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COUNTRY WOMEN'S ASSOCIATION OF N.S.W.

60TH ANNUAL GENERAL CONFERENCE

LISMORE CITY HALL, MONDAY 3 MAY 1982

LAW REFORM - IN PRAISE OF BRITISH INSTITUTIONS

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

April 1982

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WE MUST BE FREE OR DIE

Among my earliest recollections, as a schoolboy, are of sitting on the footpath outside the North Strathfield Public School in Sydney, when the Governor-General, the Duke of Gloucester, passed by on his way to the Repatriation General Hospital. Empire Day was celebrated as virtually a religious festival in my family. Queen Victoria's spirit was very much alive in my room as a schoolboy. On the wall, a gift after insistent letters to the British Council, was a map of the world, a quarter of it coloured in red -- to show the British Empire — and the rest an insignificant, innocuous, puce colour : as if to show that there was us and them : those who were members of the British Commonwealth and Empire and those who did not enjoy that inestimable advantage.

At Fort Street High School in Sydney, we received Empire Day Medals, the Queen ascended the throne, we turned every Thursday at Assembly to honour God, serve the Queen and salute the flag. And in my lessons in English literature, we were taught, with a certain thrill, the words of Wordsworth's poem, penned in defiance against the triumphant Napoleon:

> We must be free or die, who speak the tongue
> That Shakespeare spake;
> The faith and morals hold
> Which Milton held
> In our halls are hung
> Armoury of the invincible Knights of old.[1]

These were days, not so very long ago, when there was no embarrassment in talking about the important British inheritance that was, and is, so central a part of the modern Australian story. Lately, things have changed a little. Of course some change was inevitable and desirable. About one third of our people, fewer I imagine in the country than in the cities, descend from non-English speaking families, who came here in the great wave of migration that followed the Second World War. Inevitably, their impact on our community and its public and private life took a time to exert its influence. But now the influence is being felt. It adds to the diversity and variety of Australia. We now have many cultural sources. And we should rejoice in them all. The Government and the Parliament have pressed forward vigorously to make people from different ethnic, linguistic and cultural backgrounds welcome. They have given the lead to the Australian community, including in country districts where change sometimes comes more slowly. An Australian Institute of Multicultural Affairs has been inaugurated by the Prime Minister. I am proud to be a member of the Institute. At its opening, the Minister for Immigration and Ethnic Affairs, Mr. Macphee, referred to the need, in developing the Australian identity, to draw upon and take strength from the people who have come here from 140 different lands, who speak 80 different languages at home and who practise many religions and creeds. But Mr. Macphee also referred to the 'core values' which are not immutable but which remain at the heart of modern Australian life. These core values were and are essentially British — and there is no getting away from it and there should be no embarrassment about it. They are doubtless being modified and reformed. It would be odd in the extreme if our multicultural community in the Southern Hemisphere did not progress to develop its own attitudes, concerns and personality. That is happening. But our institutions of law and government, our legal system, our administration and our core values remain overwhelmingly influenced by the British impact on our history.

In my time as a schoolboy, of which I have spoken, Britain released to independence hundreds of millions of people who, when I was born, were subjects of the British Crown. It was the greatest Empire in history. It was equally the greatest, swiftest and most painless shedding of Empire. Of course, in part the process was not always voluntary. I have spoken with people who served in India. From the perspective of the late 1930s they thought British rule would last, in some form at least, for many decades. The War, with its drain upon treasury and manpower, hastened the process. But the process had long since begun. In a sense, it was inevitable that people in increasing numbers, educated in the English language, with English ideas, English history and English literature, should insist upon individual freedom and self-determination. The process may have been hastened but the laudable history of decolonisation, devolution and local administration of government and law, began early in the 19th Century, after Britain was shaken by the loss of her American colonies. Not all of the experiments in freedom have

succeeded. No-one would pretend that the history of the wind-up of the Imperial business has been without its tragedies, fiascos and bitter disappointments. Sometimes the Independence Constitution was overthrown or distorted by the successrrs to the British. But for all that, the British did leave behind certain important notions. They are relevant to law. They are relevant to law reform. They are relevant to city dwellers. They are relevant to country dwellers. They are as relevant in Australia as .hey are in Antigua and Zimbabwe. Among them is the principle of self-determination. You may think it was something of a contrast that in the same week as Prince Andrew set out south with the battle fleet for the Falklands Islands, the Queen crossed the Atlantic to the Northern American Hemisphere to sign into law the new Canadian Constitution, severing the last formal legal authority of the British Parliament over Canadian constitutional affairs. The peaceful transfer of power to local people to govern themselves in accordance with local ideals and values and to make their laws suitable to local conditions, is, I think, a most laudable feature of the denouement of Empire.

ENGLISH LAW

I said that the English left behind important and valuable remnants of Empire. Amongst these are undoubtedly the English language (rapidly becoming the lingua franca. When asked how Russian and American astronauts would communicate in space, the Russian answered, in English, 'No problem. English'). English literature, which is full of the concepts and ideals reflected in the short passage from Wordsworth I quoted, is another great gift. The Dutch have paintings. The Germans have music. The English-speaking people have literature at the core of their culture. Cricket and other sporting contests are still important links. Trade has fallen off somewhat. But public administration remains very similar throughout the Commonwealth of Nations. The bureaucracies tend to be somewhat secretive. But they also have a tradition of general honesty, incorruptability and competitiveness. Professional associations in the law, in medicine and elsewhere, are still very strong throughout the Commonwealth. The great capital developments of the 19th Century — town halls, court houses, post offices, railway stations, bridges and Anglican churches — can be found in every city and town the British occupied. They were great builders. And the administrative fabric of our countries still use the buildings they put up.

But more permanent than buildings, most lasting than professional associations and more important than games was possibly the most important legacy of all, after the English language, namely the legacy of the common law of England. This system of justice, developed by judges in England and later throughout the world, over a period of 800 years in all, is the lasting centrepiece of British rule. It is the system of justice of

more than a quarter of mankind. It is a very English system. It is a pragmatic problem-solving system. Whereas the European systems of law search for principles and concepts, and are spurred on to doing so by the codes developed by Napoleon at about the time Wordsworth was declaiming against him, the English were content simply to solve the problems produced day in and day out in the courts. If a principle emerged, it was in order to solve a particular problem in a particular case. If by chance a concept emerged, almost by accident, it was the aggregation of principles developed in numerous cases.

Mr. Justice Ellicott, when he was Federal Attorney-General, once pointed out that the very methodology of the common law of England was a methodology of law reform. Lawyers, arguing cases for their clients before judges, had to seek to develop and stretch old principles and rules to meet new circumstances. This very process of stretching and developing was a law reforming process. It is doubtless the reason why the English system lasted and continues to last for so long.

After the late 19th Century, with the development of busy elected parliaments, more legislation was brought forth, so that the creative role of the judiciary became muted out of deference to the creative role of parliaments. Judges have increasingly become interpreters of the written word laid down in Acts of Parliament. Less and less do they have an acknowledged creative function to develop, modernise and simplify the law. It was a recognition of parliaments' inability or disinterest in the details of complicated or sensitive law reform and the unwillingess of judges to return to their creative role that led to the establishment throughout the common law world of law commissions. The Australian Law Reform Commission was established in 1973 with the support of all parties in the Federal Parliament. It is one of ten law reform bodies throughout Australia created at a Federal and State level, to help their respective governments and parliaments to keep pace with the forces of change. Amongst the Commissioners of the Australian Law Reform Commission have been some of the most distinguished lawyers in our country. The Governor-General, Sir Zelman Cowen, was a part-time Commissioner. Sir Gerard Brennan, now a Justice of the High Court of Australia, was an early Commissioner. In fact, he was appointed on the same day as Mr. John Cain, the new Premier of Victoria. So the Commission has had distinguished lawyers, judges, law teachers and others as members. Its reports have been picked up and adopted both at a Federal and State level. It helps lawmakers in the development and modernisation of the legal system. But the legal system and its methodology, its personnel, its rules and even its garments and trappings, remain unmistakeably English. Increasingly we are looking further afield. We in the Law Reform

Commission look frequently to European and North American (and even South American) precedents for the development of Australian laws. That said, there is no escaping the fact that the common law, both in content and in application, is still noticeably an English phenomenon with English values modified to meet Australia's needs and modern conditions.

ENGLISH LAW AND RESTRAINT

One of the features that one notes in tackling various tasks assigned to the Australian Law Reform Commission by the Federal Attorney-General is the way the English attitude to individual freedom and to the role of the State permeates so many facets of the law. For example, we are presently inquiring into the reform of the law of evidence in Federal courts. Judges in our courts, unlike judges in the civil tradition of European courts, do not traditionally take a very active role in questioning witnesses or interfering in the conduct of the trial. This is left to the lawyers or to the parties themselves. Judges are rebuked by higher courts if they intervene too much. They are told that they must not throw off the judicial mantle and climb down from the judge's seat into the well of the court. Judges are generally appointed from the Bar. Many a judge feels frustrated at having to just sit there as a neutral umpire. But that is our way. We do not have the inquisitorial system of judicial inquiry they have in Europe. Save for exceptional jurisdictions (such as those of the coroner) the judge in our tradition has been likened to an umpire in a sporting contest. He may blow the whistle and stop the game when things get rough. He may clarify the rules. He may lay down the law. But he must not appear to join in the game. One of the issues we are facing in the Law Reform Commission is whether this rule should be modified to some extent in Australian Federal courts and whether it could be changed consistent with the Australian Constitution, which was framed against the assumptions of the judicial role developed in the United Kingdom.

A second project we are looking at relates to the law on standing before Federal courts. This is the law that determines the interest people must have in order to get the court to consider their complaint. A consumer of sugar sought to challenge Federal sugar legislation.[2] It was held that neither his interest as a taxpayer nor his interest as a citizen nor the fact that he had an occasional spoonful of sugar gave him sufficient interest in law to challenge the constitutionality of the Commonwealth's legislation. This was many years ago. There have now been cases to a contrary opinion in Canada.[3] Furthermore, our own High Court has indicated a liberalisation of the law on standing in at least some cases in Australia.[4] But here again English values of reticence

are in the fore. Judges are anxious to solve practical problems brought by the people best able to advance them. They are not to be concerned with hypothetical questions or questions posed by busybodies. Third parties ought not to have the power to busy themselves in the affairs of those principally involved. It is just not the judicial role to chase every hare down its burrow, to search out every potential breach of the law and to enforce the law hither and thither, even though the people most intimately concerned are not bringing the matter to the court.

Similarly, the Commission's early report on Criminal Investigation was developed against the background of the English system of criminal justice. This is a rather unusual system. It is not understood by people brought up in the European tradition. Indeed it is not always fully understood by citizens in England and Australia. It has certain absolutely fundamental rules. They include:

. that important cases will be tried before a jury of fellow citizens;

. that in criminal cases it is the Crown, representing the community, that must prove the case against the accused and (with rare exceptions) the accused need say nothing merely requiring that the State, if it seeks to invoke the criminal law, should have to prove the case, beginning to end, without assistance from the accused himself. This is the so-called accusatorial system. The Crown accuses. It must prove the case. Self-incrimination is not a feature of our system, unless it be offered voluntarily and without intimidation, threat or promise;

. not only must the Crown prove the case, but it must prove it against the accused person beyond reasonable doubt. The jury must be told (or the judge or magistrate if sitting alone must decide) that there is no reasonable doubt that the case has been proved against the accused and that he is guilty; and

. not all criminal cases are brought to trial. A discretion exists to determine that a person should be put on his trial. This discretion is exercised, in important cases, in the name of the community by the Attorney-General.

The Law Reform Commission developed its proposals on criminal investigation and delivered its report in 1975.[5] That report in turn produced an important reforming Bill which is presently before Federal Parliament. I refer to the Criminal Investigation Bill 1981 introduced by the Commonwealth Attorney-General, Senator Durack. The Bill is an important reforming measure because it contains the first effort of an English-speaking country to collect and state in a relatively brief form the basic rules that have been developed over the years. There are presently to be found in a multitude of sources : judicial decision, Police Commissioner Instructions, regulations and other statutes. When

passed, it will be a major achievement, I believe, of the Government and Parliament. It seeks to strike a proper balance between effective law enforcement and the liberties we have inherited under the English criminal justice system. It introduces important provisions dealing with :

. the emphasis on the use of summons rather than unnecessary arrests. Summonses are both more cost effective and less oppressive, although they will obviously not be suitable in all cases;
. introduction of new procedures for authorisation of search warrants which involve a serious intrusion of authority into individual privacy;
. provision of the assurance of interpreters for suspects not reasonably fluent in the English language;
. requirement of the presence of parents or reliable persons during interrogation of children and young suspects;
. particular provisions in relation to Aboriginal suspects;
. introduction of security for admissions and confessions to Federal Police, including security by way of sound recording;
. provisions to enable judges to balance on the one hand the community's interest in securing probative evidence and on the other hand the undesirability of police, who are appointed to uphold the law, themselves breaching the rules of fair criminal investigation.

It is this last provision which states the ultimate dilemma of any criminal investigation process. How do we arm our police with the necessary powers to protect society, to act quickly, effectively and honestly without bending or distorting the rules whilst at the same time remaining true to the important principles which we have inherited from the English criminal justice system? The English system has often been justified, in the words of one famous English judge, by the statement that we have taken our stand on the principle that it is better that ten guilty men go free than that one innocent person is wrongly convicted and loses his liberty or is otherwise criminally punished in the name of the community. This principle is a very special one. It strikes some people, particularly I should think foreign dictators and the heads of juntas, as odd. No doubt even some local economists or philosophers might beg to differ with the principle. They might say : 'Well, we should not be too concerned if a few innocent people get convicted. Look on it in aggregate. Perhaps by convicting even innocent people we will frighten others into complying with the law. The net result in human happiness may be worthwhile and we can write off against that net result the unfairness to particular individuals. They can be sacrifices, if you like, to the greater community good'.

Well, that is precisely the kind of rough and ready justice which the English criminal legal system has rejected. It has adopted the principle that we must face squarely the fact that some guilty people will go free under our system because, to secure their conviction would cost too high a price. A system of justice which puts so much store on the rights of the individual, on individual freedom and on the rights even of the guilty to a fair trial, is a very special system. It is a system which explains, in part, the freedom we enjoy in Australia and the special relationship we have with people in authority : whether they be police, immigration officers or others engaged in law enforcement.

Many of you will have travelled to Europe. Perhaps you have been stopped on the street corner and required to identify yourself. In Europe, most people are required by law to carry identity cards. Police and other officials can intrude upon their life without reason or cause. Officials are typically armed with greater powers of interrogation, preventive detention and inquisitorial inquiry. That is not our way. Our police and other officials must generally have reasonable cause to intrude upon our lives. For more serious intrusions they must have judicial warrants. They must know and abide by the basic principles of our criminal justice system which I have mentioned. These principles are doubtless frustrating in the extreme, on occasions, to dedicated law enforcement officers. There is absolutely no doubt that sometimes they lead to the escape of the guilty. However, they are principles at the very core of the British values we have inherited.

We could undoubtedly reduce levels of crime in our community if we were to :

- relax the rules and convict people on a lower standard of proof;
- require people to prove their innocence;
- permit large-scale or even unlimited telephone tapping;
- permit the opening of mail;
- encourage the local informer; or
- reintroduce the rack, torture and other means of extracting confessions and admissions.

All of these we reject because the introduction of such principles would radically change the relationship between the individual and people in authority. It would radically increase the power of authority and of the State. It would solve more crime. But the price in liberty might be a price which a society true to British ways would decline to pay.

THE CRIMES COMMISSION

Last week there was an announcement that the Commonwealth Government was considering the establishment of a Crimes Commission to act swiftly in dealing with corruption in high places, organised crime, drug trafficking, gun running and the like. One newspaper report indicated that the body would have an 'ongoing brief similar to the Commonwealth Law Reform Commission'.[6] The exact powers and duties envisaged for the body were not clear in the newspaper announcements. The matter is not one that has been referred to the Law Reform Commission. Accordingly, there are many limitations upon what can properly be said by a person in my position about such an idea. The government has invited comment on the proposal and has sought the views of the States.

Certainly, there are many thoughtful people in our community who are worried about the special risks to society that are created by crimes of the kinds mentioned in the announcement. Recent cases have suggested corruption of officials at a level that is out of line with the general British tradition and with the overwhelming experience of Australian public administration to date. Furthermore, we have had three Royal Commissions concerned with drugs. Many members of the Australian community are worried about this problem and its impact on the young. Just what we should do about the problem is not so clear-cut.

I believe that what I have said to you today about British institutions is an important background against which proposals for and the design of a permanent Crimes Crimes in Australia should be considered. Of course, there are numerous constitutional and other difficulties that would have to be worked out. When our founding fathers established the Australian Federation they did not, as in Canada, assign the criminal law to the Federal Parliament. Accordingly the great bulk of the criminal law of Australia remains State business. An effective national Crimes Commission would clearly, short of a constitutional amendment, require Commonwealth/State co-operation that has not always been notable in the law enforcement area.

It would be premature and wrong for me to comment on whether such a Crimes Commission should be established. Nevertheless, I believe there are certain guidelines which should be followed if one were set up. If it were to be a permanent inquisitorial body, like a roving Royal Commission, dealing with crime, it would clearly be important to get certain things straight. First, it would be important to define accurately the limits of the crimes that were within the jurisdiction of the new body, lest we were to distort the fundamental basis of the accusatorial system of criminal justice we have inherited from Britain. Secondly, it would probably be vital to keep the list short and confined to those areas where the current law was clearly established to be inadequate for

dealing with particular, identified problems. Thirdly, it would be necessary to define very clearly the powers and duties of such a Commission and to fit its operations somewhere within the framework of the criminal justice system generally. The relationship between the Criminal Investigation Bill and the powers of the proposed Commission would have to be worked out. The independent and preferably judicial scrutiny of exceptional powers of interrogation, surveillance, interception and so on would have to be closely defined. Fourthly, the consequences of public hearings would have to be considered. If privilege were to attach to media reports of such hearings, injustice might be done to people accused and who do not have the traditional protections which our criminal justice system has developed over many years. There may be need to consider the limitation on publicity to be given to inquiries, at least up to the stage of the trial. We have already seen in Australia evidence of prejudicial publicity at premature stages of police or other official inquiries. Fifthly, close attention would need to be given to the rights to silence and against self-incrimination, to the rights to legal representation and to due warnings, to the procedures of interrogation by sound recording or otherwise and to the powers to seize documents, all of which could catch up innocent people in a net if cast too widely. Sixthly, an effective mechanism for dealing with complaints would be necessary as a check against oppression.

Finally, I would hope that if such a Crimes Commission were established, it should have a law reforming role, preferably in association with the Australian Law Reform Commission and other State law reform bodies. All too often, we in the law tackle the symptoms of problems rather than the underlying disease. All too often, we look at cases of corruption and drug trafficking and do not ask what has given rise to this problem and what can be done to tackle the root causes? Some of the root causes may be beyond legislative or other attention. I have no doubt that the increase in the intake of drugs by young people is, in some cases at least, linked to the rise in youth unemployment and the feeling of despair and rejection that can sometimes attend that predicament. There is no magic legislative wand to solve the problems of youth unemployment. Nor is it easy to solve overnight the problems of drugs. However, where there are crimes in which there are no complaining victims, there is a tremendous opportunity for corruption of officials, including at high level. So long as the basic cause of the corruption remains unattended by law reform bodies and by governments and parliaments, the problem will remain to poison our public administration. You will all know that I am referring to such sensitive and difficult issues as the laws on marijuana, the laws on prostitution, the laws on consenting adult homosexual conduct, the laws on gambling, the laws on liquor ;ocemsomg, the laws on indecent literature and so on. These are areas in which there are many otherwise good members of our community becoming involved in what are breaches of the strict letter of the law. Yet there are rarely complainants. And because there are no complaining victims, the opportunity for corruption arises.

Until we have a society with parliaments and leaders willing and courageous to tackle or at least expose these underlying problems, the opportunity for corruption will continue, nourished by the large profits that can be made because of the large numbers of fellow citizens involved. I would hope that any future Crimes Commission would have a mandate of some kind to tackle these underlying problems. Otherwise, we may run the risk of building an instrument which is out of line with our criminal justice traditions to enforce laws which do not always have general community respect and which thereby give rise to the corruption, organised crime and other conduct that is said to justify the Crimes Commission.

THE POWER OF SCIENCE AND TECHNOLOGY

I want in the remaining time available to me to refer to another issue before our legal system. It is one which has been considered by the Law Reform Commission. I refer to the impact on our laws of science and technology. We live in a time of dynamic science and technology. Its effect on our legal system is beyond doubt. The Law Reform Commission had to look at one such issue in its project on human tissue transplantation. It is looking at another in connection with its inquiry into privacy, with the obvious implications of computerisation for personal privacy.

Perhaps the issue of bioethics that has caught most attention lately is that raised by the birth in Australia of a number of children conceived in vitro (the so-called test tube babies). According to public opinion polls, the majority of Australian people support the in vitro program. Some ask : who could possibly oppose the technique that simply overcomes a physical obstruction and may bring parenthood to more than 30,000 couples?

It is now increasingly realised that there are problems to be addressed:

. Some commentators, particularly those starting from a traditional religious point of view, are absolutely opposed to the new techniques:

.. They are seen as 'laboratory procreation' — a dehumanised, unnatural manufacture of man as if he were a mere product : the elevation of the scientist to God-like power. This, roughly, is the reason that led Pope Pius XII to condemn the technique as absolutely illicit.

.. Other opponents point out that IVF requires masturbation to produce the sperm. It is said that this admittedly widespread practice is evil. In the absence of married love at the time of conception, it is thought that no good can come of it.

.. Other opponents fear the process of freezing of the human embryo — a technique utilised because of the wastage of embryos in the process of fertilisation — will all too readily lead on to experimentation with embryos and foetuses. The spectre of the foetal farm, developed to provide tissue for the relief of adult diseases, is one that horrifies some observers, but not others.

.. If embryos are frozen and not needed for future use, should they be discarded or would this act involve killing a form of human life?

.. Other opponents of the whole program simply say that, whatever your religion, there are better things to be done with the scarce medical dollars that would bring help to more fellow citizens. According to these people, this is an exotic, extremely expensive program benefitting relatively few.

. Even amongst those who positively support the IVF technology, there is now an increasing recognition of the need to consider particular social and legal consequences. Take the following, for example:

.. Should IVF be available only to married couples or also to single people, such as, say, a lesbian woman who wanted a child?

.. Should we permit surrogates, ie if a woman cannot carry a baby full-term, should her sister be permitted to do so? If so, who is the true mother? Who, if either of them, has the say in abortion decisions?

.. What happens to the law of incest? Could a daughter carry the child of her parents?

.. Should parents be able to chose the gender of the embryo they select?

.. Should it be lawful to retain a frozen human embryo for hundreds of years as is said to be technologically possible? If so, what is to happen to the distribution of property? Is the child's identity one of our generation or the generation into which he is born?

.. In the case of frozen embryos, what is to happen on the death or divorce of the donors?

These may sound exotic questions. Looking at the smiling babies we may prefer to put them out of our minds. But unless we provide the answers and the laws, we may be delivering our society to the Brave New World which Huxley wrote about 50 years ago this year.

The rapid developments of computerisation, particularly as linked to telecommunications, present many problems for society, including its educators. By a remarkable combination of photo reduction techniques, dazzling amounts of information can now be included in the circuit of a tiny microchip. The computerised society may reduce the needs of employment, increase the vulnerability of society, magnify our reliance on overseas data bases and endanger the privacy of individuals.

These and other developments raise questions which the law of the future will have to answer on behalf of society. Should human cloning be permitted and if so under what conditions. Is it acceptable to contemplate genetic manipulation, consciously disturbing the random procedures that have occurred since the beginning of time? In the case of artificial insemination by a donor other than a husband, what rules should govern the discovery of the identity of the donor, if this is ever to be permitted? What rules should govern the passing of property and how can we prevent accidental incest in a world of unidentified donors? Should we permit the storage of sensitive personal data about Australians in overseas data bases and if so under what conditions? What requirement should be imposed for the supply of data in one computer to another? Is the systematic matching of computer tapes a permissible check against fraud or a new form of general search warrant which should be submitted to judicial pre-conditions? Under what circumstances are we prepared to tolerate telephone tapping to combat crime? Is junk mail a passing nuisance or unacceptable invasion of privacy?

Almost every task given by successive Attorneys-General to the Law Reform Commission raises an issue about the impact of science and technology on the law. In our project on criminal investigation, we had to look to ways in which police procedures could have grafted onto them the advantages and disciplines of new scientific advances.[7] In our report on human tissue transplanation, we had to work out the rules that should govern the taking of organs from one person for the benefit of another.[8] We also had to answer the question of how death is to be defined in modern terms. Should young people ever be entitled to donate a non-regenerative organ to a sibling and if so under what conditions? Should positive donation be required or can we legally impute a general community willingness to donate organs after death. Our project on defamation law required us to face the realities of defamation today: no longer an insult hurled over the back fence but now a hurt that may be carried to the four corners of the country.[9] Our reference on privacy requires us to examine the ways in which we can preserve respect for individual privacy whilst taking advantage of the computerisation of society.[10] Even our most recent project on reform of the law of evidence requires us to rescrutinise some of the accepted rules of evidence against modern psychological and other studies which suggest that many of the accepted tenets of the law do not stand up to empirical scrutiny.

CONCLUSIONS

I have tried in this address to call to your attention the tremendous debt we owe in Australia to Britain. It is right that we should reflect upon this debt at this present time. We should not be embarrassed to do so. We should not feel that it diminishes our independence as a sovereign country to refer to the obvious impact on our shared core values of British ideas, British Government and British laws.

I have tried to show how some of the rules developed in the English system of law are rather special and designed to underline and uphold the position of the individual in his relationship with the authority of the State. I have also referred to the impact of new science and technology on our laws. That very science and technology will promote the power of the State and of officials. Fortunately, the Government and the Parliament are doing things to ensure that the traditional values are upheld in the law.

I am sure there are many other issues of law and law reform that I could discuss with you. There are doubtless many important questions of Federal law reform that concern country women as such and as citizens. I could, for example, have explained the way in which, with the support of the Commonwealth Government, we have established in the Law Reform Commission a system of collecting citizen complaints about Federal laws. We now report these complaints in our Annual Reports to Parliament. It may be hoped that in this way we can catch the attention even of busy politicians, to the concerns about injustice which are expressed by citizens and also by judges, law teachers and others.

I could also have told you about the Commission's report on proposals for reform of lands acquisition law in the Commonwealth sphere. The Commission delivered its report on this topic in 1979, proposing important new protections for the individual whose property is acquired under compulsory process by the Commonwealth. This is an area of the law which, in the past, has sometimes led to injustice to country people. The need to spell out with new procedures the constitutional guarantee of 'just terms' for Federal acquisitions of property is now generally acknowledged and was explored in the Commission's proposals. These proposals are still under consideration in Canberra.

The Commission has also been asked to look at the subject of class actions. This is a procedure by which individuals can bring legal proceedings in a common cause. Occasionally, there may be a need for class actions, or for some form of representative action, to protect people living on the land. For example, in early 1977 a number of extensive bush fires caused widespread loss and damage in Western Victoria. In three of those fires, 168 farmers and some townspeople suffered huge losses. Some lost homes, plant, stock, fencing, everything they possessed. Bushfire relief payments provided only partial compensation. A subsequent Board of Inquiry established that these three fires had been caused by inadequate safety precautions by the State Electricity Commission and the Commission was held responsible. But for that Inquiry, any landholder wishing to sue to recover damages for his loss would have had considerable difficulty in establishing liability. Moreover, he would have had to bring proceedings individually and

face the burden of proving in each case the complex technical evidence that it was necessary to present. Some form of representative action seems necessary to ensure that common problems can be brought to justice in an efficient way, whilst at the same time avoiding the dangers of blackmail litigation which have arisen in class actions in the United States.

It might have been interesting to explore with you the legal liability of country people for the escape of sheep and cattle on to the highway. I am sure that some of you would have wanted to talk about the potential of the new Family Law Act to provide new problems, resulting in the dissolution of family estates on the land. All of these subjects would doubtless have merited your attention.

However, it seemed right to me to speak to you at this time in praise of Britain and to recall to your attention the important features of our justice system which we owe to Britain. It is vital that as we develop our own answers to our own special problems in Australia, we should not lose sight of our inheritance:

We must be free or die who speak the tongue that Shakespeare spake.

FOOTNOTES

1. W. Wordsworth, 'It is not to be thought of', 1802, l.11.

2. Anderson v. The Commonwealth (1932) 47 CLR 50.

3. Thorson v. Attorney-General of Canada (1974) 43 DLR (3d) 1.

4. Onus & Anor v. Alcoa of Australia Limited (1981) 55 ALRJR 631. Cf. Australian Conservation Foundation Incorporated v. Commonwealth (1980) 54 ALJR 176.

5. The Law Reform Commission, Criminal Investigation (ALRC 2), Interim, 1975.

6. As reported in the Australian, 24 April 1982, 1.

7. ALRC 2, above. Amongst suggestions made were sound recording of confessional evidence, telephone warrants for urgent searches and arrests and photography or videotapeing of identification parades. See now Criminal Investigation Bill 1981 (Cwlth).

8. The Law Reform Commission, Human Tissue Transplants (ALRC 7), 1978.

9. The Law Reform Commission, Unfair Publication : Defamation and Privacy (ALRC 11), 1979.

10. The Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information, 1980.