equal opportunity becomes a reality. It therefore complements anti-discrimination legislation by eliminating any rules or practices which might unfairly disadvantage women in the workplace and by promoting equal opportunity. He was careful to stress that the legislation does not propose positive discrimination, that is, discrimination in favour of women, and that the Government is totally opposed to the use of quotas. Further, the objectives and forward estimates required to be set are to be determined by the employer and not imposed by the Director.

reaction. The introduction of the Bill provoked immediate criticism from proponents and opponents of the principle of affirmative action alike. A spokesperson for the Women's Electoral Lobby was reported as saying that the publication of employer's names would be 'ineffective' and that the initial staffing level was 'unrealistic'. (*Canberra Times,* 20 February 1986) Taking the opposite view, a spokesperson for the Business Council of Australia reportedly warned that there could be an employer backlash against the progress which, 'regardless of its stated intent, could have the effect of positive discrimination in favour of women, thus challenging the notion that all employees should be treated as individuals according to their skills, qualifications, aptitude, and potential without regard to gender'. (*Canberra Times,* 20 February 1986) In general, the editorial reaction was favourable. *The Australian* (21 February 1986) questioned the need for such legislation and postulated that its long-term consequences are likely to be of as much harm as good to the community. However, the *Canberra Times* (21 February 1986) described the legislation as 'mild and encouraging' and said that its strength lies in the fact that it will make employers aware of the quality of their women employees and of any areas of sex discrimination within their organisations. In a similar vein, *The Age* (22 February 1986) described the program as 'essentially an exercise in consciousness-raising' and said that the legislation provides an impetus for the systematic improvement of the position of women. Nevertheless, it recognised the limitations of any such legislation, however 'admirable' by pointing out that it would make more sense if it were accompanied by a more effective and extensive child-care program because '[t]here is not much sense in asserting the right of women to enter or work their way up in the workforce if their family responsibilities prevent them from exercising that right'.

contempt and the media

> [. . .] paid stooges who with pen and tongue and radio voice are prepared to sell the cause of truth and their own souls at a lesser price than that for which Judas sold his Master – that is, when one takes into consideration the increased cost of living since Biblical times.
>
> Ben Chifley, On the Australian Press

alrc proposals. Proposals to reform the law of contempt as it applies to the media were outlined in Discussion Paper No26, *Contempt and the Media,* released by the Australian Law Reform Commission late in March. In detailing the proposals, the Commissioner in charge of the Contempt reference, Professor Michael Chesterman, stressed that they were put forward as a basis of discussion prior to the commencement of the Commission's public hearings and were not presented as the Commission's final conclusions. The Contempt reference was given to the Commission in 1983 in the wake of the conviction and gaoling of Mr Norm Gallagher, the National Secretary of the Builders Labourers Federation, for remarks made to the press which were held by the Federal Court to constitute contempt. More recently, widely publicised events such as the Lindy Chamberlain case and the murder of Anita Cobby have stimulated calls for urgent reform of the law of contempt.

The Commission's proposals seek to clarify and streamline the *sub judice* rule which prevents the media from publishing material which has the potential to influence a judge or jury in reaching a decision. The principal aim of the *sub judice* rule – that of ensuring that accused persons receive a fair trial, free

from bias and prejudice – is accepted as valid and important. But due regard is also paid to freedom of publication and to the need for court proceedings to be open to public scrutiny.

The Commission offers alternative proposals in relation to the offence known as 'scandalising the court'. The first and preferred alternative is to abolish the offence altogether and to re-define the law of criminal libel to cover remarks and publications directed at the administration of justice which the accused knew to be false and which were published with an intent to cause harm. The second alternative involves re-defining the law of scandalising to limit its operation to known or reckless falsehoods of a specially serious nature.

The Commission has also suggested formulating certain restrictions on the disclosure of jury deliberations, in place of existing legal inhibitions which are vague and unclear. They include the possibility of prohibition for one year of the publication of material which would identify the particular trial concerned, subject to a defence where the publication is in 'the public interest' for certain specified reasons.

The Commission's proposals also cover such matters as

- the refusal of journalists to disclose their sources in court,
- publications which tend to exert influence on the testimony to be given by a witness,
- publication of photographs of a person in circumstances suggesting that he or she is suspected of having committed a criminal offence,
- proceedings of Royal Commissions and other official inquiries,
- proceedings in civil trials,
- the taking of photographs and the use of recording devices in court,
- the procedure for trying contempt cases.

Professor Chesterman indicated that the Commission's tentative proposals were made after investigation of legal literature and numerous psychological and empirical studies within Australia, the United States, England, Canada, New Zealand and India, and after widespread consultation with the media, magistrates, judges, tribunals, lawyers, civil libertarians, former jurors and the police. The discussion paper is the second of three to be published by the Commission under its Contempt reference. Copies of this Discussion Paper, which brings together all the rules of contempt law which are likely to affect the media in the ordinary course of events, are available from the Australian Law Reform Commission, 99 Elizabeth Street, Sydney.

sub judice. Under the Commission's provisional proposals, a story by the media published after the time of arrest and before the delivery of the jury's verdict or plea of guilty or discontinuance of a case would only attract liability if the publication (a) created a substantial risk and serious prejudice to a jury trial *and* (b) fell within one or more of six prescribed categories. These categories are:

- a statement to the effect that the accused is innocent or is guilty, or that the jury should acquit or should convict;
- an allegation, whether true or false, that the accused has one or more prior criminal convictions;
- an allegation, whether true or false, that the accused has been or is about to be charged with one or more other offences to be tried separately from the trial in question, or that he or she has committed one or more other offences, or has been involved in incidents of a similar nature;
- an allegation, whether true or false, that the accused has confessed to the offence, or any of the offences, to be dealt with at the relevant trial;

- an allegation directly relevant to the question whether the accused (or any other prospective witness) is or is not likely to be a truthful and reliable witness. In this circumstance, the allegations would include allegations as to proclivities, associations or racial or cultural attributes of the person where these bear directly on the truthfulness or reliability of the witness; and
- an allegation tending to establish or deny involvement of the accused with the facts of the offence charged.

The Commission proposes that there be a defence of innocent publication. It should be a defence for a publisher to establish on the balance of probabilities that, taking account of available resources, all reasonable steps were taken to ascertain whether the relevant publication would be in contempt and that vital information necessary to show this (for example that the relevant proceedings had been instigated) had not been discovered. At the same time, there should be adequate training for journalists in relevant aspects of contempt law, as a useful step towards reducing the incidence of publications which infringe the law of contempt due to lack of care. Three further defences are proposed by the Commission. They are:

- that the publication was a fair, accurate and contemporaneous report of a legal proceeding or of parliamentary proceedings (except where the material reported was said in court in the absence of the jury, or was the subject of a valid suppression order by the court);
- that the publication was necessary to facilitate the arrest of a suspect or to protect public safety; or
- that the publication fell within a public interest defence. This would operate where (a) the value of a discussion of matters of public interest and importance would be seriously impaired if the material creating a substantial risk of serious prejudice to the relevant trial were omitted *and* (b) (in cases concerning a trial already occurring) the value of the discussion would be seriously impaired if the publication was delayed until the end of the trial.

Suppression orders should only be made on grounds of prejudice where there is a substantial risk of serious prejudice and the situation falls within carefully and narrowly defined criteria (as set out in the proposals). Media representatives should have the right to apply for an order to be lifted or to appeal against it to a higher court.

The Commission proposes that for publications prepared wholly within a publishing organisation, the organisation itself (if it is a corporate body) or its proprietors (if it is unincorporated) should be deemed responsible for the purposes of contempt liability. Any person, such as an editor, having supervisory control over the content of the publication or over the system of preparation of material for publication should also be deemed responsible. Any other employee who has participated in the publication would only be capable of being deemed responsible if it is established that he or she acted with the intention of committing the offence of contempt. Where the material found to be in contempt has been supplied to the relevant organisation by 'an outsider', responsibility should be attributed to the outsider if he or she attempted to procure its publication or was or should have been aware that there was a substantial likelihood of publication and intended that the relevant proceedings should be influenced.

The Commission proposals, if accepted by the government, mean that there will be virtually no restrictions on the media after a jury verdict. Only restrictions on discussing the sentence to be imposed, operating between the commencement of the trial and the imposition of sentence, and the restriction on publication of jury deliberations outlined below, are suggested.

procedure. It is recommended that cases of alleged breach of the *sub judice* rule or of a suppression order should be referred to the ordinary criminal courts, as indictable offences triable summarily. Upper limits should be placed on prison sentences imposed for contempt by publication and consideration should be given to stipulating upper limits for fines in this area. Alternatives to imposing fines on corporate defendants should be examined. If a curtailed offence of scandalising is retained (under the second of the two alternative proposals), it should be tried on indictment.

secrecy and jury deliberations. The ALRC puts forward two alternative recommendations in relation to disclosure and publication of juryroom deliberations. These were outlined by the President of the Commission The Hon Xavier Connor at a Meeting of the Media Law Association of Australasia in February. They both impose a series of moderate but flexible restrictions upon the publishing of jury disclosures.

'scandalising' the court. The Commission's preferred proposal is that the offence of scandalising be abolished so far as the constitutional law permits, with consideration given to redefining the offence of criminal libel so that it can include published material directed at a group or individual, or at a social or government institution such as the judiciary, which the accused knew to be false, and which was published with an intent to cause serious harm to a person. Alternatively, the Commission suggests a number of major changes to be made to the common law relating to scandalising, with a view to confining the offence to known or reckless falsehoods of an especially serious nature. In doing so the Commission suggests the following:

- a remark which is critical of judges or courts should only be treated as 'scandalising' if it imputes corrupt conduct to a judge so as to bring the administration of justice into disrepute;
- in assessing whether the remark brings the administration of justice into disrepute, the degree of likely repetition or republication of the remark should be taken into account, as should whether it genuinely carries credibility;
- the court should also satisfy itself that the remark has a significant bearing on the administration of justice as a whole, particularly where the remark is directed against a judge or a small number of identified judges;
- there should be a defence of innocent publication for a person accused of making a scandalising remark. This would mean that no liability would arise unless (a) the imputation was false *and* (b) the accused knew it was false or was recklessly indifferent to the question of truth or falsity. A media organisation publishing such a remark should be liable unless it had no reason to doubt the truth of the relevant allegations.

publications of photographs. The Commission proposes that there should be a prohibition on the publication by the media of a photograph of a person in circumstances suggesting that he or she is suspected of a criminal offence, where there is a reasonable likelihood that identification will be in issue at a forthcoming trial and where any process of identification which may occur would be seriously prejudiced by the publication. There should be a defence to the effect that the publication was justifiable in order to facilitate an arrest, or on grounds of public safety. The Commission is also giving consideration to establishing procedures to allow the media to apply to a judge for permission to publish a photograph, on the ground that identification will not be in issue.

journalist's refusal to disclose sources. The Commission tentatively proposes that, where a journalist, giving evidence in court, refuses to disclose confidential sources or other information, and is not protected by any privi-

lege, or by any order of the presiding judge exonerating him or her from the obligation to do so, any proceedings arising after the refusal should be referred to another court, rather than tried by the presiding judge. If so requested by the journalist, this court should consider the relevance and importance of the evidence involved. If the journalist is found guilty of contempt, any sentence passed by the court should be purely punitive and subject to appropriate upper limits. There should be no sentence of unlimited dimensions, expressed to continue for so long as the required information is withheld.

three contempt papers. This Discussion paper on *Contempt of the Media* is the second of three Contempt discussion papers being put out by the ALRC. The first, *Contempt and Family Law* (DP24), was published in 1985 (see [1986] *Reform* 40). The third, entitled *Contempt: Disruption, Disobedience and* Deliberate Inteference *(DP27) is to be published about the same time as this issue of Reform.* It deals with

- disobedience of court orders,
- contempt in the face of the court,
- deliberate interference with court proceedings, and
- contempt of tribunals and commissions.

A summary of the three papers is also being prepared. The ALRC will be holding public hearings on reform of all aspects of contempt law in each of the capital cities, commencing in late May or early June 1986.

journalists and jurors

'Tis one thing to be tempted, Escalus,
Another thing to fall. I do not deny,
The jury, passing on the prisoner's life,
May in the sworn twelve have a thief or two,
Guiltier than him they try.

Measure for Measure, [II.i.17]

juryroom deliberations. The use that may be made of the revelations of jurors about jury deliberations was highlighted recently in the United States. After a rape trial ended with a dead-locked jury, a defence attorney hired one of the former jurors to sit through the retrial as a consultant. This unusual, though not unprecedented, move has sparked a debate among lawyers and judges in the United States over the ethics of paying a juror after the trial to find out what happened during the secret deliberations.

Mr Sherman, the defence attorney, said that he hired the juror, a 21 year old waitress, to learn what arguments had been most effective with the first jury. At the retrial at the end of 1985, the new jury convicted the defendant of sexually assaulting a 50 year old woman. Nonetheless, Mr Sherman said that he had found the juror's views valuable and would probably hire another former juror in any future case involving a re-trial.

The President of the Connecticut Bar Association, Ralph Elliot, has attacked the practice as a 'dangerous trespass upon the sanctity of juryroom deliberations'. (*New York Times,* 31 January 1986) He has said that he plans to ask the Rules Committee of the State Superior Court to prohibit lawyers from paying jurors for information about deliberations. The American Bar Association has said through a spokesperson that it is unaware of any other case in which a lawyer has paid a former juror. The danger according to Mr Elliot is that:

> If this becomes an acceptable thing to do, I can easily see jurors moulding their conduct with a view toward personal gain. A juror might deliberately dead-lock the jury out of a desire to work as a consultant at a retrial. It is very important that the jury process be insulated from any expectation that a juror's vote will lead to pecuniary gain.

Miss Lord, the juror in question, who voted for acquittal in the first trial, has said that she did not take the job for money. Instead, she said, she was fascinated by the legal system and feared an innocent man would be sent to prison. Concern has been expressed that the payment of former jurors might have a 'chilling effect' on discussions in the jury room.