AUSTRALIAN LAW JOURNAL

SEPTEMBER 1976

LAW REFORM, WHY?

Hon Justice MD Kirby

September 1976

LAW REFORM, WHY?

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> "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both".
>
> *Packer v. Packer* [1954] p.15 at 22.
>
> Denning L.J.

INTRODUCTION

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 if it effecting reforms in our society.[1] Royal Commissions, Inquiries and consultative bodies proliferate. Major reforms sometimes follow their reports.[2] I do not deceive myself that bodies like the Law Reform Commission enjoy the major responsibility for effecting reforms of the law.[3] 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. The time has come to suggest a few answers.

No apology is sought or offered for the establishment of law reform commissions. The question I confront is not "Law Reform Commissions, Why?" but "Law Reform, Why?" The Prime Minister, speaking in Melbourne in April 1976, 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, whic secured the end of transportation, the establishment of responsible, representative Government, the secret ballot, the Factories Acts and the concep 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]

Armed with this Prime-Ministerial authority I could pose the question "Law Reform - Why Not?" I will not do so. Instead, I intend to explore some of 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?

"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 peopl 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]

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]

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.

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 new 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 usefulness:

> "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.

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]

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. As Mr. Ellicott recently said, 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 statutory 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:

> "6(1) The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise -
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> (a) to review laws to which this Act applies with a view to the systematic development and reform of the law, including, in particular -
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> (i) the modernization of the law by bringing it into accord with current conditions;
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> (ii) the elimination of defects in the law;
>
> (iii) the simplification of the law; and
>
> (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
>
> (b) to consider proposals for the making of laws to which this Act applies;
>
> (c) to consider proposals relating to -
>
> (i) the consolidation of laws to which this Act applies; or
>
> (ii) the repeal of laws to which this Act applies that are obsolete or unnecessary; and
>
> (d) to consider proposals for uniformity between laws of the Territories and laws of the States,
>
> and to make reports to the Attorney-General arising out of any such review or consideration and, in such reports, to make such recommendations as the Commission thinks fit."

The simple answer to the question "Law Reform, Why?" 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 has embarked 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 and so on.

LAW REFORM AND FUNDAMENTAL VALUES

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 judgment 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.

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 striking experience 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?

This is not the occasion for an exploration of the values which guide Australian law reformers. Professor Sawer suggested that the fundamental values which law reform commissions seek, 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]

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] or some other value, 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 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

References to the Law Reform Commission

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.

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.

Reasons for Law Reform

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 common law. 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.[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.

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 the Law Reform 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 tape recorder should be recognised. Its use to help reduce the vexed problems surrounding alleged confessions to policemen seem to us timely.[37] They obviously provide the model which should spread throughout the country. Why should the law not give encouragement to such obviously desirable developments? No more damming and persuasive evidence could possibly have been devised than tape recorded confessions properly proved.

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.

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 the Law Reform Commission received in 1975 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 in time of Recession 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.

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 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 present, 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.

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 than 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.

CONCLUSION

The debate in Australia is scarcely ever "Law Reform, Why?" We ask "Law Reform, How? When? At what pace? By what means?" and so on, but it is important to pause and reflect upon the reasons for the orderly renewal of the legal system. The reasons I have outlined are to repair the inadequacy of the law, to remove outmoded laws, to reflect new social values, to remedy injustices and to simplify the law and make it more accessible. Let me take as a final illustration the question of locus standi. No issue of procedural law deserves attention more urgently than the current defects in Australian laws concerning locus standi. The rules which govern the rights of persons to open the doors of the Court clearly affect fundamentally the relevance of Courts and of the legal system to solve the problems and tensions of society. A legal system which poses insurmountable technical and procedural impediments in the way of resolving issues in the Courtrooms invites those frustrated of this means of redress to seek other, perhaps less orderly, ways

of resolving their disputes. There are few questions more relevant for the modernisation of the administration of justice than this.

Perhaps in time this question too may be committed to the Law Reform Commission for inquiry and report.

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 April 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*, the 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 reports 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's 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 Approac (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.J* 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