- The criminal justice system neglects the victims of crime.

To deal with these 'problems, which are not dissimilar to our problems in Australia, measures under consideration include:

- greater specificity in legal punishments, to reduce judicial discretion in sentencing;
- remissions as a reward, not to be secured 'as a right';
- removal of many crimes from the statute book to reflect changing 'moral and social values';
- improved assistance to victims of crime including allocation of damages, leniency to convicted persons who have indemnified the victim and provision for State indemnity in the case of some physical injuries.

These developments just go to prove how universal are the problems of criminal justice law reform.

new high court?

In times of social change and tensions in the world, great are the demands upon the courts and the challenges to them in reconciling competing interests and in accommodating traditional rules to new circumstances.

H.M. The Queen, opening of the High Court, Canberra, 26 May 1980

After nearly eight decades of peregrinating, the Australian federal supreme court, the High Court of Australia, has been settled in its permanent home in the national capital, Canberra. The occasion was one of pomp and spectacle. Judges from nearly a hundred countries, together with judges, politicians and national leaders in Australia, heard the Queen pay tribute to the judiciary and lay emphasis on the need to uphold the rule of law and accommodate long established rules to fast changing times.

The opening ceremony was accompanied by judicial conferences and some public speculation about the role and functions of the judiciary and particularly of the High Court itself. Along with trivia about the new 'jabots' worn as court dress by the seven High Court Justices, there has been a deal of serious discussion about the role of Australia's highest court and particularly in relation to law reform.

Speaking at the opening of the Second Conference of Appellate Judges, Chief Justice Barwick suggested a growing role for the judiciary in calling the needs of law reform to attention.

> It is probably worth this conference taking some time in examining available methods by which a judiciary can properly influence a legislature towards what, for want of a better and more specific term, I shall call, though perhaps inadequately, law reform. In considering such a question, the proper recognition of the limits of the judicial function would need examination and probably precise definition. If the judicial function is concerned, as I would think it is, intensely concerned with the attainment of justice, it may not be enough that defects and inadequacies in the law which custom or the legislature has provided are seen and publicly observed upon, perhaps only in litigation inter partes. The pressing need for change is so often only disclosed by the circumstances of a particular case in the experience of the judge. That he should be alert to observe and identify that need is part of his pursuit of justice. Merely to call attention to the deficiencies in the course of delivered judgment may be felt to be insufficient. What is the desirable course for the judge who has perceived the need for ameliorating change? May it not be that some positive means or formalised apparatus should be available to the initiative of the judiciary whereby the legislature can directly be apprised of the observed defects and inadequacies of the substantive law or of the procedural law and perhaps the executive be furnished by the judge with ideas as to likely ways of its amendment? This might be thought worth exploration for this is part of the relationship of the judiciary to government.

Papers presented to the Judicial Conference included one by Professor Mauro Cappelletti on 'The Judge, Law Maker or Interpreter'. Another paper by Dean Irwin Griswold 'The Judiciary and The Government' included a suggestion that judges, in the British tradition were 'much too concerned about criticism'. Referring to a recent dispute in Papua New Guinea, Dean Griswold contrasted the position in the United States.

> A good many disrespectful things are said about courts in the U.S., occasionally by government officials, and no one pays much attention to them. Such remarks with us are generally regarded as an excess of zeal, and experience shows that they do not in fact interfere with the operation of the courts or lessen public respect for them.

Commenting on this assertion of overconcern to criticism, Sir Harry Gibbs told an Australian Bar Association dinner that High Court Justices in Australia faced by conflicting advice, had to be

positively 'inured' against criticism. Certainly, in the weeks surrounding the opening of the new building in Canberra, there was enough of it. Some people did not like the building. Others thought it cost too much at a time of effective cutbacks in legal aid. Others criticised the role of the Chief Justice in securing such priority for it. Some State commentators looked apprehensively at the possible decline in regular visits of the Court to different parts of Australia.

> It is possible that future High Court judges will arise from the hothouse atmosphere of this specialist [Canberra] Bar, particularly as eminent legal people from the scattered capital cities may not wish to uproot themselves...[Will] the centralising effect of the court's location...tend to make the High Court take an increasingly centralist position in future conflicts between State and Federal law?
> Adelaide *Advertiser* 28 May 1980.

One of the High Court judges, Mr. Justice Murphy ventured out of the Judicial Conference to address the National Press Club in Canberra. His recipe for the maintenance of public confidence in the Australian judiciary was in two developments:

- greater balance in the selection of judges;
- informed public discussion about the judiciary and what it does.

Asserting that the social values of judges greatly influence the laws and their application, Mr. Justice Murphy appealed for a judiciary reflecting more fairly the diverse values of Australian society.

> In Australia, no attempt is made to achieve any balance. With rare exceptions, appointments are made of persons who can fairly be regarded as conservative or ultra conservative...A proper balance throughout our legal system is overdue. This includes the appointment to the Federal and State courts of women as well as men judges and court officers; of those whose families are not from the British Isles as well as those who do originate from the British Isles.

Mr. Justice Murphy stressed that he was not urging proportionality, simply a fairer balance.

A staff corespondent for the Melbourne *Age* picked up this theme urging:

> The important controversy surrounding the new High Court building in Canberra is not about the cost of the Court but its role . . . Yesterday, the Queen and the Chief Justice, heads of two venerable pillars of government – the Monarchy and the Law – stood side by side on the shores of Lake Burley Griffin. Oddly, it was the Queen who seemed to most observers to be the more modern and more relevant figure. Whereas the Monarchy has developed and adapted its ways to meet changing social needs, the law is clinging more tightly to its ancient and traditional ways.

In a graduation address to the first law graduates of Macquarie University, the ALRC Chairman referred to the question of whether our institutions, including the High Court, can cope with the pressures of change today.

> Recent decisions of the High Court of Australia present a court generally disinclined to develop and stretch the laws we have inherited to the new moral, social and technological circumstances of today's Australia. ...In the coalescence of great forces for change, there are dangers for our country. If we cling lovingly to old rules, no longer apt for our time, our institutions and our laws will fail us. If we fail to adapt our society and its laws to the challenges of fast moving technology, our institutions will fail us.

Speaking to the Australian Liberal Students Federation in Hobart, the same speaker summed up, referring to recent cases where the High Court had declined to change established common law rules said to be inappropriate for today:

> Coinciding with the disinclination of judges to develop and modernise the law as their forbears did, are tremendous pressures for change in the law. ...The modern Australian Parliament is a 'weak and weakening institution'. The judges may turn over to Parliament such issues as prisoners' rights, fencing sheep, legal aid and 'standing'. But all too often, Parliament pays no heed. There is no regular routine machinery to catch the ear of Parliament and Government. Law reform bodies are ill-funded and under-manned. Pressures for change are enormous. The institutions of effecting change are puny. The issue before us is whether our law making institutions can cope . . . The common law system is leaving to others the minutiae once resolutely attended to by the judges. But others are frankly not interested. Or they are too busy, uncaring, distracted by political events or under the harassment of recurring elections.

References to the new High Court building have even begun to spring up in judicial decisions. Early in June 1980 the Supreme Court of South Australia granted leave to appeal to the Privy Council in London against a unanimous Full

Court decision in a damages case. One judge, Mr. Justice Zelling, did so 'with great regret'. And only because he was 'constrained by authority'.

> Appeals to a foreign Court are demeaning to the status of Australia as a sovereign nation. No Australian Government should permit this to continue. I trust that speedy steps will be taken to end a state of affairs which is contrary to the dignity of this country. Ultimate appeals from Australian Courts should go to the High Court of Australia — whose proper status has been so recently re-emphasised to all of us by the opening of its new building at Canberra by Her Majesty the Queen, as Queen of Australia.
> *Crook* v. *Masson*, June 1980, unreported.

So far as the function of appeal courts is concerned, the debate is an international one, as Professor Cappelletti's paper shows. It has been given focus in Britain by recent decisions of Lord Denning M.R. In one of them, (dissenting) in *R.* v. *Sheffield Crown Court; ex parte Brownlow* (the jury vetting case) Lord Denning proposed new ways of interpreting legislation to achieve 'the most sensible result'. The London *Times* (3 March 1980) cried caution in an editorial 'Lord Denning Bowls too Wide'.

> What Lord Denning is trying to do is to import into the interpretation of statutory provisions the same degree of judicial creativity as is normally applied to developing the common law. The tradition of English law does not support that approach. It may be acceptable to introduce a qualifying element of equity into the harsh rules of statutory construction [but] this would be, under his formula, for the majority of judges to determine a sensible result. That would be to usurp Parliament's function and give judges a power which the vast majority of them neither seek nor are capable of exercising.

It is a thoroughly good thing that the opening of a new court building in Australia should be accompanied by so much public and private self-scrutiny. The Governor-General, Sir Zelman Cowen opening the Judicial Conference in Sydney warned the judges that there was more to come:

> The climate in which the law, the courts and judges operate is a reflection of a general critical attitude to institutions. Many years ago, one of the great common law judges, Lord Atkin, said that 'the path of criticism is a public way: the wrong headed are permitted to err therein ...Justice is not cloistered virtue'. There is evidence of this in our day when institutions and their members are quite roughly handled. Lord Widgery, told an English Commission early in the 70s that judges' backs have got to be a good deal broader than they used to be years ago. I would suppose that many of you are conscious of this.

reforming law reform

It is the nature of a man as he grows older . . . to protest against change, particularly change for the better.

John Steinbeck

Completely undeterred by editors and unrepentant in the face of House of Lords criticism, Lord Denning prefaced his new book *The Due Process of Law* (Butterworths, 1980) with the following precious observations:

> Many proposals have been made by us in the Court of Appeal. Time and again we have ventured out on a new line: only to be rebuffed by the House of Lords. On the ground that the legislature – advised by this body or that – can see all round; whereas the Judges can see only one side. This I dispute. The Judges have better sight and longer sight than those other bodies: especially in practical working of the law and in the safe-guarding of individual freedom. And when it is said that some other body should first investigate and report, I ask: "How long Oh Lord (Chancellor), how long"?

Anticipating this question in the context of institutional law reform, the Senate Standing Committee on Constitutional and Legal Affairs in the Australian Parliament published in 1979 an important report *Reforming the Law.* The report is reviewed in [1979] *Reform* 52. It dealt with three questions relevant to the orderly processing of law reform proposals in Australia:

- methods of ensuring that ALRC proposals are promptly implemented or at least considered;
- machinery for collecting and assessing law reform proposals;
- co-ordination of law reform within Australian LRCs.

On 15 May 1980 the Federal Attorney-General, Senator P.D. Durack made a ministerial statement to the Australian Senate setting out the Government's reactions to the report. *Cwlth Parliamentary Debates (Senate)* 15 May 1980, 2295.

First the good news. Among the recommendations approved are: