LEGGISLATIVE FAILURE AND LAW REFORM

The final push before the last Parliament was dissolved may have improved the appearances of politicians on the hustings, but it left scars on the Criminal Code. In those final weeks, bills governing the production of records in sexual assault cases and increasing the investigative powers of the police were hastily enacted. This is not a new phenomenon. The weeks before the call of the 1993 federal election saw the quick enactment of
stalking and child pornography provisions. Bills are also routinely rushed at the end of Parliamentary sessions. This suggests that legislatures, as well as courts, are vulnerable to institutional failure. When courts suffer from systemic delay, they at least recognize the problem and try to make amends. Legislators, however, seem unable to resist systemic speed when it comes to politically popular, quick-fix solutions.

Bill C-95, the so-called biker-gang legislation, provides a new offence of participation in a group "having as one of its primary activities" the commission of an indictable offence punishable by five years' imprisonment. The former Minister of Justice deserves some credit for not, in a modern version of the infamous former s. 98 of the Code, making biker gangs illegal. But only a little. The new legislation can still apply to those up to politically motivated mischief. The legislation also employs a reverse onus on bail, makes exemptions from important restrictions on wiretaps and increases the use of parole ineligibility, peace bonds and mandatory sentences. Like the child pornography provisions, it will be subject to Charter challenges. It may survive, but the question of whether legislation is "Charter proof" is all too frequently replacing the more important question of whether it is based on good policy. The biker wars produce victims, including an innocent child killed in the streets of Montreal, but this legislation, like other crime control fixes, proceeds on the frequently false assumption that the passage of a criminal law controls crime and increases security.

Bill C-46 governing the production of criminal records is another in a long list of bills that simply respond to Supreme Court decisions, in this case R. v. O'Connor. Whether they follow the Supreme Court's direction (i.e., mental disorder, jury selection, fleeing-felon rule) or run counter to it, there is reason to be concerned about this reactive, piecemeal form of legislation. Legislatures should be more proactive and comprehensive than the judiciary. There is a place for a contextual approach, but this is not inconsistent with more ambitious law reform. Comprehensive legislation could have codified the substantive, procedural and remedial dimensions of disclosure and production while still providing for contextual treatment of therapeutic records in sexual assault cases. Legislators would only have had to reconcile any exceptions with more general principles.

Comprehensive legislation may also be less likely to result in confrontation with the courts. The legislation in response to R. v. Seaboyer, expanded the terms of the debate from the court's evidentiary rulings, to the prohibited act and fault element. As such, it may prove less vulnerable to Charter challenges. In contrast, more recent legislation constitutes "in your face" rejections of the rulings of the majority of the court in R. v. Daviault, and now O'Connor. The s. 33 override is the appropriate mechanism when Parliament strongly believes the court got it grievously wrong. It ensures sober second thoughts both when invoked and when the override expires in five years and after the next election.

The biker gang and sexual assault records legislation were passed with all party approval and few dissenting voices. The same pattern occurred
with the Seaboyer and Daviault legislation, as well as the child pornography and stalking laws. Defence lawyers and sympathetic academics need to educate the public about their concerns and create some political space for dissent. These controversial issues at least produce dissents among the independent members of our judiciary.

Despite its failures, the legislature cannot be abandoned if only because much law reform is necessary. The final weeks of the last Parliament also saw passage of procedural reforms and high-risk offender legislation which at least had the virtue of having had adequate time in committee. The new Minister of Justice must establish a plan for legislative reform early in the new government's mandate. It should include comprehensive procedural reforms to reflect the Charter and other changes in the practice of criminal law and a better codification of the principles of criminal liability.

There is also a need for a new collaborative approach to law reform. Police, prosecutors, defence lawyers and academics no longer own criminal law reform in a way they once did. The criminal law is and should be a matter of wider public interest. Future consultations will quite rightly include those representing victims and potential victims of crime, women's groups, Aboriginal people, minorities and other groups. These multiple stakeholders should not be played off against one another and can benefit from talking to each other. The result might be better, more diverse policies and even the erosion of mutual stereotypes and distrust. These groups might agree that law reform is not always simple and not always the solution. The new Law Commission, and in particular its study committees, may be able to co-ordinate these types of discussions, as well as to illustrate the limits of law reform as a solution to complex social problems. Nevertheless, it and the Justice Department should not forget the need to modernize the Criminal Code. We must start to work together now if more legislation is not to be rushed through at the end of the current Parliament's mandate.

As his farewell indicates, this issue marks the retirement of Alan Mewett as editor. No one and certainly not I can really replace Alan. His kind words of introduction, wise reflections and continued participation are greatly appreciated. Our sincere thanks also to Alan Gold and Judge Gilles Renaud for their valuable service. With this issue, Gary Trotter joins the editorial board as the new book review editor. In the hope it will assist in tracking and participating in the law reform process, Henry Brown includes legislative developments in his contribution.

K.R.