> gence. Accordingly, the common law applied. *Rondel* and *Saif Ali*, albeit in obiter dicta . . . are authority that solicitor advocates are immune. But in Victoria, in my view that is not correct. One reason, is that, if my understanding of the Act is correct, solicitor advocates are 'barristers' within the meaning of that expression in the Act and not immune. This follows from solicitors being entitled from the Act to practice as barristers and vice versa. . . . Thus, the liability of a 'solicitor advocate' is that of a 'barrister' for the purposes of s10. Such a practitioner is vulnerable to suit for professional negligence.
>
> In my view, public policy could not provide a proper foundation for a rule in Victoria that solicitor advocates enjoy the immunity which *Rondel* and *Saif Ali* define for members of the English Bar in the context of law that denied it to barristers.

Thus, in the view of Mr Justice Marks, both barristers and solicitors who practice in Victoria are liable for professional negligence and do not enjoy the immunity from suit referred to in *Rondel* and *Saif Ali*.

conference on the jury system

> Sir, I have found you an argument; but I am not obliged to find you an understanding
>
> Dr Samuel Johnson, in Boswell, *Life of Johnson*

constitutional guarantees. Over a period of three days from May 20 – 22 papers were presented to a Conference on the Jury System held at the Australian Institute of Criminology. The Conference was begun by an address from Mr Justice Lionel Murphy on s80 of the Constitution. His Honour noted that s80 of the Australian Constitution, which guarantees trial by jury for indictable commonwealth offences, was obviously modelled on artIII, s2(3) of the United States Constitution. This article has been interpreted by the Supreme Court to confer a personal right upon an accused which can be waived at his or her election. His Honour, however, contended that there are powerful arguments for and against the right to waive in Australia. Mr Justice Murphy asserted that the 1986 case of *Brown v R* 60 ALJR 257, 'may not be the last word on this issue'.

His Honour went on to assert that the guarantee of trial by jury is not restricted to the Australian States. He said that this interpretation of s80 would be inconsistent with the general framework of the Constitution. His Honour pointed out that s80 is in the Chapter concerning the judicature, not that relating to the States. He argued that:

> the Constitution of the Commonwealth would be absurd if it guaranteed a jury trial for federal offences for Australians generally but not for those in the Territories. It would be especially absurd if it did not apply to the Australian Capital Territory which was intended by the Constitution to contain the seat of Government, the Parliament and the High Court.

publication of prejudicial material. His Honour maintained that the greatest threat to the institution of trial by jury is the 'increasing tendency to trial by media in newsworthy cases'. He suggested that some sections of the media are tending more and more to attempt to orchestrate trials by publication of prejudicial material before and during them. As to internal threats, his Honour suggested that the duties of prosecutors should be spelled out in legislation and sanctions provided for transgression of those duties. He said that there should at least be voluntary peer review among prosecutors to inhibit violation of the standards. His Honour also argued that the accused in a trial of any serious offence should be entitled to the advice and assistance of counsel and that if he or she could not afford it, the community should pay for it as part of the price of justice.

forensic testing. Two scientists from the Australian Defence Forces Academy and the Australian National University, Doctors Magnusson and Selinger, in their papers argued for the introduction of standards into

forensic testing in Australia. They proposed that such standards would incorporate full information about techniques, the precision attainable, the range of materials to which the tests could be applied, the controls necessary to avoid spurious results, and the safeguards necessary to avoid invalid conclusions. Summary materials, under their proposals, would provide general information about the method, its capabilities and its dangers, in a form intelligible to counsel and, if necessary, the court.

complex commercial cases. Professor Harding, the Director of the Australian Institute of Criminology argued strongly against the implementation in Australia of the English Roskill Committee's recommendations to in part withdraw from trial by jury complex commercial cases. The Roskill Committee's report recommended the setting up of a Fraud Trials Tribunal with two lay members to try complex commercial cases. Professor Harding argued that

> the Roskill Report itself does not make out even a prima facie case of jury incompetence . . . its attitude is more an article of faith than a construct of empirical evidence.

Professor Harding, on the contrary, argued that worthwhile research tending to confirm jury competence in such matters did exist in the research of Baldwin and McConville (*Jury Trials* (1979)). He concluded that the media debate about jury incompetence in Australia had been 'rather ill-informed'. He pointed to the report of the New South Wales Law Reform Commission (1986), the background paper of the Law Reform Commission of Victoria (1985), and the discussion paper of the Australian Law Reform Commission (1986) as 'sober and scholarly analysis' which should introduce into the jury debate much needed information and commonsense. Professor Harding concluded that not only was there no case for further erosion of the jury system but rather a positive case for strengthening and possibly extending it. He suggested that a blueprint for doing so would be the recent recommendations of the NSWLRC in its report on *The Jury in a Criminal Trial*, which 'range from such questions as jury comfort and dignity through the question of eligibility and randomness to matters of jury protection, prejudicial pretrial publicity and privacy'.

nswlrc report. Paul Byrne of the New South Wales Law Reform Commission concentrated his remarks on the three aspects of the recent NSWLRC report which had created the most discussion during its preparation and the proceedings of the seminar up to that point:

- the process of jury selection with particular emphasis on the right to make peremptory challenges of potential jurors;
- whether the verdict of the jury should continue to be a unanimous one; and
- whether the jury is a suitable tribunal for the trial of complex commercial cases or other cases which involve the presentation of technical and scientific evidence.

Mr Byrne noted that in respect of the first two of these topics, there was a division amongst members of the Commission as to the approach which should be taken. Although the third area resulted in the Commission reaching unanimous agreement, this was nevertheless a topic which had been of perennial concern to critics and champions of the jury system alike.

evidence transcripts. The Senior Legal Officer with the New South Wales Law Reform Commission, Meredith Wilkie revealed that two-thirds of the jurors surveyed by the New South Wales Law Reform Commission last year felt they would have been helped by a copy of all or part of the transcript of evidence. Nine of those jurors had in fact requested a copy of the transcript. The Commission in its report had since recommended that the Jury Act 1977 (NSW) should confirm the discretionary right of the judge to provide

a copy of the transcript of evidence to the jury. Ms Wilkie noted, however, that administrative problems such as the necessity to edit transcripts to ensure inadmissible material was removed and the fact that in some cases it might be impossible to produce a transcript in time, were real difficulties, but not ones which were insurmountable. Ms Wilkie also asserted that while the judge should retain control over the asking of questions, judges should advise juries of their right also to propose questions.

revelation of jury deliberations. Immediately before the ALRC undertook its public hearings in all capital cities of Australia on the laws of contempt, Professor Chesterman put forward the ALRC's proposals on jury secrecy. He noted that the 'less favoured proposal' was basically the suggestion of the New South Wales Law Reform Commission. This proposal would simply prohibit disclosure or publication of particulars of jury deliberations in a criminal trial until sentence had been passed; supress the revelation of identity of jurors, except that a juror could disclose his or her own identity; prohibit the soliciting or harrassing or inducing of jurors to disclose or publish their identities or particulars of jury deliberations, and prevent jurors from soliciting publication of jury deliberations 'for the principal purpose of financial gain'. However, Professor Chesterman noted that the preferred position of the Commission was tentatively that there should be some additional restrictions to prevent revelation of jury deliberations identifying the trial concerned for a period of one year after the jury verdict or until all appellate and other legal processes relating to the trial had concluded, whichever was the latter. Professor Chesterman stressed, however, that in exceptional cases a 'public interest defence could allow publication of such information.

odds and ends

domestic violence. The government responded quickly to the Report of the Australian Law Reform Commission on Domestic Violence in the Australian Capital Territory (ALRC30). The preparation of draft legislation, which substantially follows the Commission's recommendations, was achieved in a little over a month. The major recommendations of the Report are outlined in the April 1986 issue of *Reform* ([1986] *Reform* 77).

In Western Australia a comprehensive and large (over 300 pages) report, *Break the Silence*, has been published by the Task Force on Domestic Violence to the Western Australian Government. Following the passing of legislation in 1982, which provided for protection or restraining orders, the Western Australian Government considered that the wider issues relating to domestic violence should be investigated, including the legal response, and in early 1985 the Task Force was set up.

The report covers the legal process, intervention services and strategies for prevention. On the legal side, recommendations are made:

- to clarify and broaden police powers of entry in domestic violence cases, with appropriate safeguards;
- to make spouses compellable witnesses in criminal prosecutions for violent offences;
- to amend the Bail Act 1982 to allow the granting of bail to be deferred for a period sufficient to enable a person to obtain a restraining order against the person in custody;
- to give a court power to revoke a firearms licence where there is evidence of domestic violence and that the permission of cohabiting adults be obtained before a firearms licence is issued;
- to encourage police to take a greater role in obtaining restraining orders on behalf of victims;