many years ago by the Law Society of South Australia, a committee which still continues in operation<sup>3</sup>.

The Law Reform Committee of South Australia consists of five members appointed by the Governor. Of these five members, two are recommended by the Attorney-General, one by the Council of the Law Society of South Australia, one, a full-time member of the academic staff of the University of Adelaide's Department of Law, by the Law Faculty of that University, and one by the Leader of the Opposition after consultation with his parliamentary colleagues. Save in the case of the academic nominee, each member of the committee must be a member of the legal profession of at least seven years standing and each member of the committee is appointed, in the first instance, for a period not exceeding three years<sup>4</sup>. Mr. Justice Zelling of the Supreme Court of South Australia is the Chairman of the Committee<sup>5</sup>.

The duties of the Committee are set out in clause 7 (1) of the Proclamation which reads:

"The Committee shall, at the request of the Attorney-General, and may, of its own motion, but subject to any direction by the Attorney-General—

- (a) inquire into and make reports (including, in cases where the Committee considers it appropriate or where they are requested by the Attorney-General, interim reports) or recommendations, or give advice, to the Attorney-General, on any matter of or concerning existing law or on any suggestions or the implications of suggestions for any alteration to or change in existing law; and
- (b) where it makes recommendations for any alteration to or change in existing law, submit for consideration of the Attorney-General such

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1. S.A. Government Gazette, 19th September 1968, 853.

2. See, e.g., Conacher, "Law Reform in Action and in Prospect", 43 A.L.J. 512; Mr. Acting Justice Zelling (as he then was) 43 A.L.J. 526.

3. The Law Reform Committee of the Law Society of South Australia.

4. Proclamation S.A. Government Gazette, 19th September, 853 (clause 3).

5. In addition to its members, the Committee has the benefit of the services of a Secretary, Mr. H. G. Edwards.

draft provisions as it thinks fit for giving effect to that alteration or change . . . ”

It will be seen that the initiating powers of the committee are far more liberal than, for example, in New South Wales where the Law Reform Commission Act contains no provisions for the committee to propose to the Attorney-General that any matter of law reform be referred to it<sup>6</sup>.

## 2. *The Present Work of the Committee*

Since its institution late in 1968, the Committee has submitted six reports to the Attorney-General. The first of these recommended several amendments to the Evidence Act 1929-68 and one to the Children's Protection Act 1936-61. The most important recommendations involved, first, the insertion of a new section 45A in the Evidence Act, creating an exception to the hearsay evidence rule along similar lines to those stated in the Civil Evidence Act 1968 (U.K.) section 4<sup>7</sup> and, secondly, an alteration to the same Act providing that a spouse shall be both a competent and a compellable witness in a prosecution under sections 5 or 11 of the Children's Protection Act, and ancillary amendments to the latter Act providing that a doctor who reasonably suspects ill-treatment of the type in question shall report his suspicions to a police officer and that any such report shall be absolutely privileged<sup>8</sup>. Subsequent Reports have recommended the enactment of a new and up-to-date Commercial Arbitration Act, the replacement of the present direct recourse provision in section 118, Motor Vehicles Act, 1959-68<sup>9</sup>, with a *limited* right of suit between spouses notwithstanding the common law rule of unity of spouses, minor amendments to the Oaths Act 1936<sup>10</sup> and the Testator's Family Maintenance Act 1925-43, and the virtual repeal of section 17 of the Wills Act 1936-66.

Apart from the work which has already been completed, the matters which have been referred to the Committee by the Attorney-General comprise an imposing, not to say daunting, list. The whole of the criminal law, both as to prohibition and penalty (and, more specifically, suicide, attempted suicide and homosexuality), the Trustee Act, the rule against perpetuities, misfeasance and non-feasance, the general question of legal discrimination against women, the status of illegitimacy, the admissibility of evidence produced in documentary form by computers, the danger of invasion of privacy as a result of the unrestricted use of data banks and computer-stored information, the law of libel

6. The Deputy Chairman of the N.S.W. Law Reform Commission regards the distinction as one of form rather than substance since "The Attorney-General has always consulted us before referring any matter to us and many of our references have made at our suggestion." Conacher, 43 A.L.J. 513. Cf. K. C. T. Sutton, *The Pattern of Law Reform in Australia*, (Inaugural Lecture, University of Queensland, 5th August 1969) footnote 26.

7. Cf. *Myers v. D.P.P.* (1965) A.C. 1001.

8. But see now Children's Protection Act Amendment Act, 1969, s.3 and s.10.

9. S.118(1): Where an insured person has caused bodily injury by negligence in the use of a motor vehicle to the spouse of such insured person such spouse shall notwithstanding anything contained in section 101 of the Law of Property Act 1936, or any rule of the common law relating to the unity of the spouses during marriage be entitled to obtain by action against the insurer such judgment for damages for such bodily injury as such spouse could have obtained against the insured person if he or she were not married to such insured person.

10. See now: Oaths Act Amendment Act 1969.

and slander, the Real Property Act and the law relating to animals, all these and more are already before the Committee.

Some of these projects, including attempted suicide and the admissibility of computer produced evidence are already far advanced; reports on them should be completed and submitted to the Attorney-General early in 1970. Others have been subject only to preliminary discussion and require considerably more detailed examination before any conclusions can be reached. Still others are projects whose completion can hardly be foreseen if the Committee is to remain composed of lawyers whose work in law reform is placed on a part-time basis.

### 3. *Methods and Objectives*

It is perhaps too early to see clear patterns in the Committee's methods of operation. However, certain aspects of its *modus operandi* are worthy of mention. The first of these is that the Committee, in appropriate cases, makes use of the knowledge and ability of members of the judiciary and of the practising profession, not themselves members of the Committee. Commentators have attended the monthly meetings of the Committee on several occasions to discuss position papers and memoranda prepared for the Committee and to exchange views with members of the Committee. Their help, which is purely voluntary in nature, has proved to be invaluable.

Secondly, since many of the matters which have been referred to the Committee involve considerations which are social rather than analytical (as in the case of attempted suicide), or require special scientific skills as well as legal ones (as in the case of the reliability of computer produced documentary evidence), considerable reliance has been placed upon the special knowledge of persons not themselves closely connected with the legal profession. In this respect, particular mention should be made of Professor J. A. Ovenstone and Mr. D. W. Simmons from the Computing Centre at the University of Adelaide, whose knowledge and ideas have greatly assisted, and will continue to assist, the Committee in relation both to questions of admissibility and to questions of the protection of individual liberty.

Thirdly, considerable assistance has been given to the Committee by members of the academic staff of the Department of Law at the University of Adelaide. Mr. J. F. Keeler has produced a paper on the Trustee Act containing comparisons with other jurisdictions and suggestions for reform; Miss M. Daunton-Fear has submitted a paper containing proposals for the reform of the law relating to suicide and attempted suicide; and Mr. J. N. Turner has produced an introductory memorandum concerning marital property including comparisons with community of property systems in operation, for example, in France, Germany and several North American States.

Finally, as it is one of the duties of the Committee to submit draft provisions for the consideration of the Attorney-General when it makes recommendations for alteration to existing law<sup>11</sup>, the Committee has sought and obtained from the Attorney-General the services of a professional draftsman to assist in its tasks. For obvious reasons, it has been thought advisable for Mr. Hackett-

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11. Proclamation, S.A. Government Gazette, 19th September 1968, 853, clause 7(1)(b).

Jones<sup>12</sup>, who is the draftsman presently assigned, to attend committee meetings and take part in the committee's discussions.

### *Some Conclusions*

The demand for law reform is insistent throughout the common law world<sup>13</sup>, and the demand is being met in part, at least, by the institution of numerous bodies for particular and general law reform. Although the Law Reform Committee of South Australia is one such body established by government proclamation, it nonetheless remains true that the Committee in some ways resembles more closely the voluntary part-time bodies which preceded it than the highly organised, well-staffed law reform bodies established, for example, in England, in New South Wales and in Queensland. (The remuneration for an ordinary member of the Law Reform Committee of South Australia is \$500 *p.a.*) But when, as in South Australia, the need is both for technical law reform, as of the rule against perpetuities, and for "social" law reform, as of the law concerning homosexuality or attempted suicide, the institution of a part-time committee, no matter how dedicated its members may be, cannot hope to deal adequately with the flood of problems requiring attention. As Professor Sutton has recently stated:

"The truth is that law reform, if it is to be done properly, is a slow, complex and time-consuming business, involving major research to ascertain what the existing law is, what are its defects, what has been done to correct those defects in other jurisdictions, and stemming from that, what tentative solutions can be suggested to meet these deficiencies, followed by consultation with professional bodies and other interested groups, and finally, the framing and submission of concrete proposals for reform. This sort of thing cannot be done adequately or within reasonable time limits by members serving part-time who come to the task at the fag-end of the day, or at weekends"<sup>14</sup>.

Of course, it can be argued that with so many institutions throughout the common law world, and even within Australia, there must be a considerable overlapping and unnecessary duplication of work. But it is not necessarily the case that what is appropriate reform within one jurisdiction is appropriate in another common law jurisdiction, even when both of them are within Australia. Moreover even where, as will often be the case, uniformity is desirable and the basic research has been completed elsewhere, considerable effort must still be expended in examining the implications, and assessing the value, of the recommendations which have been made<sup>15</sup>. Indeed, it may even be the case that some problems are beyond the resources of any traditionally based law reform committee. As Lord Wilberforce pointed out at the Fifteenth Convention

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12. Assistant Parliamentary Draftsman.

13. See the "List of Official Committees, Commissions and other Bodies Concerned With the Reform of the Law". Institute of Advanced Legal Studies (5th ed., August 1969).

14. K. C. T. Sutton, *The Pattern of Law Reform in Australia* 1969 at 14-15.

15. The existence of other law reform bodies may well tend towards greater rather than lesser work. The Law Reform Committee is already in receipt of large numbers of papers from jurisdictions as widely separated as England and California, as well as from other Australian States and New Zealand.

of the Law Council of Australia, the English Law Commission, after three years of consideration of problems concerning Administrative Law, eventually came out with a report saying that the subject was too large for them and suggesting the setting up of a Royal Commission to study it.

Apart from its part-time nature, the Committee is also hampered by the limited typing and research assistance available to it. It is hoped that, in 1970, there will be one full-time research assistant and one full-time typist to assist in the work of the Committee, but, if the Committee is to be adequately supported, considerable additional funds will be required, both for the employment of research assistants and for retaining outside experts with specialised knowledge<sup>16</sup>. (Of course there is no dearth of experts willing to perform work for the Committee on a voluntary basis, but it would be extremely embarrassing to make demands upon the time of busy men without making any recompense to them, especially if one were in receipt of remuneration oneself.)

The South Australian Committee is less well-served in these two respects than several of its counterparts within Australia. In New South Wales, for example, there are four commissioners who generally devote most, if not all, their ordinary working time to law reform, and there are four other lawyers on the staff<sup>17</sup>. In Queensland, where the committee is composed of a Supreme Court judge and two members of the profession, it is contemplated that committee members will give up a substantial portion of their time each year to the work of the Committee and a considerable sum is available for specialised research assistance<sup>18</sup>. In Western Australia, three research officers are employed by the Committee which consists of a full-time Executive Officer, a part-time Chairman and representatives of the Attorney-General and the University of Western Australia Law School. The members of the Committee are apparently expected to spend three days a week on law reform<sup>19</sup>.

With its presently limited resources, it is almost inevitable that the Law Reform Committee will be proportionately restricted in the amount of law reform it can recommend, and even in the standard of the reports which it can produce. It must be remembered that one important contribution which can be made by a Law Reform Committee with the requisite facilities lies in the preparation of comprehensive and fully reasoned reports. Even if not acted upon by Parliament, these reports are themselves of great value to both the academic and the practising profession, and help to clarify the problems, if not always providing accepted solutions.

On the occasion of his swearing in as a Justice of the High Court of Australia, Mr. Justice Walsh spoke of the need for full-time employment in

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16. There is power for retaining such assistance, Proclamation, S.A. Government Gazette, 19th September 1968, 853, clause 6(3). See the difference of opinion between Conacher and Professor Tarlo on the role of outside research assistance: 43 A.L.J. 514 and 527.

17. Conacher, 43 A.L.J. 513. See the Law Reform Commission Act 1967 (N.S.W.).

18. Law Reform Commission Act 1968(Qld.). For a discussion of the Queensland Commission and comparisons with the New South Wales Commission see Sutton, *The Pattern of Law Reform in Australia* 1969, 8.

19. P. F. Brinsden, 43 A.L.J. 521.

law reform<sup>20</sup>, and the President of the Law Society of New South Wales has pointed to the inadequacies of the present, comparatively very well staffed and supported Law Commission of New South Wales, suggesting "a great need to have established immediately, as an adjunct to this Commission in New South Wales, other Commissions which might be subsidiary to the present Commission . . ." <sup>21</sup>. In view of these comments, perhaps it is not too sanguine to hope for the eventual establishment of a full-time Law Reform Committee in South Australia with adequate provision for research and for ancillary support, at least to a standard which is comparable with the seemingly<sup>22</sup> already overburdened Law Reform Commission of New South Wales.

The views expressed are those of the author and not of any other member of the Law Reform Committee.

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20. Transcript of Proceedings in the High Court of Australia, Sydney, 3rd October 1969, reprinted in Law Council Newsletter, November 1969, 19-22 (at 22).

21. C. Dunlop, 43 A.L.J. 525. See also Mr. Justice Zelling, 43 A.L.J. 526.

22. *Supra*, n.21.