- to monitor new developments in medicine and science that raise complex ethical and moral issues or affect fundamental human rights;
- to devise procedures to ensure that appropriate legal recognition is given to medical and scientific changes; and
- to recommend legislative change where necessary.

The notion of a 'standing' reference is a new one in Australian law reform circles but it is a welcome initiative.

taps and tapes

(expletive deleted)

Watergate tapes

British moves. Telephone tapping and tapes are still in the news. Stephen Norris MP, in a column in the London *Times* (18 January 1985) has called on the British Government to cast off its 'minimalist approach' to privacy by extending proposals to regulate official 'phone tapping (due to be released in a White Paper later this year) to cover tapping by private persons and bodies:

> If and when [private] bugging is uncovered, the outraged victim finds that, apart from a possible minor breach of the Wireless Telegraphy Act, ... the offender can escape scot free.

Australian debate. In Australia, as the ALRC noted in its report on Privacy (see [1984] *Reform* 1), the position is much more secure. But even here, pressures are mounting for an extension of the right to 'tap' phones, especially in serious drug cases. The Melbourne *Age* (11 March 1985), for example, commented that:

> It seems to be an anomaly of Australia's federal system that federal police investigating drug trafficking may apply for a warrant to tap telephones but state police engaged in similar investigations may not. However, it may be argued that to safeguard against abuse, the fewer law enforcement agencies with such powers the better ...

This was certainly the view of the ALRC, which recommended strongly against extension of the right to tap phones, arguing that only the Australian Federal Police should be authorised to do it, and then, only on judicial warrant. The Age suggested that another solution would be to widen the role of the National Crimes Authority, permitting State police to approach the NCA for authority to tap 'provided the procedures are not so cumbersome as to jeopardise the security and effectiveness of the investigations concerned'.

Meanwhile the Hawke and Wran Governments' 'Loans Affair' – the *Age Tapes* – has gone into a period of revival over the question whether immunity from prosecution should be given to the NSW police who allegedly made the tapes in breach of federal interception laws. Mr Justice Stewart always favoured granting immunity to encourage the police to cooperate in authenticating the tapes. The Director of Public Prosecutions, Mr Ian Temby QC originally said 'No'. He apparently took the view that the large scale systematic and deliberate breach of privacy laws by a police force should not be condoned. Mr Temby has also stressed that even if the indemnities were granted the material on the tapes was unlikely to lead to prosecutions nor to assist in prosecutions. In an editorial in the *Sydney Morning Herald* on 22 March the case for an indemnity was forcefully put. The *Herald* argued that if Mr Bowen wanted a precedent for granting indemnity to the police 'he need look no further than that provided by the New South Wales Chief Justice, Sir Laurence Street, when he recommended that Mr Kevin Jones, a magistrate, be granted immunity so that he could be compelled to give evidence against the former Chief Stipendiary Magistrate, Mr Farquhar. Sir Laurence clearly accepted that occasionally a lesser wrong had to go unpunished so that a great wrong could be uncovered. The tapes are a similar case'.

As Reform goes to press it has been disclosed that there are more recent and relevant tapes than the Age tapes, and that they might be of evidential value. Mr Bowen and Mr Temby have reportedly agreed with Justice Stewart that any necessary indemnities should be given to enable that evidence to be used in prosecutions.

The Stewart Royal Commission is being given extended terms of reference to look into the illegally recorded 'Age Tapes' and indemnities are to be given to some of those involved in their production. This will necessitate changes to the Telecommunications (Interceptions) Act to allow Justice Stewart to gain access to the phone-tap material.

Meanwhile the High Court by a 3-2 decision (*Hilton v R*, 26th March, 1985) has ruled that information obtained from the illegal tapping of conversations may be admissible as evidence in criminal proceedings. The three majority judges affirmed the *Bunning v Cross* discretion to admit illegally obtained evidence. They acknowledged that acts in breach of a statute would 'more readily' warrant the rejection of evidence as a matter of the Court's discretion, but emphasised that the discretion had to be exercised in the light of the competing public interests. The Chief Justice, Sir Harry Gibbs, and Justices Wilson and Dawson combined to hold that the Telecommunications (Interception) Act 1979 did not explicitly or implicitly prohibit the tendering in evidence of information illegally or improperly obtained by telephone tapping.

Justices Mason and Deane constituted the minority. They said that it was 'scarcely plausible' that Parliament could have intended the result favoured by the majority when it passed the Telecommunications (Interception) Act in 1979. Their Honours focused upon the fact that s 7 of the Act sets out the kinds of court proceedings in which legally intercepted material can be used. From this they inferred that use in other proceedings of illegaly intercepted material was contrary to the intention of the legislature.

In view of the Attorney-General's stated attitude toward the use of illegally obtained evidence in this regard, it may well be that he and the majority of the High Court are of the same mind with regard to the use of such material. The judicial discretion to admit illegally obtained evidence will be addressed by the ALRC's *Interim Report on Evidence.*

land rights — aboriginal veto or not?

It's the only thing that matters because it's the only thing that lasts.

Clark Gable (Rhett Butler)
in 'Gone with the Wind'

The issue of Aboriginal land rights has reappeared on the front pages of Australian newspapers in recent months. Much of the coverage has centred on the Report into Aboriginal Land Rights in Western Australia by Mr Paul Seaman QC published in September 1984 and the ensuing debate between the Premier of Western Australia Hon Brian Bourke and the Federal Minister for Aboriginal Affairs, Hon Clyde Holding. At issue is whether Aborigines should have the right of veto over mining on Aboriginal land.

The Seaman Report which followed a year-long and wide-ranging inquiry strongly supported the concept of land rights for Aborigines. It recommended that certain land, in particular lands presently reserved for Aborigines, should be transferred to local or regional organisations and that other land such as unallocated Crown land, unused public land, national parks, forests and other conservation reserves and mission lands should be available for claim by Aboriginal people. It proposed the creation of a Tribunal to hear and determine claims. Once land became Aboriginal land the Report recommended that mining exploration and development should be subject to Aboriginal consent [Seaman Report 9.64-65]. It is this recommendation which has proven to be the most controversial in the Report.

Shortly after the Report was published the Premier of Western Australia announced that while the Government accepted the general tenor of the Report's recommendations there would be no right for Aborigines to veto mining or Aboriginal land, not all the categories of land recommended in the Report would be available for claim nor would there be royalties or compensation payments to Aborigines. This statement immediately brought comment as it appeared to conflict directly with the Labor