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LAW REFORM, WHY?

Hon Justice M D Kirby

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission

INTRODUCTION

1. There are at least 14[1] bodies busily devoted to law reform in this part of the world. In Victoria, not content with one, you have three such bodies.[2] I am the Chairman of the first federal law reform commission. Its first Members were appointed in 1975. Two of the first five Federal Commissioners came from Melbourne.[3] But important as the work of law reform agencies may be, they constitute only part of the law reform movement. We live in a new age of reform. Not a year goes by in any jurisdiction in Australia, but substantial, innovative legal reforms become part of the law that governs us. Parliaments and the Departments of State produce a great deal of legislation, some of it effecting reforms in our society. Royal Commissions, Inquiries and consultative bodies proliferate. Major reforms sometimes follow their reports. I do not deceive myself that bodies like the Law Reform Commission enjoy the major responsibility for effecting reforms of the law. They nevertheless have an important role that must be seen in the context of changes originating from very many sources. Viewed in this light, it is apt to ask "Why all this talk about reform?", "Why has the pace so increased?", "What is so wrong with the law, that we never get a day's peace from those troublesome people in society that seek its change?", "What criteria should we adopt to change particular laws?", "Are we in danger of changing so much, that the stable elements in our society are under threat?". I am often asked these questions by anxious citizens, dazzled and not a little disturbed by what they see as the forces of instability and uncomfortable change.

2. I am grateful for this occasion and in this city (usually imagined by mere New South Welshmen to be the heartland of Conservatism in Australian life) to examine with you some of these questions. I will do so with a few

illustrations from the work of my Commission. In particular, I want to illustrate the rationale for law reform, by reference to the most recent task set for us by the Federal Attorney-General, Mr. Ellicott. No apology is sought or offered for the establishment of law reform commissions. The question for tonight is not "Law Reform Commissions, Why?" but "Law Reform, Why?" The Prime Minister, speaking in this city earlier this year, gave an answer to this question that most Australians would regard as acceptable.

> "There are many aspects of Australia's institutions where reform is needed. Reform is needed wherever our democratic institutions work less well than they might. Reform is needed wherever the operation of the law shows itself to be unjust or undesirable in its consequences. Reform is needed wherever our institutions fail to enhance the freedom and self-respect of the individual..."[4]

After tracing the political traditions, generally of a non-partisan kind, whicl secured the end of transportation, the establishment of responsible, representative Government, the secret ballot, the Factories Acts and the concept of a fair wage and the arbitration system, Mr. Fraser took this stand:

> "These moves show that Australia has always been a country where constructive reform has been welcomed and encouraged. Achieving a better life for all Australians through progressive reform will be a continuing concern of the Government. The debate in Australian politics has never been over whether reform is desirable. Australians, whatever their politics, are too much realists to believe that no further improvement is possible and too much idealists to refuse to take action where it is needed. The debate has rather been about the kinds of reforms and the methods of reform that are desirable."[5]

With nothing less than Prime-Ministerial authority I could therefore turn the tables tonight. I could pose the question for you "Law Reform - Why Not?" I will not do so. Instead, I intend to explore with you the reasons why, entirely above party politics, we should have come in this country to the view that further improvement is always possible in the law. I will then examine the criteria by which change and the pace of change are to be decided.

WHAT IS LAW REFORM?

3. "Reform" does not mean simply "change". "Reform" is change "for the better".[6] Indeed, it is precisely because it involves change for the better that law reform is a controversial business. The fact is that different people will have different ideas about what is "better". Rare indeed will be the reform of the law that can secure universal approval. That recent major Commonwealth innovation "The Family Law Act 1975", gained the support, I would judge, of a great section of the Australian community. But the support was not universal. Opposition ranged from those who saw it as an attack upon the sanctity of marriage, to those who condemned it as imposing already outmoded rules upon "liberated" relationships. The reform of Rape procedures, a matter under scrutiny in all States, is another case in point. All of us would wish to relieve the victim of rape from harassment that turns the criminal trial of the accused into an inquisition of the sexual life of the prosecutrix. But how do we do this, without abandoning the time-honoured protections which British societies have afforded in criminal trials? The accused also has rights. Some balance must be struck which shows greater respect for the victim, accords more closely with our modern opinions about private morality[7] but does not debar the court and the jury from scrutiny of facts that may be relevant to the issue of consent.[8]

4. But law reform is not only the improvement of the law. Hopefully all law amendments, whether in legislation or decisions of higher courts, quasi legislation or administrative orders involve improvement of some kind. As we have come to understand "law reform" in the context of modern government in Australia, it means something more than just functional change.[9] It should involve rethinking the concepts of law to see whether those concepts fit modern circumstances. One rather angry Canadian professor (I should admit that he is a disillusioned ex law reformer) wrote a challenging article which he called *"Law Reform Needs Reform"*.[10] In it he attacked the "boom industry" approach to law reform. The concept of an academic production line which delivers large numbers of reports as the only contribution to law reform, he found quite unsuitable for the modern age. He suggested that law reform was the process of identifying and clarifying the standards of the legal order governing society. Once those standards were identified, the task of law reform (whether by government, special inquiries or law reform commissions) was to find ways of achieving those standards.[11]

5. I think the fact has to be faced, even in our Antipodean remoteness, that we are witnessing today major changes in society that for good or ill involve radical changes, in terms of their traditional roles, in all the major institutions of society. These include the Church, the family, the Government, our educational system and the law. Values and truths accepted previously, no longer command unquestioning support. Traditionally, the law tends to address the audience of society in terms of absolutes. Whether in the form of legislation or court decisions, laws express values and interests which do not conveniently stand still. Paul Tillich, one of the great theologians of this century, saw laws as "the attempt to impose what belonged to a special time, to all times". There is a germ of truth in this. And it is because values change, attitudes vary, and interests and power relations in society alter, that what is suitable for one time may become perfectly unsuitable for another.

6. There are countervailing dangers in the resolution of this tension. The first is to resist change entirely, grounding the authority of the law in absolutes which can rarely, if ever, be found. That modern technology accentuates the challenge to the relevance, justice and acceptability of old laws. Professor Weeramantry of Monash Law School puts it well in his excellent book *"The Law in Crisis"*:

> "Having regard to all these present and possible impacts of science upon the law, it is not surprising that science is regarded by many as the major source of law reform in history ... It is said of Justice Frankfurter that when he was a law teacher he once asked his students - who was the greatest law reformer of the eighteenth and nineteenth centuries? The class responded with various answers such as Bentham and Mansfield. They were all wrong, said the eminent lecturer, and his ... answer was James Watt - the inventor of the steam engine".[12]

But whilst the law must keep pace with developments in all spheres of life, indigestible change is as foolish as rigid adherence to outmoded absolutes. One of the members of the Canadian Law Reform Commission who recently retired, was not a lawyer at all. He was a sociologist, Professor J.W. Mohr. His observations may therefore have a special usefuleness:

> "We believe ... that reform and change are good things. Has anybody ever heard of a law restoration commission?

> And yet the law is a very old house and crumbling as it may be, it has some interesting rooms, decorations and knick-knacks ...". [13]

Professor Mohr found the words "reform" and "change" attractive because of their inherent call for activity and the production of new things. But his caution about change for the sake of change is not without articulate supporters.

7. Lord Mancroft came out to Australia earlier this year to make a speech which he titled "*Stop the Clock : We've Made Too Much Progress*".[14] He asked a question which every law reformer must ultimately face up to:

> "But why is the law so unpopular? And why are lawyers equally unpopular until, of course, they become judges when they are naturally sacrosanct. I believe the reason may be this : the operation of most Western legal systems is slow and susceptible to the most shameless delaying tactics which frequently deter decent people from seeking their rights ... Resort to the courts is a costly lottery providing intellectual stimulus and enjoyment to practitioners but leaving the unfortunate litigant feeling as if he has been trapped in an uncontrollable machine ..." [15]

The conclusion Lord Mancroft urged upon us was as follows:

> "...the world over, men and women of goodwill are beginning to discover that there are plenty of things that can be done and they are beginning to push the clock gently back in the name of progress".[16]

8. This then, is the tension which every law reformer must resolve. It is the tension between stability and authority, on the one hand, and change and progress on the other. The preface to the 1789 edition of the *American Book of Common Prayer* suggested the approach that institutional law reform, however originating, might follow:

> "Seeking to keep the happy mean between too much stiffness in refusing and too much easiness in admitting variations in things, once advisedly established".[17]

Stated in such a way, few could differ with that proposition. Laws which govern the relationships between citizens in society and proffer guidance for those who have to resolve social tensions, inevitably need modernisation,

simplification and reconsideration from time to time. Some changes can be effected by the Judges. Mr. Ellicott recently reminded us that the initial dynamic of the common law, in its formative stages, embodied the true spirit of law reform - law and lawyers responding to new situations demanding just solutions.[18] Although a number of important and recent innovative reforms have come from the pens of our judges, there are severe limitations upon what they can do. The role of judge-made law has undoubtedly declined significantly in this Century.[19] Legislation increasingly controls the leeways for choice open to judges.[20] This movement (involving parliamentary control of law reform) is unlikely to be reversed. But parliaments, in practical terms, have no great interest in large areas of the law where there are no votes to be had, complex and technical issues to be resolved and intractable problems to be solved. This is a reason for the establishment of law reform bodies. They can assist parliaments to renew and renovate the law. Most of them are established by Act of Parliament. Many of them have like statutor objects. The statutory objects of the Australian Law Reform Commission articulate the Parliament's answer to tonight's question.[21] They include, in the Commonwealth's sphere, the following purposes:

* The modernisation of the law by bringing it into accord with current conditions.
* The elimination of defects in the law.
* The simplification of the law.
* The adoption of new or more effective methods for the administration of the law and dispensation of justice.
* The consolidation of laws.
* The repeal of laws that are obsolete or unnecessary.
* The consideration of proposals for uniformity between laws of the Territories and laws of the States.[14]

9. The simple answer to tonight's question, is therefore this: Living together in an organised society, we need laws and authority to make sure disputes and tensions can be resolved. The dynamic nature of society inevitably produces changes which require laws to change. But of their nature laws tend to be expressed in absolutes.[22] They are often difficult to change. What judges can do or should do, being unelected and not necessarily representative individuals, are limited. What parliaments, of their own motion, will do is equally limited by the pressures of other work and the realities of parliamentary democracy. That is why parliaments, in a self-preservation instinct, if you like, have created law reform bodies. In the

nature of things, they will often work outside the great political and social issues. This need not necessarily be so. Increasingly law reform bodies are being entrusted with social issues of the greatest relevance. The New South Wales Law Reform Commission is about to embark upon a major inquiry into the legal profession. The national Commission has secured from successive Governments, References which require reports upon issues intimately tied up with the nature of our society in the last quarter of the 20th century and beyond. I refer particularly to the reference given by the Commonwealth Government for new laws for the protection of Privacy in Australia, the reference which requires us to seek a modern, national approach to Defamation in this country and the reference on Human Tissue Transplants.

LAW REFORM AND FUNDAMENTAL VALUES

10. The tradition of the common law and of common lawyers is to steer clear of debates about fundamental values. Law reform, whether by governments or law reform bodies such as my Commission, has scarcely ever faced up to and debated what the fundamental values are, that the whole exercise is aiming to achieve. Perhaps it is the British sense of the pragmatic that leads us to avoid such philosophical debates. It may be the conclusion that the articulation of all reasons which motivate an Act, a judgement or a law reform report would require the author to indulge in the expression of an infinite number of reasons. Some will say that in the modern pace of today's world we simply cannot afford such academic luxuries. But I have suggested that law reform is not just change in the law, but change for the better. I have suggested that, certainly in law reform commissions, it should involve something more than pragmatic, functional change. That may be the proper, necessary role of government. Law reform, through a law reform body set up with objects such as I have mentioned, should set its sights somewhat higher.

11. In a previous age, and even today in other countries, it is enough that authority dictates the law and changes in the law. In our country, that will no longer do. The "strikingexperience" of this century has been the fact that the greatest atrocities have been made possible by value-free science carried out under the mantle of value-free law. In such an age, what are the values which law reformers can use as their touchstones? Should they endeavour to express them?

12. This is not the time for an exploration of the values which guide Australian law reformers. It has been suggested that the fundamental values which law reform commissionsseek, in practice, are:

*Intelligibility, i.e. clarity and simplicity.

*The saving of costs in time and money.

*Securing appropriateness of the law to contemporary needs.

*Securing compatibility of the law with contemporary society's moral views and sense of justice.[23]

13. But whether we unconsciously follow Bentham's principle of utility[24] or seek to maximise the competing "interests" in society[25] or search for the most rational allocation of resources in a harmonious society[26] we are clear on one thing. The values which we promote in our recommendations cannot be adequately discovered by isolated meditation and introspection. Comfortable though the belief may be, lawyers do not have a special claim on omniscience. Whatever may be possible in law reform bodies that secure only References which are of a highly technical, specialised kind, none of the References so far received by my Commission fits nicely into this class. All of them involve social values and social judgments. If we are to aid the Parliament adequately and propose laws which, in the language of our statutory objects, reform, modernise and simplify the legal system, we must do so in the closest possible consultation with the Australian community. That is why I am here tonight. That is why the Commission has sought from its earliest days to procure the input of ideas and suggestions for law reform from the national audience. We may be subject to the criticism that we do not express our "ultimate", "fundamental" values. We may be taken to task by academics for cutting those awkward corners which explore the "nature of happiness" and the content of Justice.[27] But we are conscious of the fact that the proper task of law reform is not mere change. It is not even simply change for the better. It is not only functional change that grapples with a particular, neat lawyer's category that is contained within a Reference. All laws express values. We seek to procure those values from society. We must set ourselves the obligation, in every case, of testing our appreciation of those values against society, before reporting them to the Parliament.[28] This is the way we have gone about things in the past. It is the way we will approach the discharge of our statutory function in the future.

LAW REFORM IN PRACTICE

14. I have said that I will illustrate the rationale for law reform by reference to the programme of the Commission. The Commission has already reported on References concerned with *Complaints Against Police*, *Criminal Investigation* and *Alcohol, Drugs & Driving* (i.e. the use of breathalyzers and other instruments to control the dangerous mixture of intoxication and driving).[29] The References on the Commission's current programme require it to report upon a number of subjects:

* Whether the present *Bankruptcy Act* is adequate to cope with consumer and other small debtors.
* Whether adequate laws exist to protect privacy in Australia.
* Whether the law of defamation needs review and, if so, whether proposals should be made to bring State and Territory laws in Australia into uniformity.
* Whether new laws should be made for facilitating the donation of human tissues and organs, to accord with advances in medical and surgical technology.

Other References are currently under discussion. The Commission is fast acquiring a substantial, varied, programme. There are now four full-time Commissioners, five part-time Commissioners from several States, and a staff of 19. The achievements that can be made are necessarily related to the resources that can be devoted to law reform and renewal.

15. In the 14 law reform agencies in Australasia, there is a great variety of work being performed upon defects in the law. The programme given to my Commission in little more than a year illustrates adequately the rationale of law reform. But the full picture will only be secured by considering the great number of reports and proposals emanating from law reform bodies, government departments, special inquiries and Parliamentary committees.

16. In some cases, law "reform" is needed because the law provides no remedies to right plain wrongs or provides remedies that are inadequate to do the job effectively. No better illustration of this could be given than the *Privacy* Reference. The common law of Australia, unlike its counterpart in the United States, never developed a general remedy, enforceable in the courts, to protect unreasonable intrusions into privacy. On the contrary, the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co.*

Limited v. Taylor[30] said that no such general remedy existed, known to the la
Various particular remedies have been provided by the common law and by legislation. The civil remedy of Defamation exists but only where the consequence of communicated information is to lower the subject's reputation. Intrusions into privacy short of this, however hurtful, embarrassing, unfair, will command no legal redress. Specific legislation set up a Privacy Committee in New South Wales, but no other State has yet followed suit.[31] In the United States, in the past decade, there has been a great movement by legislation and otherwise to provide access to information kept about persons, so that they can check that it is accurate and correct it when it is wrong.[32] This facility has been particularly provided in respect of information held by governments. The pressures for new laws to protect privacy arise principally from the insatiable desire by big Government and big business to have information on tap about all of us. Of course, as society grows increasingly complicated, such demands become more and more reasonable. But up till now, we have enjoyed a relaxed society living by the principle often expressed in the epigram "an Englishman's home is his castle". The retreat to immunity in that "castle" is becoming increasingly difficult. The law, which developed to meet the threat of the intrusive king or baron or even law officer is not proving adequate to deal with the new threats posed by a whole range of intruders armed by modern technology. Nobody has written better on this threat than the Attorney-General for Victoria, Mr. Haddon Storey. I commend the re-reading of his *Law Journal* article, to you all.[33] The *Privacy* Reference illustrates, therefore, the first reason for law reform. It is the provision of adequate new laws where none exist, particularly in complex questions which involve many facets. Plainly, privacy protection is one of these. Clearly, privacy is under threat in modern Australian society. Obviously, the Australian common law missed its chance to provide a remedy. Only now is Parliament seeking the assistance of a law reform body to provide new remedies. I am glad to say that we are securing very considerable assistance from a number of States. I mention this because it is clear that the protection of privacy requires a national approach. What will be the value of protections that are geographically or otherwise confined? This reference by the Government is a most timely and important exercise. It is precisely the kind of issue where mere patching and an ad hoc approach would fail totally to meet the needs of the time.

17. A second reason for law reform may be found where the current laws are overtaken by technology. The report on *Criminal Investigation* last year illustrates this. The police force, which was organised and developed in the 19th century, has inherited rules of procedure largely developed at the same time. Accordingly, there is a great need to bring the law into closer accord with the advantages produced by modern science. This is why, in the *Criminal Investigation* Reference, much store was placed by my Commission upon urging the adoption by the law of modern devices. Why should search and other warrants not be capable of being granted, with proper security, by telephone or telex for that matter?[34] We could see no reason why the laws of criminal investigation should not face up at long last to the invention of the telephone. Therefore, we proposed that search warrants could be given in this way, fingerprinting could be so authorised, medical examinations could be permitted, bail appeals could be conducted from police stations, communications with lawyers and relatives could be facilitated and (a matter not unimportant in the federal sphere), interstate applications could be made by use of this modern facility. Other like proposals, too numerous to mention here, were made. We proposed, in advance of the Devlin Committee's report that the camera should be brought into use to help put at rest arguments about identification parades.[35] We suggested that telex facilities should be provided in police outstations, especially in the Northern Territory.[36] We proposed that the invention of the taperecorder should be recognised. Its use to help reduce the vexed problems surrounding alleged confessions to policemen seem to us timely.[37] In this respect, the Victoria Police are in advance of other forces in the country. The Chief Commissioner arranged for me to see the taperecording facilities at Russell Street Headquarters. They obviously provide the model which should spread throughout the country. Why should the law not give encouragement to such obviously desirable developments? Can I say that once, as Counsel, I had to face a tape recorder in a criminal trial. No more damming and persuasive evidence could possibly have been devised.

18. Sometimes, the advances in technology bring problems in their train requiring law reform. The development of the computer and of the merely invisible listening device results in significantly increased intrusions into our privacy. They facilitate enormously the capacity of unwanted intrusions upon us. They are not, certainly in the case of the computer, adequately disciplined by laws at the moment. In a decade, these new instruments have been developed and refined which significantly affect the distribution of

power in society. It is intolerable that they should be above or beyond the law. Yet they provide such plain benefits to us all, in potential, that the proposals for reform must achieve an exquisite balance that hurried legislation, not tested against the experts and the community, could scarcely achieve. The developments of technology, therefore, promote both challenges to and opportunities for the law. Law reform is the business of responding to the challenge and adapting and utilising the opportunities.

19. A third case for law reform arises where the law becomes out of step with current morality or current social values. Even in the past ten years, we have witnessed a sexual revolution which has quite transformed our society Accepted values of a past age are now regarded, particularly by the young, as unjust, draconian and having no justification other than religious or other moral dogma. I make no comment upon whether these developments are desirable or not. The fact is, they have occurred. The law, which governs the relationships between us, cannot hold out, like Canute, against these changes. It is pointless to hope that things will go back overnight. They will not. Plainly, in respect of the rights of women and of other oppressed minorities, we have come a long way towards a more just, humane, charitable society.[38] The changes in the criminal law already made or under contemplation throughout the country reflect this important line of law reform. But it is not only in the criminal law that changes must be brought about where the law becomes unacceptably out of step with current social attitudes and practice. The *Family Law Act 1975* is an illustration of law reform designed to make Family Law accord more closely with modern standards of morality. The improvement of the lot of illegitimate children throughout Australia is a recognition of the same movement. There are many like examples which reflect nothing more than the fact that attitudes change. Older members of our society will find all these changes quite uncomfortable. But the law cannot stand still. If it attempts to do so, it will be disobeyed, it will be harsh and selective in its impact. Because it does not command obedience and respect by the great bulk of society, the instruments which administer it, officials and the courts, will be held in disregard or contempt. The reference which my Commission received last year to update criminal investigation procedures of police is a classic case in point. The modernisation of procedures, equipment and language were just part of the exercise. As an attempt to bring the law "in the books" into closer relationship to the law "on the ground",[39] the Reference to the reform of the *Bankruptcy Act* is another case in point. The Reference asks whether the present Act in its application to small or

consumer debtors makes adequate provision to enable them to discharge or compromise their debts from their present or future assets or earnings. It asks whether measures should be adopted to provide financial counselling facilities to small or consumer debtors. The old-fashioned view of bankrupts may not be appropriate for those who suddenly and unexpectedly lose employment or simply cannot cope with the complexities of hire purchase, credit sales, mortgage arrangements and so on. The task of law reform will be to consider more flexible procedures which bring current attitudes into the law of Bankruptcy.

20. A fourth case arises where the law has taken a wrong turn or is working a positive injustice. This problem was faced in our first report. Because they are in legal theory the holders of a public office, police constables are not entitled to the privilege accorded to other employees, including Crown employees, of indemnity for their wrongs. A police constable is personally responsible for both his criminal and tortious acts.[40] Not only is this unfair to the policeman, when compared to the protections afforded to other citizens, as against their employer. It works injustices upon citizens who sue policemen and may rely upon Crown discretion, outside the law, to recover their damages. We proposed that this outmoded principle, no longer in keeping with modern social values, should be abolished.[41] The report on breathalyzer laws also illustrates this point. If Victoria has the lowest punishable blood alcohol concentration in the world, the Capital Territory has the highest. At the moment, as a result of court decisions on the present Ordinance, the de facto position is that nobody is prosecuted unless the blood alcohol concentration is greater than 0.165%. This is not what the Ordinance intended It was plainly out of keeping with modern needs and values. Associated questions relating to the faith that can be put by the law in modern machines, the introduction of random tests and the way in which alcoholism and other drug dependence should be treated, and not only punished, were all matters appropriate for law reform. I am happy to say that in reporting to the Federa Parliament we were greatly assisted by the imaginative and innovative work being done in Melbourne, particularly by Dr. Santamaria and his team at the St. Vincents Hospital.

21. A fifth case for law reform is where the law is confused, inconsistent, difficult to find or otherwise in need of simplification. Few problems are more important and urgent that securing access to the law. The simplification of the law is easier said than done. The aim is not always achievable. The

efforts announced recently by the Victorian Attorney-General to modernise and simplify the Victorian Statute Book will be watched with interest throughout Australia. Law reform commissions should seek to discharge their statutory obligation to simplify the law and modernise its language. When we dealt with the reform of police bail procedures, we proposed the sweeping away of the old-fashioned language which most citizens would not understand. Access to the law and understanding of it are plainly important rights in a democracy. We proposed to substitute "undertaking" for "recognisance" : "guarantor" for "surety" : "renewal" for "respital" and "forfeiture" for "estreat". So long as the law remains a mystery, capable of being unravelled only by highly paid initiates, it will not command respect but will be looked upon with a mixture of bewilderment, fear and amusement.[42] The Commission's forthcoming report on *Alcohol, Drugs & Driving* seeks, by simplification of the legal concepts to avoid lengthy trials over comparatively unimportant, technical issues, whilst not foreclosing an accused of the right to ventilate the real issue in dispute, should he wish to do so. The simplification of the law and its de-mystification are important functions for law reform. It is reassuring that in Victoria, important steps are to be taken to give a lead in this regard.

DEFAMATION LAW REFORM

22. It is too early to forecast the proposals that will be made to reform Defamation laws. The Reference is a month old. Already we have written to a wide variety of media and other public bodies throughout Australia seeking to elicit their views about what is wrong with our present Defamation laws. Discussions with working journalists, broadcasters and lawyers who have been involved in these actions have already been held. Many, many more, will be conducted in the next few months. The Reference to reform Defamation laws in Australia illustrates all of the reasons for law reform and for having law reform commissions. In respect of some intrusions by the modern media, short of bringing people into "hatred, ridicule and contempt", conduct is undisciplined by the law which many would say requires discipline. Whether that discipline should be by the law or by voluntary means such as the newly established Press Council will remain to be seen. All Australians will be watching closely the effectiveness of this new experiment.

23. The Defamation Reference also illustrates the case of laws overtaken by technology. As Mr. Ellicott has pointed out:

> "The development of the media and of other means of communication on a national basis has made urgent the task of tackling the reform of Defamation law on a basis that will produce uniformity throughout Australia. Newspapers are published for circulation on a national basis, or at least for circulation in several States. Television and radio programmes are broadcast simultaneously in all or a number of States.
>
> . . . Yet there are great differences in the laws of Defamation. These differences are so great as to produce the result that in adjoining States, plaintiffs may succeed in an action for Defamation in one State and fail in an adjoining State in respect of the publication of the same material."[43]

How could the founding fathers have anticipated, in working out the constitutional compact, the developments that have so affected the distribution of information and hence the laws of Defamation? How could they have foreseen the developments of broadcasting and television and of aeroplanes, telex and other devices which make the provision of daily newspapers distributed nationally, a daily commonplace? But the law may also be out of line, in important respects, with current social values. The use of 'stop writs' to prevent freedom of expression takes on a special relevance in our country. We can have no appeal to constitutional guarantees of freedom of speech. We have a tradition of such a freedom but not a legally enforced and protected *right*. The Queensland Attorney-General, Mr. Knox, illustrated this problem in August 1975. To that date, from January 1972, there had been 248 writs for Defamation issued in Queensland. In that time there was only one trial and four judgments by default. Delay in the courts could not be the sole explanation for this statistic. The use of Defamation writs to inhibit discussion on matters of public interest is a serious problem. Clearly the reform of the law of Defamation must come to grips with the problem. I am coming increasingly to the view that the major problem for Defamation law reform lies in the procedural area. The technicalities and delay which presently beset this area of the law often require of litigants patience of almost Biblical proportions and speculation of costs which sometimes borders on the foolhardy. There seems little doubt, from a survey of litigation in the past decade in Australia, that interlocutory proceedings are now used as a conscious weapon to exhaust the patience and resources of plaintiffs. It is this aspect of Defamation laws and procedures that has produced, of late, the suggestion that we should adopt a radical new approach, after the model of the Scandinavians : rather than provide damages

(frequently a puny or inadequate remedy), we should equip a Press Ombudsman with powers of rapid action to require immediate and equal redress in the media rather than grossly delayed and often irrelevant remedies in the courts. I make no comment on the acceptability of this import. Clearly it is an idea that may have to be considered. In *Gorton v. Australian Broadcasting Commission*[45] the former Prime Minister's complaint was that he was seriously damaged by a television interview. Between March 1971 when the interview took place and final judgment in July 1973 not only did Mr. Gorton lose office but his Party was in Opposition. Although he secured a verdict, the remedy was somewhat irrelevant to the protection of his reputation. The fact that the same subject matter, published simultaneously in three jurisdictions, from the same videotape, should result in the recovery of damages in two cases, but not the third, was, as Fox J. called it "a strange and unsatisfactory result, but ... one which flows from the differences in the laws of those places".[46]

24. The Defamation Reference, therefore, illustrates the injustices that may arise (either to Mr. Gorton or his Defendants) by the present working of the law and the confused state of the law which calls out for simplification and modernisation. The law at present offers only damages to an aggrieved plaintiff. If he succeeds, he obtains his damages years after the event, at a time when many people who read or heard the defamatory statement will have forgotten it or will only be reminded of it by the case itself. Some may learn of the plaintiff's success in the Defamation proceedings. But there is no guarantee of this. The purpose of Defamation law is supposed to be the protection of the reputation of the plaintiff. But if in fact the plaintiff's reputation is not restored, even by success, the law is failing to promote its ostensible object. Instead of restoring the reputation, the law does no more than offer a lottery ticket. The prize may be high, even very high. Chances of success are diminished by *Bleak House* delays and technicalities. From the publisher's point of view the situation is not satisfactory. The possibility of significant financial burdens, in the form of exemplary damages, may well produce self-censorship which leads to the suppression of material that is correct and that should, in the public interest, be disclosed.

25. The problem for law reform in this case will be to devise a system whereby reputations wrongly slurred can be promptly restored as fully as may be. We must rid the system, so far as it is possible, of technical distinctio which provide so many opportunities for delay. Who could justly complain against provisions that ensured a prompt trial? Should courts be empowered to

order immediate correction or apology? Is not speed the essence of the restoration of reputations? Should damages be limited to actual monetary losses? Should general damages be confined to blatant cases of wilful destruction of reputations? What should we do to encourage in this country the vigorous press that exposed the abuses of Watergate? What role should judges and juries have respectively in the trial of these matters? All of these are questions for reform that will face my Commission in the next year. Nobody underestimates the difficulty of achieving a happy balance of the competing forces here. I use this illustration to show the reasons for reform of the law. I say again that we will seek to promote the answers, in the closest possible consultation with those specifically and regularly involved in this problem, but also with the whole Australian community, which is affected by it.

26. I have now come full circle. With an illustration or two, a few wise words from those who have gone before me, and a few ideas of my own, I hope I have shown you the rationale for law reform. Fortunately, the Prime Minister is right. The debate in Australia is scarcely ever the debate on the agenda tonight. We do not ask "Law Reform, Why?" We ask "Law Reform, How? When? At What Pace? By What Means?"and so on. But it is apt from time to time to pause and reflect upon the reasons for the orderly renewal and renovation of the legal system. I am grateful that this occasion has given me the opportunity to do so.

FOOTNOTES

1. The Law Reform Commission (Aust.) *Annual Report* 1976. A.L.R.C.5, paras. 17, 53; *ibid* 1975, A.L.R.C.3, pp.20ff.

2. *Annual Report* 1975, A.L.R.C.3, pp.20-21.

3. *ibid.*

4. Rt. Hon. J.M. Fraser, M.P., Address to the Melbourne Rotary Club, 21 Ap 1976, *mimeo* p.1

5. *loc cit*

6. A. Diamond "The Work of the Law Commission" (1976) 10 *Journal of Association of Teachers of Law* 11.

7. On this point, see Wootten J. in *R. v. Fraser* [*1975*] 2 *N.S.W.L.R.*521 at p.524.

8. There have been a great number of recent reports on the reform of the law of Rape and Rape trial procedures. They include the Fourth Working Paper of the Victorian Law Reform Commission *Rape Prosecutions 1976*, th Special Report of the South Australian Criminal Law Reform Committee *On Rape and Other Sexual Offences 1976*, the Report of the Tasmanian Law Reform Commission *Procedures and Evidence in the Crime of Rape : Harassment and Embarrassment 1976* and several reports of Commissions of Inquiry in England, N.S.W. and Queensland. This proliferation of repor illustrates the duplication of law reform effort in Australia.

9. See the first *Annual Report 1968* of the N.S.W. Law Reform Commission.

10. J.N. Lyon "Law Reform Needs Reform" (1974) 12 *Osgoode Hall L.J.* 421.

11. Lyon, p.422.

12. See G. Weeramantry *The Law in Crisis* 1976, p.249.

13. J.W. Mohr *Law Reform and Social Change*, Gibson Memorial Lecture, Queen' University (Canada) Sept. 1975, p.13.

14. Lord Mancroft "Stop the Clock : We've Made Too Much Progress" [April 1976] *The Australian Director* p.10.

15. *ibid* p.17

16. *ibid* p.13

17. Cited by Sir Paul Hasluck (1973) 47 *A.L.J.* 415.

18. R.J. Ellicott, *Speech at the Opening of the Third Australian Law Reform Agencies Conferences*, Canberra, 8 May 1976, p.3

19. N. Marsh "Law Reform in the United Kingdom : A New Institutional Approa (1971) 13 *William & Mary L.R.* 266.

20. J.H. Farrar, *Law Reform and the Law Commission*, 1974, p.126.

21. *Law Reform Commission Act 1973* (Cwth) s.6(1).

22. Mohr, p.11.

23. G. Sawer "The Legal Theory of Law Reform" (1970) 20 *Uni. of Toronto L.J.* 183 at p.188. *Cf.* F.E. Dowrick "Lawyers' Values for Law Reform" (1963) 79 *L.Q.R.* 556.

24. G. Woodman "A Basis for the Theory of Law Reform" (1975) 12 *U. Ghana L.* 1 at p.4

25. *ibid* p.11.

26, Lyon, p.421

27. J.H. Farrar, "Law Reform Now - A Comparative View" (1976) 25 *I.C.L.Q.* p.14

28. See The Law Reform Commission *Annual Report 1975*, A.L.R.C.3 pp.40ff; *ibid* A.L.R.C.5 paras. 91ff.

29. The reports *Complaints Against Police*, 1975, A.L.R.C.1 and *Criminal Investigation*, 1975, A.L.R.C.2 have already been tabled in the Federal Parliament. The report *Alcohol, Drugs & Driving*, 1976, A.L.R.C.4, was delivered on 1 July 1976 and awaits tabling in Parliament. It will be tabled shortly.

30. (1937) 58 *C.L.R.* 479.

31. *Privacy Committee Act 1975* (N.S.W.)

32. D.W. Metz "Federal Leadership in Privacy Protection" (1975) 61 *American Bar Association Journal* 825.

33. H. Storey "Infringement of Privacy and Its Remedies" (1973) 47 *A.L.J.* 49

34. A.L.R.C.2, p.95.

35. *ibid*, p.53.

36. *ibid*, p.129

37. *ibid*, p.71

38. The rights and special problems faced by Aboriginals and migrants in the criminal investigation process are dealt with in A.L.R.C.2., pp.117f

39. *ibid*, p.63.

40. *Enever v. The King* (1905) 3 *C.L.R.* 969; *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; *Attorney-General for New South Wales v. Perpetual Trustee Co. Limited* (1955) 92 *C.L.R.* 113.

41. A.L.R.C.1., pp.61-2.

42. A.L.R.C.2., p.80

43. R.J. Ellicott, *Law Reform - The Challenge for Governments*, an address to the Women Lawyers' Association of New South Wales, Sydney, 11 June 1976, *mimeo*, p.8

44. *Cf.* G. Robertson, "The Libel Industry", *New Statesman*, 2 July 1976, p.6-7.

45. (1973) 22 *F.L.R.* 181.

46. *ibid*, p.196