How does one fix priorities in law reform? It is impossible to quantify, for comparison, the amount of mischief done by an outdated *Limitations Act* or by outmoded child welfare laws. All law reform bodies work with limited resources. In the case of the A.L.R.C., it is for the Attorney-General to give the references that set the Commission to work. Furthermore, he is empowered to give direction as to the order in which the Commission is to deal with references and as to any interim report it must make. The A.L.R.C. is empowered to suggest matters appropriate for reference to it. It has done so. The latest suggestion, contained in its report *Insolvency: The Regular Payment of Debts* (A.L.R.C.6) was for a general review of Australia's *Bankruptcy Act.* In the end, it is for the Federal Attorney-General, doubtless in consultation with other Ministers and departments, to decide what the Law Reform Commission should do. In one sense this diminishes the Commission's autonomy. In another sense it puts the responsibility for priorities where it should be: with politicians who must in the end convert proposals into law and assess, by community standards, where a law is going wrong.

Judicial "Imperialism"?

> "The business of a judge is to hold his tongue until the last possible moment, and to try to be as wise as he is paid to look."
>
> Ascribed to Lord Hewart by Glanville Williams *The Proof of Guilt*, 26.

The last quarter has seen judges and the judicial office under scrutiny in Australia and elsewhere. Professor Gordon Reid (W.A.) identified a new development in an address to the Australian Institute of Political Science on 29 January 1978. This development he called "judicial imperialism". He listed the use being made of judges, throughout Australia, for essentially executive office and expressed the opinion that "the practice is fraught with dangers for a fearlessly independent Judiciary". Reid quotes the traditional view of the judge's functions stated in a memorandum to the Victorian Government by Irvine C.J. in 1923.

> "The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and a subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law. There begins and ends the function of the Judiciary."

In contrast to this view, the development of the judicial-type review of administrative decisions at a federal level, the expansion of the Family Court of Australia and the development of a new Federal Court are identified by Reid as transformations which are "revolutionary".

> "And, as if this was not radical enough, we also have new statutes providing for a network of Legal Aid Commissions throughout Australia, a newly created and active federal Law Reform Commission and legislation is now before the Parliament for a Human Rights Commission. . . . The Federal Judiciary has made obvious territorial gains in the developments just explained."

A list of bodies using federal judges is impressive. In the United States, the view has been taken on this issue by the American Bar Association:

> "A judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

Reid acknowledges that many, including judges, regard the strict division of functions as unnecessary Montesquieuian fundamentalism, inappropriate to the modern state. He suggests that thought should be given to stopping the erosion of the "ailing" Parliament by loss of power to the Executive and the Judiciary.

In England a controversy was stirred by comments made by a trial judge in a case involving alleged racial discrimination. Parliamentary questions and protests were reflected in the general media. On 24 January John Mendelson wrote a leading article for The Times, *Should Parliament Have the Power to Take Action Against Judges?* The author, a Member of Parliament, identified a hard-core question:

> "If a judge acts in such a manner that Parliament comes to be convinced that he is not carrying out the existing law, particularly in his directions to the jury and in his further comments, then action by Parliament is not only justified but wholly necessary in the public interest. . . . There must be a final effective

method in which the interests of the nation itself and of all its citizens can be defended against the arbitrary use of power, not only by government but also by a member of the judiciary. Ultimately, in any truly democratic system, Parliament cannot shirk that responsibility."

Meanwhile, different views exist among the judges themselves. Some oppose a Bill of Rights for Australia precisely because this would take the judiciary into frank law-making, even in court rooms. On the other hand, Lord Scarman told the Lords Select Committee on a Bill of Rights that he wanted "to move over to the attack". A Bill of Rights would "freshen up the principles of the common law; it provides the judges with a revived body of legal principles to which they would go to develop the common law case by case as they had been doing for centuries". (*Times*, 24 Jan.)

In the United States, which has lived with a Bill of Rights for nearly two centuries, the current issue is how to instil "merit selection" in the place of well-established patronage. A proposal to create 145 new federal judgeships in the U.S. has produced two Bills to control all federal judicial appointments by merit principles. Merit selection is described by 35 *Congressional Quarterly W.R.* 394 (1978) as an "apple pie issue". Everyone is in favour of it; but what is "merit"? Once judges abandon the "declaratory theory" and the mechanistic view of their role, "merit" may go beyond technical skills. In 1971 Lord Reid declared that we no longer believe in the "fairy tale" that "the law is . . . some known and defined entity secreted in Alladin's cave and revealed if one uses the right password" (1972) 12 *J.S.P.T.L.* 22. Some see Professor Reid's paper as a call back into the Alladin's cave which Lord Reid opened up.

Reforming Lawyers' Monopolies

"They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."
Sir Thomas More, *Of Law and Magistrates.*

February 1978 saw the 500th anniversary of the birth of Thomas More. A glittering legal dinner in Melbourne celebrated this occasion with a scholarly address by the Governor-General, Sir Zelman Cowen. The sainted Chancellor was, he declared, a man for all seasons and for this season. A man for our time, with lessons for today's lawyers.

The role of lawyers in modern Australian society has never been under such close scrutiny. The catalyst is the inquiry by the N.S.W. Law Reform Commission into the reform of the profession in that State. The Commission's wide-ranging investigations have taken it to most parts of Australia. Its *Annual Report 1977* sets out some of the issues facing the Commission. More than 500 letters have been received from individual members of the public, most of them making some complaint in relation to the legal profession. The Commission is proceeding to the time-consuming task of sifting and analysing complaints, for the lessons they bear.

"The people who have been in touch with the Commission do not constitute a cross section either of the public or of the clients of the legal profession, but they have served to give the Commission a broad understanding of the matters which have caused dissatisfaction amongst those members of the public who are dissatisfied as a result of experiences with the legal profession. The overwhelming majority of those contacting the Commission have been sensible people with matters of substance to discuss."

The debate on legal monopolies continues. In Victoria in December 1975, the Law Institute challenged in the Supreme Court the legality of a business which had been offering conveyancing on home purchases at half the fees charged by solicitors. The business had attracted about 100 clients since it began advertising. Undertakings were secured that the defendants would cease contravening the *Legal Profession Practice Act* (Vic.). Needless to say, the proceedings, regarded as a minor triumph in some legal circles, were less well received elsewhere. The *Age* newspaper (25 Jan.) intoned:

"Most of the work involved in conveyancing is purely routine and is generally performed by clerks or trained typists. If no complications are likely to arise, a solicitor's professional judgment is hardly required . . . It seems ludicrous that in this era of computer technology so much wasteful paper work should be involved."

In N.S.W., the State Minister for Lands, Mr. Crabtree, announced on 9 February two steps that will simplify current procedures: