THE PROBLEM OF CONFIDENTIALITY IN MEDICAL RESEARCH IN WESTERN AUSTRALIA

G SYROTA*

> *"Those undertaking clinical data trials, epidemiological research projects and other projects dependent upon a large supply of personal information should not be encouraged to justify them by reference to an expansive concept of 'public interest', but through legislation specifically authorising a particular activity"* (Australian Law Reform Commission *Privacy* Report No 22, Vol I (1983) paragraph 859).

This Note is concerned with two questions which should be of interest to all those who are involved with medical research in Western Australia. First, is it true that the common law regarding doctor-patient confidentiality which applies in this State unnecessarily impedes the public health research (and, in particular, the *epidemiological* research) which takes place here? Secondly, if it is true, what steps need to be taken to overcome the problem?

These questions may seem novel to laymen and lawyers. But they are not new questions, at least to the public health experts who practise in WA. They were first raised more than five years ago by the State Health Department and were made the subject of a special inquiry by the Law Reform Commission of Western Australia.[1] That inquiry found that the existing common law on doctor-patient confidentiality does indeed present an unnecessary obstacle to the carrying on of many types of epidemiological research. It went on to make recommendations for legislative changes which

---

* Member of the Law Reform Commission of Western Australia, 1988-1991. The views expressed in this Note are my own and do not necessarily reflect those of other members of the WA Law Reform Commission, past or present.

1. WA Law Reform Commission *Confidentiality of Medical Records and Medical Research* Project No 65, Pt II (Perth, 1990) ("Report"). A Discussion Paper on the same topic was issued by the Commission in 1989.

would correct the problem.

However, despite the warm reception given to the Commission's report when it was published in 1990, its recommendations have never been implemented by the State Government. As a result, epidemiological research in Western Australia continues to take place within a legal framework which is antiquated, restrictive and obscure.

The aims of this Note are fourfold:

- To explain the nature of the legal problem which confronts Western Australia's epidemiologists under current law;
- To outline the Law Reform Commission's proposals for dealing with that problem;
- To suggest reasons why the Commission's proposals appear to have foundered; and
- To point to a possible solution.

Before doing this, however, it is necessary to give a brief overview of what epidemiological research entails, for the benefit of the layman.

WHAT IS EPIDEMIOLOGICAL RESEARCH AND HOW IS IT CONDUCTED?

Epidemiology, according to the *Oxford English Dictionary*, is the study of the *incidence* or *prevalence* of disease. It is the research domain of the public health expert and it depends heavily on the collation and statistical analysis of large quantities of data by him. These data consist in part of the medical records (or "histories") of patients which are stored in the computers and files of hospitals and public health laboratories around Australia. Another source of data frequently accessed by the epidemiologists in this State are the public health registers maintained by the State Health Department in Perth.[2]

The range of questions to which epidemiologists seek to provide answers is wide indeed. One highly publicised study, conducted in the early 1980's, investigated the question whether war veterans who had been exposed to the chemical defoliant "Agent Orange" whilst on service in Vietnam had an increased risk of bearing children who were congenitally deformed.[3] This study was the first to be conducted under the aegis of the

2. These registers include the Cancer Register, Mental Health Register, Birth Defects Register, Infectious Diseases Register, Drug-Related Deaths Register, Hospital Morbidity Data System, and Midwives' Notification Data System: see Report supra n1, ¶ 10.1.

3. JW Donovan, R MacLennan & M Adena "Vietnam Service and the Risk of Congenital

Commonwealth Government's Epidemiological Studies (Confidentiality) Act 1981.

Other less well known (but no less valuable) epidemiological studies have sought to identify the risk factors for various forms of cancer and heart disease; looked into the causes of geriatric pain; studied the reasons for the high incidence of osteoporosis (bone disease) in the Melbourne area; and looked for explanations for the high infant mortality rates in Tasmania compared with those in other Australian States.[4]

THE NUB OF THE PROBLEM

As mentioned above, a common feature of most or all of these studies is that they involve access to medical records of patients by the researchers concerned. The problem for the researchers is that many of these medical records contain information in "patient-identifiable" form. That is, the records contain the *names* of individual patients, and then give details of their illnesses, the treatments prescribed and the outcomes.[5]

In effect, this means that information which was given by patients to their doctors on the basis that the information would be kept in strict confidence is divulged to a third party (the epidemiologist) without the patients' knowledge or consent. This invasion of privacy can be permitted only if it is authorised by the common law or by a specific statutory provision.

In all mainland Australian States, other than Western Australia, the appropriate statutory authority has been given to epidemiologists,[6] thus enabling them to gain access to name-identified medical records, *without* patient consent, for the purpose of conducting epidemiological research.

In Western Australia, however, epidemiologists have to work within the common law, which has not been superseded by statute. Thus, one of the central issues which the Law Reform Commission had to address in its report was whether the common law in this State permits this type of epidemiological research to be carried on or whether it effectively prohibits it. This issue resolved itself into the three questions considered below.

Anomalies: a Case Control Study" (1984) 140 Med Journ of Aust 394-397.

4. See Privacy Commissioner (Cth) *Fifth Annual Report on the Operation of the Privacy Act* (Canberra: AGPS, 1993) 67-69, from where these examples are drawn.
5. Report supra n 1, ¶ 10.1; Discussion Paper supra n 1, ¶ 4.2.
6. Epidemiological Studies (Confidentiality) Act 1981 (Cth); Privacy Act 1988 (Cth) s 95; Health Administration Act 1982 (NSW) s 23(1); Health Act 1937 (Qld) s 154M; Health Commission Act 1976 (SA) s 64(d); Health Services Act 1988 (Vic) s 141. See generally Discussion Paper supra n 1, ¶¶ 5.6-5.20. Where access to name-identified data is given to epidemiologists, this is subject to stringent safeguards designed to protect patient privacy.

1. Are all forms of epidemiological research prohibited under WA's common law?

The Commission's answer was "No": the common law is less restrictive than this. The Commission found that there is no problem, legal or ethical, where the epidemiologist is given access to medical records from which patients' names (and all other identifying marks) have been removed. On the other hand, a problem may arise where the epidemiologist is granted access to medical records from which names, etc, have *not* been expunged, since in this case the patients' rights of privacy may be infringed.

This raises the question, why not simply "de-identify" the patients' medical records before giving epidemiologists access to them (ie, why not render the records anonymous before the research begins)? The problems here are twofold. First, the cost (in time and money) of removing names and all other identifying marks from large numbers of patients' records prior to granting access to them to the researchers would often be prohibitive. Should a requirement of absolute anonymity be enforced, it would render much epidemiological research impracticable, on cost grounds alone.[7]

Secondly, there is the point that a great deal of epidemiological research depends on a technique known as "linkage". Linkage means that the records of patients who have been treated in more than one hospital (or clinic) must be linked together and then correlated with information from other sources (eg, the WA Births Register, Deaths Register, Cancer Register or employment records). Linkage can be achieved only if the researcher has access to medical records in name-identified form.[8] In short, to confine epidemiological research in Western Australia exclusively to cases where the researcher has access to de-identified data, whilst overcoming any problems of breach of confidentiality, would kill much worthwhile public health research stone dead.

2. Since the hospital is the owner of the patient's medical records, doesn't it have the right to hand them over to whomever it pleases?

The Commission thought not. It is true that the hospital, doctor or other health care provider *owns* the file on which information regarding a patient is stored, but this does not give it an unqualified right to hand over the file to

7. Discussion Paper supra n 1, ¶¶ 4.2–4.6.
8. Ibid. Cf Editorial "Privacy, Epidemiology and Record Linkage" (1979) Brit Med Journ 1018.

a researcher without the patient's consent. The point is worth emphasising because it seems to be a common misconception in the medical profession that ownership of a patient's medical file automatically carries with it the right to divulge its contents to others.[9]

The fact is that the law of privacy protects any *information* which a patient gives to his or her doctor in confidence. Disclosure of that *information* to another person without the patient's consent is normally a civil wrong, regardless of where the information is stored or how it is divulged.

3. The common law recognises that the duty of confidentiality between doctor and patient can be overridden where the "public interest" is involved. Does this public interest exception cover epidemiological research?

Again, the Commission thought not. The common law of Western Australia certainly permits disclosure of name-identifiable patient records to third parties without patient consent in a narrow range of cases involving the "public interest". But this appears to be a strictly limited category confined to cases involving a patient's criminal or unlawful activities, or the prevention of harm to innocent people. Although the point has never been finally decided by a court, the weight of legal opinion suggests that the public interest exception does not cover disclosure of name-identified medical records to epidemiologists for purposes of medical research, *except* where the patient's consent has been obtained. It follows that access to such records without consent, even for so worthy a purpose as public health research, probably (though not certainly) involves a breach of confidence and an infringement of State law.[10]

PROPOSALS FOR REFORM

Having concluded that the common law of Western Australia does not provide an appropriate framework for conducting epidemiological research, the Commission went on to survey the law in other States and overseas. This

---

9. Report supra n 1, ¶ 3.3.

10. Report supra n 1, ¶ 3.2; cf RP Meagher, WMC Gummow & JRF Lehane *Equity Doctrines and Remedies* 3rd edn (Sydney: Butterworths, 1992) ¶¶ 4123-4125. Some epidemiologists, however, have argued that the "public interest" exception may be broad enough to justify the continuation of this form of research even under the existing common law: see Armstrong "Privacy and Medical Research" (1984) 14 Med Journ of Aust 620. The point is arguable.

survey showed that all mainland Australian States, and many overseas jurisdictions as well, have long ago amended their own common laws by statute in order to facilitate epidemiological research.[11] This uniformity of approach elsewhere moved the Commission to recommend that similar legislation should be enacted here so as to bring the law in this State into line with that of other comparable jurisdictions.

Full details of the Commission's proposals need not be reiterated in this Note. But in essence they involved legitimising all forms of epidemiological research (even those which involve access to patient-identifiable data without patient consent), provided that the research project has been approved by an established Institutional Ethics Committee ("IEC") set up by one of the universities or hospitals of Western Australia.[12]

In order to assist the IEC to decide whether or not to approve a proposed research project, the Commission recommended the enactment of detailed statutory guidelines. These would allow the IEC to approve a research project only if it found that the public interest in allowing the research to proceed outweighed the private interest in maintaining doctor-patient confidentiality.[13]

The use of IECs as the "approving authority" was favoured by the Commission on several grounds.[14] Their chief advantages were felt to be low

11. Supra n 6. For a summary of the law overseas, see: Privacy Commissioner (Cth) *NHMRC Guidelines for the Protection of Privacy in the Conduct of Medical Research: Reasons for Approval of the Guidelines* (Canberra, 1991) ¶¶ 2.1-2.2.7.

12. On the role and composition of Institutional Ethics Committees, see: National Health & Medical Research Council *Statement on Human Experimentation: Supplementary Note No 1* (Sydney, 1988). This states: "In every institution in which human research is undertaken there must be a properly constituted institutional ethics committee ... No research project may proceed without prior consideration and approval of a written protocol by such a committee ... [The committee shall] consider the ethical implications of all proposed research projects to determine whether or not they are acceptable on ethical grounds..."

13. Under the guidelines proposed by the Commission, the IEC could only approve a research project if it was satisfied (a) that the project has as its purpose the advancement of medical knowledge or the improvement of health services in WA; (b) that access to patient-identifiable information is necessary for the scientific validity of the project; (c) that access to that information *without subject consent* is justified having regard to specified criteria; and (d) that the public interest in undertaking the project outweighs the public interest in maintaining confidentiality: Report supra n 1, ¶ 6.4. A similar test has been approved by the Privacy Commissioner (Cth) for research projects which involve access to data held by commonwealth agencies: see Privacy Commissioner *The Federal Privacy Handbook: A Guide to Federal Privacy Law and Practice* (Sydney: Redfern Legal Centre Publishing, 1992) ¶¶ 3030-3035.

14. The alternative was to require approval by a Government minister or head of department, as in South Australia: Health Commission Act 1976 (SA) s 64(d)(3). Cf Discussion Paper supra n 1, ¶¶ 6.4-6.7, where the reasons for rejecting government approval are stated.

cost, speed, informality and freedom from political bias. Another important factor was that considerable experience has been gained in the operation of IECs in relation to medical research generally, both in this State and elsewhere. It therefore seemed appropriate to recommend that epidemiological research should fall within their remit.

It has to be said, however, that IECs have their critics. For example, the Commonwealth Privacy Commissioner has implied that IECs are little more than "voluntary bodies", with no legal standing. He has also queried whether they have the capacity "to function at a level of acumen and organisational discipline appropriate to the legal responsibility [they are] now being given".[15]

This may seem an unduly harsh judgment on IECs, particularly since they are comprised (under National Health and Medical Research Council guidelines operating across Australia) largely of doctors, lawyers and ministers of religion. It may also be queried whether the Privacy Commissioner is correct in his view that IECs are simply "voluntary bodies". The IEC set up by The University of Western Australia, for example, is a committee established by Senate (the University's governing body) and it operates under a constitution approved by Senate. This IEC is not appropriately described as a "voluntary body" and it certainly does not lack "acumen and organisational discipline", as the Privacy Commissioner's strictures might seem to imply. Whilst IECs are not infallible, it is suggested that they are the right bodies to oversee the ethical implications of epidemiological research in this State, as the Commission recommended.

Two further points may be made about the Commission's proposals for legislative reform. First, it has to be emphasised that the Commission's proposed scheme would not involve any element of *compulsion* on record-keepers (hospitals, doctors, nurses, etc). That is, record-keepers would not be forced, against their wishes, to divulge name-identified patient records to epidemiologists for research purposes. The aim of the proposed scheme is simply to *permit* such disclosure if the record-keeper chooses to do so. The record-keeper's freedom not to disclose information is therefore preserved.[16] This may be of particular importance to psychiatrists, psychologists, venereologists and others who may well be unwilling to divulge their patients' medical records to third parties in name-identifiable form in view of the highly confidential information they contain.

15. Privacy Commissioner (Cth) *NHMRC Guidelines for the Protection of Privacy in the Conduct of Medical Research* supra n 11, 27.

16. Report supra n 1, ¶ 5.4.

Secondly, whilst it is true that the Commission's inquiry had its genesis in fears expressed by the State Health Department regarding the lawfulness of epidemiological research in this State, the Commission's final proposals were not limited to this type of research. The Commission felt, rightly in my view, that epidemiology was too limited a category and would exclude many forms of worthwhile research. The alternative was to extend the scheme to medical research generally, in line with the Commonwealth's Privacy Act 1988, and this is the view that ultimately prevailed.[17] Since both the Commonwealth Privacy Act and the Commission's legislative proposals (if implemented) will eventually operate in tandem in this State (see below), it is clearly desirable that they should cover the same terrain and apply principles which are broadly similar.

WHY HAVE THE LAW REFORM COMMISSION'S PROPOSALS FOUNDERED?

"Foundered" may be too strong a word, but it is nonetheless the fact that the Commission's proposals have not been implemented by the State Government, notwithstanding the very favourable response which they received from the medical profession on publication some four years ago. A number of reasons may be advanced for this Governmental inaction.

First, the Commission's proposals may initially strike many politicians and legislators as novel (and unwelcome) since they involve the authorisation, by Act of State Parliament, of an infringement of a medical patient's rights of privacy. In an increasingly privacy-conscious society, this is obviously a concern. The answer to this point, however, is that the Commission's proposals are merely intended to bring the law in this State into line with that of other comparable jurisdictions in Australia and overseas.[18] The Commission's proposals also contain statutory safeguards to protect patient privacy which are both more explicit and more advanced than those operating in other Australian States.[19] In retrospect, it may be that these safeguards for patient privacy were insufficiently emphasised in the Commission's report.

Secondly, there has evidently been some confusion in the public mind regarding the interplay between the Commission's proposals and the NHMRC

17. Supra n13: the project must have as its purpose "the advancement of medical knowledge or the improvement of health services in WA".
18. Supra nn 6 & 11. It should also be noted that the Commission's proposals would not authorise any new activity but would merely remove doubts concerning the legitimacy of common and long-standing research practices under existing law.
19. See Report supra n 1, ¶¶ 6.1-6.7; 9.1-9.3.

guidelines recently approved by the Privacy Commissioner under the Commonwealth's Privacy Act.[20] The latter (the NHMRC guidelines) seem to have overshadowed the former and some people may think that there is now no need to legislate the Commission's proposals. But this is not the case. The NHMRC guidelines apply exclusively to epidemiological research which involves access to records held by a "commonwealth agency",[21] such as the National Health Insurance Commission. They do *not* apply to State agencies and so do not cover access to records held by the major hospitals in Western Australia nor to the extensive data banks maintained by the State Health Department in Perth. Access to any name-identified records in those data banks, without patient consent, can only be authorised by a change in State law.

Thirdly, the future of the Commission's proposals seems to have bogged down in a political and bureaucratic wrangle over the future of privacy legislation in Western Australia. In the wake of the "WA Inc" saga, the previous Labor Government under Premier Dowding committed itself both to Freedom of Information legislation and to a Privacy Act. So far only the former has emerged. The notion, at least at one stage, seems to have been to incorporate the Commission's proposals regarding epidemiological research into a Western Australian Privacy Bill (thus following the precedent set in the Commonwealth's Privacy Act). But with the foundering of the State's Privacy Bill, the Commission's proposals have also sunk — or at least been greatly delayed.

Finally, a new and virulent threat to epidemiological research has emerged in Australia in the four years since the Commission reported. Some hospitals, both in this State and elsewhere, have become increasingly reluctant to divulge name-identified data to epidemiologists on the ground that the data might later be subpoenaed from the researchers by lawyers and used in private litigation against individual doctors (eg, in negligence suits).[22]

---

20. The NHMRC Guidelines were approved by the Privacy Commissioner under powers conferred on him by the Privacy Act 1988 (Cth) s 95. The Australian Ethics Committee has recently reported that the operation and application of these Guidelines is "not clearly understood": Privacy Commissioner *Fifth Annual Report* supra n 4, 68. The Guidelines are due to be reviewed by the Privacy Commissioner at the end of a 3 year trial period ending 30 June 1994.

21. As defined by s 6 of the Privacy Act 1988 (Cth).

22. The problem has existed in the US for some time: see AR Holder "The Biomedical Researcher and Subpoenas: Judicial Protection of Confidential Medical Data" (1986) 12 Am Journ of Law & Med 405. Holder states: "In recent years, malpractice and product liability attorneys have become extremely interested in the results of epidemiological and biomedical research. Researchers and their records are now commonly subpoenaed in

Foreseeing that possibility, the Commonwealth's Epidemiological Studies (Confidentiality) Act 1981 specifically provides that researchers operating under its aegis are *not* compellable by court order to give discovery of name-identified patient information (or any other data collected in the course of their research) in civil or criminal proceedings.[23] A similar immunity was given to epidemiologists in New South Wales under the Health Administration Act 1982,[24] and the Law Reform Commission recommended that the same immunity be legislated in Western Australia. But this further complicates matters from the legislator's point of view for it is clear that WA's epidemiologists are seeking not merely one exemption from the general law but two: first, exemption from the duty of confidentiality normally applicable in the doctor-patient context, and secondly, exemption from the normal rules of discovery. Whilst, in my view, both exemptions can be justified, the addition of the second to the first further complicates matters and could again delay the passage of legislation.

Of all these various factors, it is probably safe to say that the biggest single factor which has caused the delay in enacting the Commission's proposals is the failure of the State Government to finalise a Privacy Bill and bring it before Parliament. The Government's decision to link the Commission's proposals regarding epidemiological research to privacy legislation generally has had disastrous consequences for the former. There is, however, no reason why the Commission's proposals should not be immediately enacted as a separate, self-contained statute which could later be incorporated into a State Privacy Act, if one ever emerges. The importance of public health research in this State cannot be overestimated and it deserves to be supported by the Government. There could be no better way for the Government to demonstrate that support than by enacting the Commission's proposals now.

The alternative (ie, for the Government not to act on the Commission's report) means that the epidemiologists of Western Australia must continue to justify their research on the basis that it falls within the "public interest" exception to confidentiality, discussed at page 122, above. Whilst a court might accept that argument, there is no certainty that it would do so. It therefore seems advisable to enact specific legislation which puts the legitimacy of this form of public health research beyond doubt. To quote

---

connection with lawsuits". (Cf Report supra n 1, ¶¶ 9.1-9.3, where Holder's views are cited.)

23. S8.

24. S23(4).

again from the Australian Law Reform Commission's report on *Privacy*, cited at the outset of this Note: "Those undertaking ... epidemiological research projects ... should not be encouraged to justify them by reference to an expansive concept of 'public interest', but through legislation specifically authorising a particular activity". It is surely time for the Government of Western Australia to heed these words.

BOOK REVIEWS

Review of Malcolm Turnbull, *The Reluctant Republic*, Sydney: William Heinemann Australia, 1993. pp xi–xvii, 1–358. $19.95.

Mr Turnbull's *The Reluctant Republic* presents a scenario of a "minimalist" republican revision of the Constitution with historical and socio-political observations. He writes in a clear style and pitches his message at the level of the general reader rather than the constitutional specialist. There are very useful tables and appendices in the book, including a draft re-write of the present text of the Constitution, mostly consisting of deletions of words, phrases and clauses where "Crown" and "Governor-General" appear. However, he also formulates major new sections on the Executive, particularly in relation to the discretionary powers of a President.

Turnbull is preoccupied with the "Englishness" of the monarchy. This is clearly seen in the chapter in which he reminisces on the speeches in Sydney on Australia Day 1988, with attention devoted to the pivotal role of Prince Charles (ch 1). The fact that an English woman or man occupies or will occupy the throne and therefore is or will be our Head of State (as Queen or King of Australia: *Nolan's* case (1988) 165 CLR 178, 185-6) is a phenomenon which, in Turnbull's view, diminishes the Australian nation. One may ask whether in multicultural Australia, particularly with its roots in the British Isles, members of one ethnic group are to be singled out for obloquy.

The real issue, though, is the symbolism of the Crown and whether it provides the "cement" for the existing Constitution which would be exposed to crumbling influences under changes ushered in with the replacement of the Monarch by an elected President. My answer and that of many Australians would be that such a change would direct attention away from the Governor-General who exercises ceremonial and administrative duties and, in rare times of constitutional crisis, reserve powers to a person who, being elected by one method or other, would have a mandate to play a political role. Jousting with the Prime Minister, at least to secure public esteem, the new President would play a role which would create more instability than that created by the existence and rare exercise of vice-regal reserve powers under the present system.

Turnbull is particularly repelled by the provisions relating to succession to the throne in the Act of Settlement 1701. He and other republicans including the present Attorney-General, Mr Lavarch, assert that this Act is both sectarian (in ruling out members of various faiths from the succession) and sexist (in making male heirs superior to female heirs in the line of succession). However, the succession law which appears to be written into the Constitution by Covering Clause 2 of the Constitution

is a separate matter to that of the existence of the monarchy and the position of the English Monarch as Queen or King of Australia. The author certainly raises questions as the end of the twentieth century approaches about the operation of principles of equality in the succession law. But they can be dealt with some time in the next decade or at the end of the reign of the Queen at a meeting of Heads of Governments, the constitutions of whose States still recognise the Monarch as Head of State (15 in all: see his Table at p 316). This could result in a new Statute of Westminster-type resolution followed by its legal adoption in the United Kingdom and the other participant countries.

In Turnbull's analysis of the transition to a republic, three major issues arise: the method of electing a President (see his important Table at p 125), the powers of the Presidency and the constitutional status of the States. As to the method of election, Turnbull supports election by a prescribed majority of the Federal Houses of Parliament (not a popularly elected President). As to powers, his most controversial proposal is that the High Court be involved in the determination of issues of illegality which may lead to the dismissal of a Prime Minister. But where does this leave the doctrine of separation of powers?

The major constitutional question however is the question of the monarchical structure of the States. I do not think that *The Reluctant Republic* adequately grapples with the issue of "heptarchy" (seven Crowns). Certainly, any removal of the State Governors would diminish the constitutional status of the States and the functioning of their institutions. (The Canadian example of Lieutenant-Governors — Vice-Presidents? — is not a desirable structure to follow.) Turnbull suggests that the Monarch would not accept a situation where there were monarchical States within a republican Commonwealth.

In the end, attention must be focused on the method of constitutional change. Section 7 of the Australia Act 1986 (UK), the final act of the UK Parliament forming part of the Australian constitutional system, entrenches the monarchy as part of the States' structure (in addition to manner and form provisions in various State Constitutions). Under section 15(1) of the Australia Act 1986 (UK), the assent of all State Parliaments as well as the Commonwealth Parliament is required for changing section 7. The only other method is a constitutional referendum under section 128 of the Constitution. But under section 15(3) of the Australia Act 1986 (UK), that referendum would need to be in a particular form — giving power to the Commonwealth Parliament to alter section 7 of the Australia Act (or, indirectly, giving power to the Parliament to alter the Statute of Westminster 1931 (UK)). Any republican proposal may well founder on this requirement.

Two further questions remain after reading *The Reluctant Republic*: (i) are there not more important tasks in constitutional revision than concentration on a minimalist republican re-write (eg, the restoration of a true federalism by the amendment of sections 81, 96 and 51 (the latter by spelling out specific State legislative powers)); and (ii) what should be the vehicle of major constitutional reform?

As I have proposed in an earlier issue of *The Review* ((1992) 22 UWAL Rev 52), a fully elected constitutional convention appears to be the only democratic method of producing proposals which will succeed at a referendum.

R D LUMB
Professor of Law, The University of Queensland.

Review of Robert Pullan, *Guilty Secrets: Free Speech and Defamation in Australia*, Sydney: Pascal Press, 1994. pp i-xi, 1-241. $16.95.

Is the right to free speech adequately protected by laws of Australia? Many people seem to think that it is, but a provocative new book by Robert Pullan (*Guilty Secrets: Free Speech and Defamation in Australia*) challenges this widely held view.

As Pullan sees it, the Australian legal system, far from protecting free speech, provides a vast array of weapons which can be used to attack it. This includes the laws of defamation, sedition, blasphemy and contempt. Pullan explains how each of these "weapons" can be used by the rich and powerful to silence others (particularly journalists) who dare to criticise or mock them.

The book begins with an intriguing discussion of some of the more obvious absurdities of modern libel law. These are illustrated by the recent Andrew Ettingshausen case, where the unauthorised publication of a photograph of the footballer's naked body in a women's magazine (Ettingshausen's private parts were dimly discernible in the defamatory photograph) cost the publisher a princely $350 000. A tidy sum for such an innocuous injury, the author implies.

The Ettingshausen case is an interesting one because it seemingly sets a double standard for men and women. After all, pictures of naked or scantily clad girls routinely appear in magazines like *People* and *Truth*, even though no permission was given by the girls concerned. No one has ever suggested that this amounts to *libelling* the girls (though it may involve a trespass or breach of their privacy). But if that is the case for women, why should it be any different for men? This is one of the great unsolved mysteries of the Ettingshausen affair.

Ettingshausen, however, is not the only famous figure to have sued for libel in recent times. Paul Keating, Bob Hawke, Gough Whitlam, Joh Bjelke-Petersen, Nick Greiner, Kerry Packer, Christopher Skase, Ros Kelly and Rod Cameron are also among those who, claiming that they have been wounded by what others have said about them, have held out their hands and demanded compensation.

A curious feature of this gallery of libel litigants is that it is comprised almost entirely of men. Suing for slander clearly has more attraction for males than females. Why this should be so is not entirely clear but, as Pullan points out, it is unquestionable that women in high places, unlike their vainglorious male counterparts, rarely resort to libel writs to avenge themselves on those who have hurt them.

Pullan has little sympathy for those who sue for libel. But he has even less patience with the judges who try their cases. These judges are, he claims, a mean-minded and literalistic bunch who have precious little interest in the right of free speech and a poor understanding of the world that surrounds them. For example, Mr Justice Michael Hunt, who presided over the Ettingshausen case, and who is widely acknowledged to be one of Australia's leading libel experts, is said by Pullan to be "cocooned in ignorance of the media" (p 3).

In a similar vein, Western Australia's own first Chief Justice, Archibald Burt, is derided for jailing two Perth journalists for contempt in 1870. The way Pullan sees it, Burt jailed the pair merely for writing that one of his judgments was "unpopular"

with the people (pp 123 - 126). But this is not strictly accurate: the contempt lay not so much in the allegation of unpopularity as in the innuendo that Burt was not an impartial and even-handed judge. That was the real basis of the contempt charge and the reason for the journalists' imprisonment. Even so, as Pullan rightly says, Burt's handling of the affair seems to have been unduly heavy-handed.

Whilst judges and lawyers are painted in a poor light in *Guilty Secrets,* journalists (of whom Pullan is one) are portrayed as a saintly bunch. There is no need for any legal control of journalists, he implies, for they rarely if ever do anything wrong. There is no mention here of the grubbier side of the newspaper industry (cheque book journalism, foot-in-the-door investigative techniques, hidden cameras, "infotainment", etc) nor of the fact that journalists may occasionally be motivated by spite or greed, or simply be incompetent in their reporting. The laws of libel provide some protection against those possibilities, a point which Pullan ignores.

After libel, the other major theme of the book is official censorship, both of the print media and of broadcasting. Australia has a dismal record on both scores. The low-point must surely be the use of armed police to prevent the distribution of Sydney's *Daily Telegraph* to retailers in New South Wales on 17 April 1944. But there have been other equally shameful instances as well. For example, the attempt (in 1938) by the ABC's management to censor a radio broadcast by the distinguished judge Alfred Foster on the topic "Freedom of Speech and Censorship" shows just how twisted the censor's logic can become. As Pullan says, there is something sad and ironic in seeking to censor a speech about freedom of speech (p 56).

What is particularly troubling, though, is that the job of government censor is not one which appeals exclusively to cranks and dictators. Pullan points out (pp 162 & 166) that many university professors and even ex-newspaper editors have been willing to take up the censor's pen when offered a large salary and membership of a government-backed superannuation scheme. It seems that most people, intellectuals and so-called free-thinkers included, will happily jettison their commitment to free speech whenever it suits their purpose.

An interesting feature of *Guilty Secrets* is that it draws heavily on cases and scenarios which originated in Western Australia. Indeed some of the research for the book seems to have been done by Pullan whilst he was resident here. This makes the book of particular importance to local readers. In addition to his criticisms of Archibald Burt CJ (noted above), Pullan also deals with the notorious Gribble affair (pp 131-136) and with a number of important libel actions brought against *The West Australian,* the now defunct *Daily News* and a variety of other local publications.

The jailing of ex-*Sunday Times* reporter Tony Barrass in 1990, and the WA Law Reform Commission's *Report on Privilege for Journalists* (Perth, 1980), are both the subject of critical comment, Pullan taking the view that a journalist should have a statutory right to refuse to name his or her sources in court, even if ordered to do so. But the dangers inherent in granting journalists that right are not fully acknowledged by the author.

Indeed it can be said that the book as a whole often takes a very one-sided view of the issues with which it deals. For example, it is true (as Pullan points out) that censorship can produce absurdity — but does this mean that censorship can *never* be justified? Equally, it is true that the libel laws can stifle public debate — but does this mean that those laws should be abolished *altogether*? These questions, and others,

are not adequately answered in *Guilty Secrets*, the author preferring to point to the glaring deficiencies of the present law rather than to propose solutions to them.

The book concludes by referring to the recent decision of the High Court in the *Nationwide News* case ((1992) 108 ALR 577), which the author believes will mark a fresh start to the protection of free speech by the judges. Time alone will tell whether this prophecy is correct. My own view is that *Nationwide News* will prove to be a "fizzler" — a short-lived aberration — and that the traditional antipathy of the judges to the right of free speech will re-assert itself before long.

GEORGE SYROTA

Review of Helena Kennedy, *Eve was Framed—Women and British Justice*, London: Vintage, 1993. pp i–xii, 1–285. $16.00.

When women protested at Greenham Common, England, Helena Kennedy appeared at Newbury Magistrates' Court where the cases were subsequently tried in a "celebratory atmosphere":

> The magistrates were perplexed and unsettled by the motley collection of women who appeared before them: women of all classes, ages and marital status, gay women, nuns, mothers ... Apart from the male magistrates and a few police officers, the only other man in the court was the court interpreter, who was there to translate the incantation of the Japanese Buddhist nuns ... [H]e charged his translation with some emotion and enthusiasm, and spoke with deep feeling about the horror of war. The women were all found guilty, but my last memory of the courtroom was of a great festival of kissing and hugging, with the little interpreter getting his fair share of affection (pp 258-259).

Helena Kennedy had argued (unsuccessfully) that her clients had "right of way". Then the women spoke forcefully for themselves. Standing together in the dock meant the setting did not intimidate them. They spoke freely, encouraged and supported by one another. The response of the court was to contain this "female insurrection" by trying only one or two women at any one time.

This vignette appears in "She-devils and Amazons", chapter 10 of *Eve was Framed*. Helena Kennedy analyses how women political activists are man-handled through the court system: suffragettes, peace women, women charged as IRA bombers. A prurient interest surrounds women tried as "terrorists". Earlier, Helena Kennedy notes that women tend to fall into "extreme" categories, whether on trial in the literal sense (as accused) or "on trial" figuratively (as lawyers).

Whether accused persons, civil litigants or counsel, women in the courtroom remain oddities. That is why, when the Greenham Common women appeared, the

courtroom changed so markedly. A courtroom full of women is an unusual event. One of the most significant aspects of the Greenham women story is that those controlling the courts — the magistrates and registrars in this case — had to separate women to maintain control. Women en masse are daunting to the courts in a way that men en masse never are, and never will be. After all, courtrooms are full of men every day.

In chapter 1 of *Eve was Framed,* Helena Kennedy covers a number of "theories" holding sway in criminological treatises and in courtrooms throughout the world: the notion that woman-as-criminal is more perfidious than man; that women are not to be believed — whether as accused persons, victim-witnesses or witnesses for an accused. The book then outlines in greater detail the issues highlighted in chapter 1.

In chapter 2, "Playing Portia", Helena Kennedy writes of her experience in becoming a barrister and subsequently Queen's Counsel, against the history of women struggling for acceptance into legal circles on the same terms as men. "The Fragrant Woman", chapter 3, analyses the way "the good wife" is trundled into court to support her husband. Her word is allowed to stand where she supports a "respectable" member of parliament (who happens to be her husband) who has been defamed. Her evidence that her husband has "normal" sexual relations with her is used to "prove" that he wouldn't engage in extra-marital sex with prostitutes or, in other cases, sexual abuse of children or sexual exploitation of his own children. The "good wife" is juxtaposed against the "bad woman" — the prostitute who lies, the child who "makes up stories", the woman "from the wrong side of town".

Chapters 4, 5 and 6, "The Wife, the Mother and the Dutiful Daughter", "Asking for It" and "Naughty but Nice", cover violence against women through criminal assault at home, rape and sexual assault by strangers and others, and sexual harassment. Men, she concludes, need to dispense with an outdated map: "The challenge now is to create a climate of mutual respect in which we can locate our human relationships" (p 160).

In Britain, "black people constitute less than five per cent of the population" (1992 Home Office statistics at p 161). "And She was Black", chapter 7, provides the "reasons" for black women making up 29 per cent of the female prison population — proportionately higher, even, than black men in male prisons:

> Judges will not have it that the colour of a person's skin in any way affects their judgements [sic], even if it is suggested that attitudes may be unconscious or that discrimination can be indirect (p 161).

Helena Kennedy shows convincingly that race is a significant factor in determining guilt and sentence. Young black women had better look out when they act with assertiveness and independence — then find themselves in court. These are "male" characteristics. *Aggression,* as it is described when exhibited by women, means trouble. "Trouble" dictates a finding of guilt and a likely prison term.

"Man - Slaughter" and "The Unreasonable Woman", chapters 8 and 9, look at the way "neutral" legal rules operate. A man is told he's impotent, or a hopeless lover, out-classed by every man in the street? Provocation goes to the jury, with a sympathetic summing up. A woman is told she's frigid or has a bottom the size of a bus? Provocation? Not likely! Helena Kennedy also puts into a "real world" context the "defence" of infanticide, too often portrayed as giving women an "unfair" advantage.

Eve was Framed concludes by looking at standard denials of a bias in the legal system and efforts being taken to address the issue. "When judges were first challenged about gender bias they refused to recognise there was a problem," Helena Kennedy observes:

> They could not see that change had overtaken our political and social institutions — that male behaviour which was once considered acceptable is no longer so, or that what was deemed chivalrous or courtly is now patronising. Conversely, we hear male judges, in relation to women lawyers and defendants alike, asking why they are so aggressive. "Why can't they act like women? Why must they act like men?" In fact, they are acting like lawyers or independent human beings (p 263).

Bias in the courtroom, the law and the judiciary is not limited to bias against women. Bias exists in relation to race, ethnicity, class, sexuality and status. Being a gipsy, a vagrant, or unemployed, for example, raises a number of stereotypical assumptions. It is ludicrous to suggest that these assumptions are never a part of the legal system, that never do judges or barristers or solicitors or forensic psychiatrists hold stereotypical views. Helena Kennedy goes further than mere bias, however. She pin-points "legal processes which produce injustice and the mind-set of lawyers and judges which allows the law to be reproduced in an unfair way" (p 264). At the same time, she is determined to show that the law need *not* be as it is, that the courts need *not* operate so as to be antithetical to the interests of humanity (including women, black people and persons of non-anglo ethnicity), that judges may be capable of embracing positive change. Indeed, she notes that some judges have *already* shown an ability to think outside the narrow mind-set. (Lionel Murphy J's inclusion of non-sexist language into his High Court judgments is referred to at p 53.)

In early 1992 a committee to look at the position of women in the legal system was established in England after a positive vote at the Annual General Meeting of the Bar Council. When Helena Kennedy first wrote to the Chairman of the Bar (in 1988) with this suggestion she was told "the senior men considered there was no problem" (p 278).

Yet the legal system and lawyers will survive only if criticisms are addressed. Helena Kennedy warns against changes being "driven by public relations advisers, who see the value of 'cosmetic' changes on race and women whilst remaining sensitive to the traditionalists' desire to preserve the status quo, as near as damn-it to before" (p 278).

Eve was Framed has a resonance for the law and lawyers in Australia. Rather than judges and others protesting that they are being unfairly criticised, they would do well to pay attention to what is being said and to listen — for once.

In Western Australia, the Chief Justice of the Supreme Court, David Malcolm, has accepted that criticisms are legitimate, requiring a positive response. As Helena Kennedy writes so eloquently in *Eve was Framed*, women and the legal system deserve more from the law and the legal system. Not only should "something" be seen to be done — it must be done.

JOCELYNNE A SCUTT

Barrister and author.

Review of B Fisse & J Braithwaite, *Corporations, Crime and Accountability*, Cambridge: University Press, 1993. pp i-vi, 1-279. $29.95.

In 1994, Denbo Pty Ltd pleaded guilty to the manslaughter of the driver of one of its trucks. The driver had been killed when the truck's brakes failed on a steep road construction site. The truck had been bought second-hand by the company and rushed into service without a proper mechanical check and despite warnings about the possible condition of the brakes. Denbo Pty Ltd was a family company in the road construction business. One of the company's directors — the son of the founder — who had been responsible for acquiring the truck and the direction to put it into service as soon as possible pleaded guilty to charges under the Occupational Health and Safety Act and was fined $10 000. The other director, his father, was not charged.

So far as I know, this was the first time in Australia that a company had been convicted of manslaughter. The company was fined $120 000. At the time of the conviction, Denbo Pty Ltd's business had run down and it was in liquidation. The fine is unlikely to be paid.

Some saw the Denbo conviction as a hollow victory. The authors of this book — Brent Fisse and John Braithwaite — would not agree. They would rightly see the case as a significant milestone in moving the Australian legal culture to accept that companies can be guilty of manslaughter, a counter to the usual refrain of "no soul to be damned, no body to be kicked". It is also a milestone in getting police, prosecutors and the courts to accept the concept of corporate criminal responsibility more generally. Through their writing, Fisse and Braithwaite have been among the prime movers in pushing legal systems in this country and overseas to take corporate criminal responsibility seriously and to respond imaginatively and effectively to the very large amount of harm done by corporate criminality.

This book synthesises the research on corporate criminal responsibility and links it with some of the most spectacular instances of corporate criminality in recent times. There are lucid and concise analyses of the BCCI case, the EF Hutton frauds, the Zeebrugge ferry disaster and Michael Milken's junk bonds scheme, to name a few. Fisse and Braithwaite deploy these cases to illustrate their own accountability strategy, a strategy evolved from ideas which will be familiar to readers of their earlier work.

Fisse and Braithwaite argue for what they term "the Accountability Model". Once a court found a corporation had committed the actus reus of an offence, a number of responses would be possible, depending on the seriousness of the wrongdoing, the complexity of the situation and the size of the corporation. At the bottom of the response pyramid are advice and warnings — and, at the top, corporate capital punishment. In between are civil monetary penalties, accountability investigations (voluntary and court-ordered) and criminal sanctions. The key idea here is to design strategies of increasing severity which can mobilise the company's internal structures of responsibility. If we accept that companies are good at finding and promoting those responsible for their successes, there is reason to think they

would also be good at finding and punishing those responsible for their failures. The trick is to motivate the company to find the failures.

The flexibility and dynamism of the Accountability Model are two of its great strengths, given the variety of corporations and their misdeeds. The graduated scale of responses is intended to induce co-operation and good faith with the less drastic responses at the bottom of the pyramid for fear of the more drastic responses available higher up the scale. A key feature of the Accountability Model is the opportunity for the company — either voluntarily or by court order, depending on the circumstances — to conduct an investigation and to report to the court on how the wrongdoing occurred, to allocate responsibility and punishment to those individuals responsible for the wrongdoing, to compensate the injured, and to propose measures to prevent repetition of the misconduct. The report would then be available to the court and the media. The court's response to the report could also be flexible. It may be that the report, the attendant public humiliation of the company and the individuals concerned, and the company's own disciplinary responses would suffice. Or it might be that the report justified further sanctions by the court in the form of fines or prosecution of individuals. Or it might be that the company deserved to be wound up.

No doubt, readers will see a number of objections to this Model. Fisse and Braithwaite do too and they provide powerful responses and some convincing examples of the Model at work. Companies that value their good name and their business are likely to investigate and respond more effectively, more quickly and more cheaply than the standard investigative agencies. Indeed, the very scale and cost of some of the cases stymies external investigation altogether or leads to weak compromises. Under the Accountability Model, the company pays for the investigation into itself. If it does a thorough job — and this will be subjected to scrutiny by the court and the media — the potential for identifying those truly responsible for wrongdoing is far greater than the conventional techniques. This is not a soft option for powerful corporations. It offers genuine accountability in cases where currently there is none or very little.

Corporations are major actors in social and economic life. Their enormous power to do good is accompanied by the capacity to wreak great harm. Public policy must ensure that both the companies in their corporate selves and the individuals who are the moving spirits and hands of the company bear the responsibility for both the good and the evil that they do. This is particularly so in an era when there are great rewards for managers who cut costs. They and their shareholders need to expect significant penalties for those who cut costs by cutting corners.

The Denbo case signals a new openness to development in the law on corporate criminal responsibility in Australia. Similarly, a Bill which will replace the *Tesco* test of corporate criminal responsibility with a test based on a corporate culture of non-compliance has been introduced into the Commonwealth Parliament in June 1994 as part of the national Model Criminal Code project. The Fisse and Braithwaite agenda maps the road ahead. Their model might well have traced the lines of responsibility and made the sanctioning more meaningful in the Denbo case. The application of their model by the Trade Practices Commission in the CML insurance case in Northern Queensland shows the potential, and some pitfalls, of the Accountability Model.

Corporations cause a great deal of harm from their criminal activity. Some 500 deaths occur in the workplace annually in Australia, to say nothing of non-fatal illness

and injury. Defective products add to these statistics. By no means all of this is the result of criminal default. But the fact that the Denbo case is the *first* conviction of a company for manslaughter reveals a worrying lack of perspective on corporate criminality. Fisse and Braithwaite deserve a great deal of credit for their work in correcting that perspective.

DAVID NEAL

Barrister; formerly member of the Victorian Law Reform Commission.

Review of S Parker, P Parkinson & J Behrens, *Australian Family Law in Context: Commentary and Materials*, Sydney, Law Book Co, 1994. pp i-xxxv, 1-938. $95.00.

If there is one clear problem with this book, it is that it covers too much ground. It combines both inter-disciplinary materials on social problems relating to family law with primary legal materials relevant to a reasonably mainstream family law course, and it seeks to do this in just 938 pages. The result is that it covers some topics much too thinly. The subjects of nullity of marriage and dissolution of marriage, for example, are together dealt with in just 30 pages. (Child support, on the other hand, takes up 63 pages.)

This is not to say that this book consistently falls between two stools. Its collection of materials on the social context of family law is often well-chosen and presents points of views which will be of undoubted value to law students. The pity, perhaps, is that the authors did not seek to concentrate on this particular aspect of their book, and leave the more black-letter law materials for another work altogether.

It is a common failing for reviewers to criticise a work for not doing what its authors do not seek to do. So how does this work match up to the aims set by the three authors of the present work? It is clear from the Introduction that in this book the authors wish to present law students with alternative points of view in respect of family law and thereby challenge their current ways of thinking. It also seems clear from the Introduction that the authors wish to present a variety of points of view. Why else would they have noted that whilst this work would include a good amount of feminist and critical material, "other perspectives have been included and, we hope, respected" (p 2)? The fact is, however, that perspectives other than those which may be broadly classed as "progressive" are thin on the ground. This is a pity, because well argued theses of a more conservative nature can provide just as much provocative thought as those by more radical proponents. To give just one example, the authors properly include an extract from Mathews J's majority judgment in *R v Harris & McGuiness* on why a post-operative male-to-female transsexual should be regarded at law as a woman. But there is no extract from Carruthers J's dissenting judgment

in this case which presents forceful arguments to the contrary.

The authors may perhaps respond that they deliberately intend that their work be radical, and make no apology for it. The problem with this approach, however, is twofold. First, it deprives readers of the benefit of challenging arguments which do not follow the straight progressive ticket. Secondly, it may lead the authors into perceiving the law from just their own point of view and thereby presenting a questionable impression of the current state of the law, and even flogging dead horses. For example, at the beginning of their chapter on discretion in custody and access cases (ch 25), the authors state: "One theme which runs through the whole chapter is the tendency of many judges to adopt and perpetuate a normative picture of the 'the family' (nuclear, heterosexual, white, middle class, traditional division of labour) through the exercise of discretion in children's matters" (p 801). Perhaps the present reviewer is particularly obtuse, but he gained the impression from reading this chapter that, whatever the law may have been, it had passed this point some time ago.

Little fault can be found with the statements of law in this work, and such as can be found are mostly of a carping nature. For example, proceedings for an alteration of property interests under section 79 of the Family Law Act do not necessarily involve "divorcing parties", as statements on p 433 may imply, and the reference to "the factors in section 79(2)" towards the bottom of p 615 should be to the factors in section 79(4).

The authors' language and style reflects the radical thrust of their work. So sex (signifying the differentiation of male and female) is always referred to as "gender", leading to such ungainly expressions as "gender equality" (p 102). And ideas are not criticised: they are always subject "to critique". (On p 801 the word "critique" even becomes a transitive verb: "In this chapter we ... critique examples of the operation of discretion".)

The authors' use of abbreviations is surely overdone. Though one may well use the abbreviations "FLA" (for Family Law Act) and "MA" (for Marriage Act) in one's personal notes, is this appropriate in a work of scholarship? Sometimes comprehensibility is at stake. How readily intelligible are sentences such as: "The additional components of SPP, that is, those related to the number of children in the family, were moved over to FP and the maintenance income test made to apply" (p 453), and "The upshot is that many sole parents now rely heavily on a mixture of SPP and FP" (p 454)?

A particularly commendable feature of this work is its regard to proposals for the reform of the law, especially by governments or law reform bodies. Indeed, entire chapters are devoted to this topic. This is particularly fortunate in light of the legislative changes to the Family Law Act that the Commonwealth Government has announced it will introduce into Parliament in the very near future. These proposed changes to the law would not have been known to the authors when they were preparing this work. By having such detailed regard to proposals for law reform, the authors have undoubtedly saved their work from a premature end.

ANTHONY DICKEY

Queen's Counsel.

Review of Phillip Lipton & Abe Herzberg, *Understanding Company Law*, 5th edn, Sydney: Law Book Co, 1993. pp vii–liii, 1–735. $65.00.

In the decade since its first publication, *Understanding Company Law* has earned a well deserved reputation as an excellent introductory textbook for students of company law. In the Preface to the first edition the authors explained that the primary purpose of the book was to provide a guide to students of accountancy and commercial courses. It was hoped that it would also be of assistance to others, such as practising accountants, businesspeople and shareholders. The first and subsequent editions of the book have certainly achieved their purpose. In addition, this book is a useful text for law students encountering Company Law for the first time.

The coverage is comprehensive, dealing with the essential features of the company from formation to dissolution, and with regulation of all aspects of corporate activity. A useful feature of the book is the bibliography at the end of each chapter which has grown in length with each edition.

The authors' descriptive and explanatory style, whether referring to procedural requirements or conceptual principles of law, is maintained in the fifth edition. Contributing to this are the clear and succinct summaries of the facts of what are frequently complicated cases. Extracts from leading cases throughout the text highlight for the reader the importance of decided cases as a primary source of law. This is of particular importance for the reader who either is not able or does not wish to make use of law reports or casebooks.

There are two noteworthy features of the fifth edition. First, it incorporates materials from the supplement to the fourth edition, and amendments to the Corporations Law and reform proposals since that supplement was published. Second, there is included with the textbook a computer tutorial disk.

The difficulty of keeping any textbook on Company Law up to date is immense, given the amount of legislative change and new case law in this area. It is to the credit of the authors that they have kept their work up to date through five editions in ten years. Although supplements are one way to deal with change, they are not as satisfactory as integrated texts and from this point of view the fifth edition will be welcomed by all users of the book.

Unfortunately the pace of legislative change in this area means that already there have been developments in the law which are not discussed in this edition. The authors have dealt with new developments to the extent that they can by referring to the direction that the law is likely to take based on draft legislation and committee reports.

The fifth edition is based on materials available to the authors as at May 1993, and incorporates discussion of the Corporations Legislation Amendment Act (No. 1) 1991 and the Corporate Law Reform Act 1992. The reforms effected by the former Act to the accounts provisions are discussed in Chapter 15 and the new provisions to regulate insider trading are discussed in Chapter 19.

The important changes introduced by the Corporate Law Reform Act 1992 are

discussed in a number of chapters. The financial benefits to related party provisions are discussed in chapter 12. The recast section 232, the restructured insolvent trading provisions and the civil penalty provisions in Part 9.4B of the Corporations Law are discussed in chapter 13. Implementation by the 1992 Act of many of the Harmer Report's insolvency recommendations has led to Chapter 24 on Liquidations being substantially rewritten. The new voluntary administration scheme dealing with companies in financial difficulty is dealt with in Chapter 23.

Since publication, the Corporate Law Reform Act 1994 has been enacted, implementing many of the provisions contained in earlier drafts of the Act, namely the Corporate Law Reform Bill (No. 2) 1992 and the Corporate Law Reform Bill 1993. Both drafts are discussed in the fifth edition. The reforms enacted by the 1994 Act are relevant to the discussion of insurance and indemnity of company directors and officers in Chapter 13, and continuous and enhanced disclosure in Chapters 13 and 15.

Further changes which will occur consequent upon passage of the Corporations Legislation Amendment Bill 1994, introduced into Parliament on 24 March 1994, are not dealt with in the fifth edition.

The second notable feature of the fifth edition is the inclusion of a computer tutorial disk. The disk has been prepared by the Queensland University of Technology (School of Accounting & Legal Studies) and is based on computerised lessons which have been developed and used at that institution for some years. An introduction to the computer tutorial disk and installation instructions are located at the end of the book, and the disk is provided in a separate jacket.

The tutorials are grouped into four sections: Introduction to Corporations, Corporate Financing, Corporate Management and Corporate Restructuring. Within these sections there are a total of 20 modules, which cover the materials dealt with in the 24 chapters of the book.

There are four types of questions in the tutorial program: multiple choice, true\false, short answer (where clues and prompts assist selection of the correct answer) and matching of questions and responses. Once an answer is attempted, the correct answer appears on the screen accompanied by a reference to the relevant page in the textbook. The program also enables the user to see their results displayed on the screen and to print the results.

A Teachers' Manual which accompanies the disk is available. In the Manual, the text of all the questions and fact scenarios on the disk are reproduced with the suggested answer and feedback. A "tutor mode" option allows the teacher to turn off "randomization" of questions and suggested multiple choice solutions and to proceed to a designated question. The authors of the tutorial disk do not recommend its use for formal assessment nor is it suggested as a replacement for other forms of instruction.

Aids to learning in the form of computer tutorial programs are to be welcomed. They provide an additional learning tool for students. However an important factor to which the authors of the tutorial disk refer is that the exercises are time-consuming. In their experience, each module takes an average student at least 30 to 45 minutes. With this in mind, as long as use of the tutorials is optional, many students are likely not to take the opportunity to use the program.

For optimum use of the program the course being taught will need to follow

Understanding Company Law closely. If the course does not cover all aspects of the textbook and the tutorial questions, the course organizer would be well advised to provide guidance to students about the aspects of the tutorial on which they should work. Otherwise a student is likely to be discouraged if he or she is unable to answer all the questions correctly. The program does not allow for a student to select the questions to be attempted.

Overall, this program has clear benefits for students in courses of study where the primary object is to acquire knowledge of the existence and content of legal rules. Accordingly, the computer tutorial has much to offer the students at whom *Understanding Company Law* is primarily directed.

ROBYN CARROLL

Lecturer, The University of Western Australia.

Review of Kenneth R Simmonds, *Antarctic Conventions*, London: Simmonds & Hill, 1993. pp i, 1-324. £50.00.

This volume is part of a series whose purpose is to present the texts of certain international treaties of major significance, with selected interpretative materials. This will cover a substantial gap in international law. There has been a tendency to publish multi-volume texts on various areas of international law, sometimes reaching 20 volumes, and also multi-volume texts with detailed commentaries. Whilst both serve essential purposes, it is often difficult to find the major treaties in a specified area in one volume.

Antarctic Conventions consists of a review of the Antarctic System and the texts of the Antarctic Treaty 1959, the Convention on the Conservation of Antarctic Seals 1972, the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR), the Convention on the Regulation of Antarctic Mineral Resource Activities 1988 (CRAMRA) and the Protocol on Environmental Protection to the Antarctic Treaty 1991 (the Madrid Protocol).

This book may be compared with the *Handbook of the Antarctic Treaty System* which contains the Conventions and the recommendations in force. The *Handbook* can be seen as a complete coverage of Antarctic System measures. In particular, recommendations are an essential part of the Antarctic System. On the other hand, recommendations change with each Consultative Meeting and the addition of the recommendations would have produced a very substantial volume. The advantage of Professor Simmonds' book is that it contains all the major treaties of the Antarctic System in a format which is very easy to use.

Professor Simmonds provides a most useful examination of the Conventions

themselves which is especially helpful with regard to the Madrid Protocol. Examples are the discussion of the role of Non-Consultative Parties and the warships exception. It is pointed out (p 20) that Article 3 is the single most important provision of the Protocol. This is clearly the case. However the principles in that Article are of a general nature. The question arises as to whether these principles will be actually observed in practice, having regard to the repeated non-observance of some of its much weaker predecessors. Examples are the failure to prepare environmental impact statements for major activities and the numerous problems of the French airstrip.

Whilst there is much to be praised in the Annexes, it may be pointed out that they are mainly based on existing measures. This is significant because it enables one to look at the Consultative Parties' past record on matters such as environmental impact assessment (Annex I) as an indication of the likely success of the Annexes.

Of particular interest is the inclusion of CRAMRA in light of the prohibition on mineral resource activities in Article 7 of the Madrid Protocol. No Consultative Party has ratified CRAMRA whereas the process of ratification of the Protocol is well under way. However it is suggested that the inclusion of CRAMRA is well warranted for a number of reasons.

With respect to Article 7, the ban on mineral activities shall continue unless there is, inter alia, in force a binding legal regime on such activities (Article 25(5)(a), Madrid Protocol). CRAMRA would presumably be invoked as a model for such a regime in this case. CRAMRA and the process of its negotiation provides a useful commentary on the development of the Antarctic System. For instance, the complex membership and voting in the Regulatory Committees underlines the persistence of sovereignty as a major concern nearly thirty years after the negotiation of the Antarctic Treaty. CRAMRA has also influenced the Madrid Protocol, particularly in relation to the detailed environmental principles.

Of wider interest is the extent to which CRAMRA may be examined as a model for other areas in which joint development is seen as a compromise for conflicting resource claims. CRAMRA is especially interesting because of the number of negotiating participants and the complexity of the treaty. Whilst the Antarctic Treaty has been suggested as a model for solving the South China Sea dispute, equal attention should be given to CRAMRA.

FRANCIS AUBURN

Associate Professor, The University of Western Australia.