on the nature of the treatment and the age and understanding of the infant. But a decision on the part of the girl to practise sex and contraception required not only knowledge of the facts of life and of the dangers of pregnancy and disease, but also an understanding of the emotional and other consequences to her family, her partner and herself. It was doubtful whether a girl under 16 was capable of a balanced judgment to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science could protect her in mind and body, and ignoring the danger of leaping from childhood to adulthood without the difficult formative transitional experiences of adolescence. He said that there were many things which a girl under 16 needed to practise, but sex was not one of them. Lord Templeman said that Parliament could declare that view to be out-of-date, but as the law now stood an unmarried girl under 16 was not competent to decide whether to practise sex and contraception.

Lord Templeman said that a doctor, acting without the views of the parent, could not form a 'clinical' or any other reliable judgment that the best interests of the girl required the provision of contraceptive facilities. The doctor who provided contraceptive facilities without the parents' knowledge deprived the parents of the opportunity to protect the girl from sexual intercourse by persuading and helping her or by the exercise of parental power. Lord Templeman said that a parent would sooner or later find out the truth in any event and might do so in circumstances which brought about a complete rupture of good relations between members of the family and between the family and the doctor. He said that the secret provision of contraceptive facilities to a girl under 16 would encourage participation by the girl in sexual intercourse and that that offended basic principles of morality and religion which ought not to be sabotaged in stealth. Contraception should only be considered if and when the combined efforts of parent and doctor failed to prevent her from participating in sexual intercourse and there remained only the possibility of protecting the girl against pregnancy. A doctor might not lawfully provide a girl under 16 with contraceptive facilities without the approval of the parent responsible for the girl save pursuant to a court order, or in the case of an emergency, or in exceptional cases where the parent had abandoned or forfeited by abuse the right to be consulted. A doctor was not entitled to decide whether a girl under 16 should be provided with contraceptives if a parent who was in charge of the girl was ready and willing to make that decision in exercise of parental rights. (*The Times,* 18 October 1985)

standing in public interest litigation

> United States President Dwight Eisenhower, confronted by a team of economic advisers warning of impending economic doom, reportedly replied, 'Don't just do something, stand there.'

A report by the Australian Law Reform Commission, tabled on 29 November 1985 in Federal Parliament, contains recommendations designed to assist citizens, pressure-groups and associations who wish to enforce the rule of law in areas such as economic regulations, environmental protection, welfare rights, constitutionality of laws and review of the legality of the conduct of government departments and agencies. The report is entitled *Standing in Public Interest Litigation.* It deals chiefly with complex and technical legal rules as to who are appropriate plaintiffs to take civil proceedings in public interest matters. It suggests that existing restrictions on the right to sue should not be eliminated wholly, but should be defined more simply and in narrower terms.

A public-spirited citizen who sees another person, or perhaps a government department, acting unlawfully, may want to ask a court to rule on the question whether the law is being complied with. He or she may even want to ask the court to stop the other person from breaking the law or to ensure that when the person or government department acts in

the future, it does so strictly in accordance with the law. There are several obstacles between such a public-spirited citizen and the courts. This report deals with one of those obstacles, the law of standing. The law of standing is the set of rules that determine whether a person who starts legal proceedings is a proper person to do so. The law of standing is confused, unclear and restrictive. There are different tests of standing, depending on whether the plaintiff is seeking a declaration, an injunction or some other order from the court. The effect of these different rules, in brief, is that the plaintiff generally has to demonstrate some special connection with the subject matter of the proceedings—namely, that he or she is specially affected, or has a special interest, or has an interest going beyond the interests of ordinary members of the public. The plaintiff who has no such interest may approach an Attorney-General for a consent, called a fiat, which will allow him or her to take the proceedings as 'relator', usually in the Attorney-General's name. But fiats are often not granted and obtaining them may cause delay. The law of standing is ripe for reform. The High Court has held that reform cannot come from the judiciary. It up to Parliament to reform the law.

need for reform well recognised. The Commissioner responsible for the final stages of the Report's preparation, Professor Michael Chesterman, said on tabling of the Report:

> It has been recognised for some time in many quarters, including the High Court, that the rules of standing law, determining who is the appropriate plaintiff to bring a legal action, are obscure and technical and restrict unnecessarily the rights of citizens and associations to have access to the courts in matters of public interest. In 1978, for instance, the Australian Conservation Foundation was prevented, despite its well-recognised expertise in environmental matters, from challenging the procedural aspects of a planned tourist development at Yeppoon because it did not have a proprietary, financial, material or other 'special' interest in the matter, as required by the law of standing. The Report recommends that such cases should be allowed to go ahead, though it recognises the dangers of allowing unlimited access to the courts.

commonwealth reform. The Commission has concluded that the law of standing should be reformed for some classes of actions in federal courts, Territory courts and State courts exercising federal jurisdiction. These are:

- any proceeding in any court, to the extent that the relief sought in the proceeding is any of the following, namely, a declaration, an injunction or a 'prerogative writ', (certiorari, prohibition, mandamus, habeas corpus or an information of quo warranto), if the relief is sought—
  - in constitutional litigation;
  - in respect of a matter arising under any Commonwealth or Territory statute (other than a Northern Territory or Norfolk Island statute); or
  - against the Commonwealth, a person being sued on behalf of the Commonwealth or an officer of the Commonwealth;
- a proceeding in any court (other than a court applying Northern Territory or Norfolk Island law), to the extent that the relief sought is an injunction or a declaration for which the Commonwealth Attorney-General could sue; and
- a proceeding in any court, seeking relief provided for by Commonwealth or Territory Legislation (other than Legislation of the Northern Territory or Norfolk Island), where the relief is similar in function to the types of relief just described.

an 'open door', but with a 'pest screen'. The laws of standing in public interest litigation should be broadened and unified. Any person should have standing to commence public interest litigation within the range outlined above, unless it can be shown that, by doing so, the person is 'merely meddling'. This criterion should be elaborated in the following respects.

- *personal stake.* A personal stake in the subject-matter or outcome of the proceedings should be a *sufficient,* but not a *necessary,* condition of standing.
- *ability to represent the public interest.* Standing should be denied to a plaintiff who has no personal stake in the subject-matter of the litigation *and* who clearly cannot represent the public interest adequately.
- *presumption of standing.* There should be a presumption that the plaintiff has standing *unless* the court is satisfied that the person is 'merely meddling'.
- *application generally needed.* The court should not deny standing unless one of the parties makes an application to dismiss the case for lack of standing. However, where the plaintiff has no personal stake in the subject-matter of the litigation, such an application should not be necessary if the court finds that the plaintiff clearly cannot conduct the case adequately.
- *standing normally not a preliminary matter.* The question of standing should not be determined as a preliminary or interlocutory matter unless the court considers it desirable to do so for special reasons in the particular circumstances of the case. The normal approach should be to reserve standing for determination along with the merits.

related matters. The Commission also makes recommendations about a number of subsidiary matters including:

- intervention;
- amicus curiae;
- costs;
- legal aid; and
- maintenance.

retention of right of private prosecution. The Commission recommends that the existing power to commence a private prosecution should continue. Any person should be able to institute a private prosecution, subject to consent requirements in the relevant statute and the existing powers of the Attorney-General and the Director of Public Prosecutions to intervene and/or terminate.

extension to indictable offences. The Commission is concerned that, after committal proceedings (which may have been instituted privately) have established that there is a *prima facie* case against an alleged offender, the matter may go no further under existing law simply because the Attorney-General and the Director of Public Prosecutions take no action. The prosecution may 'die' without any formal, official act of discontinuance, such as a *nolle prosequi.* It is preferable that if any private citizen considers that trial on indictment should occur, his or her wishes should be put into effect until such as time as the Attorney-General or the Director of Public Prosecutions formally overrules them. For these reasons, any person should have the right to lay an indictment against an accused person in respect of any offence or offences for which the accused has been committed for trial. This right should be subject to the existing powers of the Attorney-General and the Director of Public Prosecutions to intervene and/or terminate. It should not be exerciseable until the expiry of three months after the order of committal. If the offence in question is one for which the consent of the Attorney-General or another official is required, this will have had to be obtained before instigation of the committal proceedings; hence, it is unnecessary to require that a second consent be obtained. It is not recommended that the leave of the court be required for a private indictment, or that courts should have the power to review exercises of the power to prosecute privately or of a Crown law officer's powers to intervene and terminate.

official consent to prosecution. A further safeguard against undesirable private prosecutions is furnished by provisions requiring official consent to prosecutions for specific offences. The Commission considers that while these may be desirable in areas of acute

sensitivity, the other arguments put forward in support of them (for example, that they make for consistency in prosecution policy and that they prevent frivolous or vexatious prosecutions) do not justify their continuance. Existing general restrictions on private prosecution are adequate in the majority of cases. Accordingly, a review hould be undertaken of provisions in existing Commonwealth and Territory legislation which require the consent of the Attorney-General or some other public officer to be obtained before a prosecution is initiated, with a view to ensuring that such limitations on the right of private prosecution are consistent and no greater than is necessary. Consent requirements should not be included in new legislation unless it deals with highly sensitive matters (such as defence or national security) and inclusion is justified in all the circumstances.

legal aid. It is not always clear from the relevant statutes and guidelines whether legal aid is available for private prosecutions. The importance of legal aid is crucial in many cases: without it, the theoretical right to prosecute privately may be of no use in practice. Commonwealth legal aid policies should therefore be revised so that explicit provision is made in the future for the granting of legal aid to private informants where they satisfy the existing means tests and such other criteria as are appropriate in the context. In addition the availability of legal aid for private prosecutions should be publicised.

scope of recommendations. The foregoing recommendations apply to private prosecutions for offences under any law of the Commonwealth or any law of a Territory other than the Northern Territory and Norfolk Island.

contempt and family law

discussion paper. Provisional proposals for making the enforcement of court orders in divorce cases more effective were released in November by the Australian Law Reform Commission. The proposals deal with the use of contempt powers by judges of the Family Court, and by magistrates, to impose prison sentences, fines or other penalties on husbands or wives who disobey court orders made in matrimonial litigation. The proposals are set out in a Discussion Paper entitled *Contempt and Family Law.* The Paper invites the public to make comments and criticisms to assist the Law Reform Commission in formulating final recommendations.

family law emotions. Professor Michael Chesterman, the Commissioner in charge of the Commission's current inquiry into the law of Contempt, said on the paper's launch:

> Getting an order enforced in any court can be difficult. But there are special problems where the Family Court is concerned. Usually, a Family Court order stirs up very deep emotions. Being told by a court to give up your child, or to pay maintenance, to a husband or wife whom you are divorcing is likely to make you distressed and resentful. Most spouses accept decisions made against them, unpalatable though they may be. But it is hardly surprising that some determined individuals do not, and that judges and magistrates encounter disobedience of orders in family law more frequently than in other classes of case.

two difficulties. Professor Chesterman said there were two especially difficult aspects of enforcement of Family Court orders—

- Punishing spouses for every breach of an order would be at odds with the Court's reliance on techniques of counselling and mediation, which are successful in most cases in helping spouses to negotiate a settlement of the dispute between them.

- Possible harm to the family: for example, if a parent is gaoled for failing to give child access ordered by the Court, it will probably hurt the child as much as the parent and will not necessarily ensure that access is granted in the future.

a discriminating approach. The Commission's research shows that the Family Court