C.L.R. 583, and there are many other examples throughout the book where New South Wales Weekly Notes references are given instead of State Reports and Weekly Law Reports and All England Law Reports are given instead of the authorised Law Reports. The other matter I found annoying was the frequent use of Roman numerals in references to law reports and in some cases the references are not in the correct order: for example *Williams* v. *Earle* (1868) III L.R. Q.B. 739 (paragraph (1211)); *Clegg* v. *Hands* (1890) XLIV Ch.D. 503 (*ibid.*); *Plomley* v. *T.K. Steanes Ltd* (1898) XIX L.R. (N.S.W.) 215 (paragraph (305)).

Notwithstanding these matters, the busy barrister or solicitor will have much use for this book provided that he uses it to help solve the day to day problems and doesn't assume that it contains all the relevant information on the more doubtful or debatable elements of the law of landlord and tenant. It also seems to provide the type of information which would give to students a good understanding of this branch of the law. Although the statutory references are to those of New South Wales, the principles and cases are generally of Australia-wide application and most States and Territories have legislation which is similar, in varying degrees, to that which applies in this State. Therefore, although the book will have much greater appeal in New South Wales, it will, I believe, be of considerable use and benefit to practitioners in other States.

J. R. Dunford*

Law and Poverty in Australia, Australian Government Commission of Inquiry into Poverty, Second Main Report, by PROFESSOR RONALD SACKVILLE, Commissioner: Law and Poverty. (A.G.P.S., Canberra, 1975), pp. i-xxvi, 1-333. Recommended retail price $8.10. (ISBN 0 642 01868 5).

The Report of the Poverty Commission into Law and Poverty in Australia sheds a completely new light upon the law and its administration in this country. It is the first substantially complete examination of the operation of the Australian legal system in a social context, based on the best available empirical evidence. It reveals defects in the administration of justice, both civil and criminal, which few Australian lawyers could previously have appreciated. Perhaps a few practitioners and probably fewer academic lawyers might, as a result of their work, have suspected that the Australian legal system was not entirely successful in providing justice for all equally, regardless of status or wealth. But on the first page of the Report, the following statement appears:

> Lawyers and laymen alike consider it unthinkable that the legal system should discriminate against a person simply because he is poor. Yet even on these uncontentious criteria the law has failed

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> to accord equal treatment to all people and therefore contributed to the perpetuation of poverty in Australia.

The following 300 pages of the Report substantiate this statement. In them are summarised the results of a number of research projects undertaken by the Commission. The results speak for themselves: the Commission has merely to express some obvious conclusions and to suggest some means of overcoming defects revealed by the empirical research.

Many illusions must be shattered by the findings of the Commission. The law in Australia provides nothing like equal justice for all. This is not to say that the Report is a radical document, as no Government commission of inquiry can be expected to produce anything radical. Nevertheless, the Commission's conclusions will shock many people, especially lawyers.

Most Australian lawyers take pride in being part of a system which is fair and just, but the Commission establishes that the Australian legal system treats poor and disadvantaged people very differently from other members of the community. This is not consistent with fairness or justice. How has this situation come about? Why were lawyers unaware of it?

In part, the answer lies in the nature of law and its function in society. The Commission does not examine this, though certain assumptions have been made in the terms of reference. In part, the answer lies in the nature of legal education and legal practice, which allows lawyers to remain ignorant of defects in the system. Few lawyers are poor. Most of them come from middle-class backgrounds. Except for the minority of lawyers engaged in criminal practice and possibly industrial accident practice, lawyers have few professional, and fewer social, contacts with poor and disadvantaged people. On the whole, the law serves lawyers and the majority of their clients reasonably well. Lawyers have been trained in the traditions of the Australian legal system and they respect that system, often unaware of the social function of law and of the need for constant, informed, constructive criticism of the institutions of the law if those institutions are to be responsive to community needs. Few lawyers question the fairness of the legal system in the settlement of disputes and the maintenance of the social order. Few lawyers would have regarded as necessary the widening of the terms of reference of the Poverty Inquiry to include the effects of the law and the appointment of a commissioner with special responsibility for this area, let alone imagined that the law might be working injustice upon a substantial part of the Australian community.

The Commissioner for Law and Poverty was required to "investigate the effect of the law and the legal system upon the poor and other disadvantaged groups and individuals in the Australian community, and in particular examine" areas of substantive law, federal and state, of special significance to the poor; the delivery of legal services, including legal aid, to the poor; the administration of civil and criminal

justice as it affects the poor and "vulnerable groups" such as migrants and children; the legal rights of welfare recipients; and related matters.

From the outset, the Commission recognised both the need for empirical evidence concerning the questions referred to it and the virtual absence of any such evidence. It therefore undertook or commissioned a series of research projects. These were limited by lack of time and other resources, and some were confined to particular parts of Australia. This led to the Commission's need to generalise, and to call for further such research, a call which should be heeded.

The relatively meagre evidence available to the Commission moved it, after due consideration, to call for sweeping changes in several areas of law. All indications are that further research will reveal more instances of injustice flowing from the operation of the legal system.

The ideology in the Report is confined to the terms of reference, which assume that there are poor people in Australia, and that the law does discriminate against them. The Commission accepts this, and its Report is devoted to finding possible remedies for the defects.

The first substantive chapter of the Report deals with the delivery of legal services. This chapter might more appropriately have been placed last, for there must have been some doubt in the minds of the Commissioner whether poor and disadvantaged people had any rights which could be protected by legal aid and advice. For example, it seems from Chapter 6 of the Report, dealing with the position of social welfare recipients, that such people have no *right* to know the criteria upon which decisions about eligibility for benefits are made by the Department of Social Security nor any right to appeal against the refusal of a benefit. Legal aid would not help an aggrieved applicant for a pension. In this area the recommendations are for the provision of substantive rights, such as a right to information about criteria and a right to require departmental observance of the rules of "natural justice" *etc.* These recommendations flow not from general principles of freedom of information but from a detailed examination, in a professional and pragmatic way, of the operation of law and administrative practice.

In its examination of the criminal justice process (Chapter 7), the Commission was hampered by the lack of empirical evidence except for that available in relation to aborigines and migrants. Partly for this reason, it makes few recommendations apart from suggesting the abolition of the crimes of vagrancy and public drunkenness, which really penalise poverty rather than types of behaviour. There is no ideological assumption that the criminal legal system is structured against the poor, who have never exercised political power. This may also be taken as an example of the pragmatic approach of the Commission and its appreciation of the need to base its suggestions on factual evidence.

Housing is another area in which it is doubtful whether the poor and disadvantaged have many substantial legal rights which could be enforced, even with legal advice and aid. The Commission's research

showed that the poor are more likely to rent accommodation and to rent it from private landlords. Hence their legal rights are few and depend upon the willingness of the landlord to give them rights under a lease. Such willingness is unusual and a high proportion of tenancies of the poor are created orally. Thus the recommendations of the Commission are for the provision by statute of a set of standard conditions in leases, which could not be varied merely by agreement of the parties, and which would cover such matters as the period of notice required to terminate a lease and the obligation to provide accommodation which is habitable. The Commission found that rents paid by the poor were disproportionately high but, in full awareness that the poor and disadvantaged are almost totally dependent on a stock of privately-owned housing, did not call for a system of blanket rent-controls, such as that which was imposed during World War II and persisted until recently in New South Wales. The imposition of such a system or of conditions which might be too oppressive upon landlords could evaporate the supply of private housing upon which the poor depend. Instead, the Commission recommends a system of rent review by a tribunal chaired by a lawyer but including a community representative and a valuer. Such a tribunal might avoid the delay and formality associated with court proceedings. The tribunal would also have certain powers in respect of failure by landlords to offer or maintain premises in a habitable condition.

Both in the area of leases and of consumer credit contracts, the Commission recommends that courts or tribunals have power to grant relief against terms which are harsh or unconscionable, such as that already conferred by legislation relating to moneylending and hire-purchase. Indeed, Professor Peden has recently recommended that these powers should be extended in New South Wales.[1]

Credit is, and has always been, a necessity for the poor. But because credit always has a price, the poor can least afford it. They are also less able to obtain the cheapest forms of credit because they lack security of income. They rely on the more expensive forms of credit provided by retailers and finance companies.

There are many forms of credit used in Australia. These are often cumbersome and their multiplicity is anomalous. Concrete suggestions were made for the review of consumer credit laws by the Rogerson Committee in 1969,[2] and by the Molomby Committee[3] a couple of years later. Only South Australia has enacted some of the recommended measures. The other States are waiting on a report from the Standing Committee of Commonwealth and State Attorneys-General,

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[1] *Harsh and Unconscionable Contracts* Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales (1976).

[2] *The Law Relating to Consumer Credit and Moneylending* Report to the Standing Committee of Attorneys-General of the Commonwealth and States of Australia (1969).

[3] *Fair Consumer Credit Laws* Report to the Attorney-General for Victoria (1971-1972).

which has had the matter under review for five years. The Commission finds this delay intolerable. Although it recognises the traditional interests of the States in this area, it feels that reform is required so urgently that the Commonwealth Parliament should exercise its powers under trade and commerce, bankruptcy and insolvency, and financial corporations to bring about the reforms.

Credit providers are one of the largest groups of creditors of the poor, and the Commission's recommendations on reform of credit laws cannot be separated from their consideration of the process of recovery of debts. Chapter 5 of the Report is perhaps the most considered and important part. For enforcement of their debts creditors rely upon either a right to recover judgment in contract or upon a security interest in goods. Under the present law these remedies may be concurrent. The existence and use of the remedies ignores the fact that a poor debtor may have no security of income and also that the sale of repossessed goods often realises far less than the true market value of the goods. For this reason a debtor may not only lose his goods but he may also be subject to a "deficiency action". If judgment is recovered against a debtor and remains unsatisfied, the debtor may be subject to bankruptcy proceedings.

Execution and bankruptcy found their present form more than a century ago and, as the Commission states (page 128):

> Laws modelled on the needs of a society in which consumer credit was virtually unknown, and in which the material aspirations of the great majority of people were vastly different from those of today, are hardly likely to be appropriate to modern Australian conditions.

The Commission recommends that the "socialisation", or sharing of the burden of a debtor's debts, which is one of the underlying principles of bankruptcy law, together with other purposes of the bankruptcy law such as the release of the debtor from the pressure of creditors and the economic rehabilitation of the debtor, could be provided for without the formality of bankruptcy proceedings. It could be done by the Commonwealth Parliament under its "insolvency" power. Reform is necessary because the existing laws are more likely to hinder than to assist the aims of the law. Therefore reform should build on the debtor's main asset, his wage-earning capacity. Measures which restrict this capacity, such as the use of garnishee proceedings, which may lead an employer to dismiss a debtor, should be used only as a last resort. Judgment should not lead to execution without a full hearing by the Court after the debtor has had an opportunity for proper financial counselling and the opportunity to propose an alternative method of meeting his obligations. Courts should be empowered to relieve a debtor from making periodic payments (which should become the main means of enforcement of debts) where the debtor becomes unable to pay because of sickness, unemployment, or other causes beyond his control. Repossession should be discouraged and a secured creditor should be put to an election between repossession and personal

remedies. Imprisonment for debt, which is still a reality in Victoria and South Australia, should be abolished. Some of these questions are presently under consideration by the Australian Law Reform Commission.

The Research Reports produced by the Commission lead it to the conclusion that both aborigines and migrants are at a considerably greater disadvantage than other sections of the community. In part, this is due to differences in legal culture and language. The Commission makes a number of recommendations relating to special legal advice and assistance for members of these groups and for the provision of interpreters. It also finds that children appearing before childrens' courts are treated in ways which are undesirable and makes some recommendations in this area.

The Commission concludes that the law does provide some substantive rights for the poor and disadvantaged, but that often such people cannot ascertain their rights or articulate them. Justice to which people cannot obtain access is not real justice. A section of the community which suffers injustice is potentially a rebellious section of the community.

Denial of justice for lack of access to the law, or for lack of legal services, is just as undesirable as injustice resulting from anomalies in the law. Aborigines suffer in both respects. The substantive law would not recognise their traditional rights in land and denial of legal aid and advice meant that they were more likely to be convicted and imprisoned for trivial offences. Both created a sense of injustice, even of resignation, and were probably significant causes of aboriginal discontent.

The Commission makes a long series of recommendations for the extension and improvement of legal services for the poor. Following the change of government in Canberra at the end of 1975, these seem like an idealistic dream of what might have been. The present government appears committed to the dismantling of the Australian Legal Aid Office and the transfer of its functions to Legal Aid Commissions in the States. These Commissions appear likely to be controlled by the private practising profession. The Commission gives ample reason why that part of the profession should be represented in, but should not control, the provision of legal aid services. The Commission recommends considerable representation of the consumers of legal aid on the controlling bodies. It sees the provision of salaried legal aid services as essential, but not as the sole channel of legal aid. Any person should have the right to select his own lawyer and the legal aid agency should provide the funds. However, because solicitors' offices are often inaccessible or frightening to the poor, salaried officers in "storefront" offices are seen as an essential part of the provision of legal aid services. While both Federal and State governments should be represented on the controlling bodies and would be responsible for the provision of a major part of the funds, legal aid should be independent of the political control of either. The private profession,

as mentioned, should also have a voice in the provision of legal aid, but the Report emphasises that, probably as a result of a lack of appreciation of the needs for legal aid, the response of the profession has too often been to provide too little, too late and usually in the worst possible location.

The main impetus for law reform traditionally comes from lawyers whose interests, or whose clients' interests, are ill-served by the existing law. In the past, the poor have had few legal representatives, so that shortcomings of the law which adversely affect the poor have not been brought to the public notice or referred to law reform agencies. The Commission has found many such shortcomings in the law and has recommended that legal aid agencies have direct access to, and possibly representation on, law reform bodies. It sees this as one way of ensuring that reform of the law which adversely affects the poor and disadvantaged is not neglected.

The Report is the result of the first empirical study in Australia of the effects of law and the legal system on the poor and disadvantaged. Those effects appear to be horrifying. The Commission has recommended some changes which should improve the position of the poor. Change must be continuous. Many, probably most, Australian lawyers are simply unaware of the shortcomings in law and the legal system. The law is unlikely to change unless lawyers, who have disproportionate political influence as well as the technical skills necessary to criticise the law and suggest changes, recognise the need for change and the urgency with which it is required. Those lawyers who can find the time to read this Report will at least be aware of the corners of the legal system in which they are likely to find anomalies which work injustice.

In addition, the Report is, at last, an attempt to examine, by empirical methods, the way in which the law works in Australia. Its success indicates that further such studies would be well worthwhile.

John Goldring*

CORRECTION

Mr Laurence W. Maher, who reviewed Hambly and Goldring (eds), *Australian Lawyers and Social Change* in the last issue of the Journal, (1976) 1 U.N.S.W.L.J. 365, was wrongly described. Mr Maher is in fact a solicitor practising in Melbourne.

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