

# reform

A regular bulletin of law reform news, views and information  
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## Coping with the Eighties

“The trouble with our times is that the future is not what it used to be.

Paul Valéry

President Lincoln once told an audience that the best thing about the future was that it came “only one day at a time”. Inevitably, on the brink of a new decade, Australian lawyers, and particularly those in the business of law reform, ask: what do the eighties have in store for us?

To answer this question, it is useful to identify the primary forces for change at work in Australian society. These are:

- *Changes in social values:* Arising chiefly

out of the extension of education and the exponential growth of information which bombards society today.

- *Technological change:* Which is happening at ever-increasing speed so that the “time cushion” which was once available to lawmakers to adjust the law to change is diminished. Furthermore, the capacity of laymen to understand the new technology is increasingly limited. How many of us really know what the computer is capable of?

The next decade will see efforts to adjust the law to these changes. Almost certainly, there will be renewed proposals to provide more readily available machinery for the protection

of human rights. The Human Rights Commission Bill 1979, is presently working its way through the Australian Federal Parliament, as is the Freedom of Information Bill 1978. Other areas in which legislation can be expected are:

- privacy protection
- police powers
- dealings with the bureaucracy.

What are the threats to law and order in Australia in the eighties? Some of them can be readily identified:

- *Terrorism*: With its unique impact on open Western communities.
- *Vulnerability*: The computerised society is increasingly vulnerable to accident, computer crime and even sabotage.
- *Unemployment*: From a stable figure of less than 1% Australia's unemployment is now a steady 6%. O.E.C.D. figures suggest the eighties will be a time of hard core unemployment with the consequential risks of disaffection and polarisation in society.
- *Overreaction*: Increases in perceived and actual crime figures produce a clearly evident recent tendency to "turn back the punitive clock". Furthermore, some problems appear intractable and largely unresponsive to orthodox legal sanctions. The most obvious of these is the growth in drug addiction. Introduction of widespread phone tapping, detention without trial and forced confessions would doubtless reduce crime. But the price in the loss of liberties must always be weighed. A modern society totally without crime could be achieved only at intolerable cost in the loss of individual privacy and liberty.

What of lawyers in the eighties? The figures suggest that they continue to come from a high-income background. They are significantly urban and strongly concentrated in the Eastern States. However, more women are now being admitted as legal practitioners (1% in 1940, 22% now). There is a great shift in the age balance of the profession to the young. If

there is not an over-supply of lawyers in Australia, the numbers are certainly abundant. All of this will probably contribute to a profession more responsive to legal reform. In anticipation of the N.S.W.L.R.C. report on reform of the legal profession, changes are already occurring. What are the likely areas of change?

- *Discipline*: There will be more lay involvement. Neglect and incompetence as well as dishonesty will be regarded as "professional misconduct".
- *In the courts*: There will be a gradual abolition of periwigs. Courtroom design will seek to reduce the intimidation of the trial. Q.C.s will appear without juniors. There will be an increase in lay representation.
- *Advertising*: Already the moves are afoot to permit limited advertising, particularly of specialities.
- *Computerised information*: Judges by the 1990s will have a computer terminal on the Bench to retrieve statutes and legal authorities.

Legal education will develop in the 1980s. For lawyers, the business of educating them to change has a long time-fuse. The law students of today are the judges of the 21st century. The introduction of law courses on law and technology generally and computers in particular will advance from their current meagre beginnings. Community legal education, now in its infancy, will expand vastly. Already, Legal Studies is the third most popular matriculation subject in Victorian schools. The obligation to give future citizens a broad understanding of the law and its machinery has at last caught the eye of education authorities.

What of law reform in the eighties? The problems will remain much as they are today:

- *Funds*: Those who expect an overnight "spring cleaning" of the law must be prepared to pay for it. The present spasmodic, scattered reforms will only expand to a comprehensive effort when there is a major investment of public funds in the legal science. Technology may force the pace somewhat.

- *Federation*: The achievement of conceptually satisfactory reforms is limited in Australia by the federal division of powers. Major national proposals for reform must always run the gauntlet of the constitutional limitations of the Federal Parliament and the “conceptual straight-jacket” which the motley collection of federal powers sometimes involves.
- *Follow-Up*: The preparation of splendid reports may contribute to scholarship. Unless they are followed up with legislation and, beyond, with scrutiny of the operation of reformed laws, they will not generally improve society. It is in this connection that the proposals of the Senate Committee on Constitutional and Legal Affairs for a regular system of processing A.L.R.C. law reform proposals through Parliament assume major importance. The government has not yet announced its reaction to this report.

As for the methodology of law reform, it will become more empirical and less a matter of hunch and guesswork. There will be growing reliance on:

- surveys of public and operational opinion
- scrutinies of court practices in operation, court files and computer records
- economic analysis of the cost/benefit implications of law reform proposals.

The A.L.R.C. has already used some of these techniques. Discussion of the economic implications of such projects as “class actions” and “insurance contracts” law reform are to take place with the Centre for Policy Studies at Monash University and other bodies devoted to economic analysis of legal change.

What are the major reforms one can look for in the eighties? In the areas of substantive law, the following stand out as requiring scrutiny:

- *Accident compensation*: as well as prevention and rehabilitation.
- *Industrial democracy*: modification of present company law
- *Computers*: The multiple impact of new

information technology on the law of evidence, intellectual property, crime and so on.

In the area of procedural law, we will probably see moves towards:

- more conciliation and mediation
- more lay and para legal participation in the law
- reformed laws of evidence
- improved provision of legal aid
- machinery so that the courts can cope with big cases i.e. where there are many criminal defendants or many class plaintiffs.

Should we be optimistic? Against optimism is the speed and complexity of change and the slow machinery we have for making laws. Our exquisite legislative drafting and the procedures of Parliament stand in the way of rapid adaptation. However, there are some reasons for optimism. One only of these is the creation of efficient institutional machinery for channelling law reform, through public debate and expert commentary, into the lawmaking process. Law reformers enter the eighties, optimistic.

## High Court Reforms

“The people can change Congress; but only God can change the Supreme Court”.

George W. Norris

The publication in December 1979 of “The Brethren”, an “investigative analysis” of the Supreme Court of the United States has no parallel in Australia. The impending move of the High Court of Australia to its permanent base in Canberra evokes a controversy that is mild by comparison. Until now the Federal Supreme Court of Australia has been itinerant, sitting in State capitals for varying periods during the year. *The Australian* (8 December 1979) lamented that the decision was ever made to move the High Court to Canberra. Judges are already too remote, according to the