to grant such an application is made. Administrative guidelines issued in South Australia acknowledge that the victim of a crime should have the right to:

> . . . be advised of justification for entering a nolle prosequi (ie to withdraw charges) when the decision is taken not to proceed with charges. (Decisions which might prove discomforting to victims should be explained with sensitivity and tact).

need for a policy review. Generally speaking, reasons for decisions to grant no bill applications are not published although reasons may be communicated to an applicant or his or her legal advisers. In straight forward cases where the decision is based on such reasons as lack of evidence, the age of the particular offence or the severe illness of the applicant there would appear to be no difficulty in making reasons public. However, it is not difficult to imagine circumstances, such as the need to protect third parties, in which it is desirable that reasons for such a decision be kept confidential. Mr Masterman QC in his 1986 report suggests that, generally speaking, reasons for 'no bill' decisions be given not because of any criticism of existing decision-makers or decisions but because 'secrecy of the existing decision-making procedure inevitably led to rumours and suspicion' (p.257). The NSW Attorney-General has proposed legislation to provide for the appointment of a Director of Public Prosecutions one of whose functions will be to make 'no bill' decisions. Meanwhile, the federal DPP is reported to have ordered a review of the policy of not publishing reasons.

There would appear to be considerable scope for publishing more information about decisions to grant no bill applications than is presently available. If necessary, the information could be published without reference to the names of the particular individuals involved. This would go some distance towards improving public confidence in the prosecution process.

kirby the reformer

> Injustice, poverty, slavery, ignorance – these may be cured by a reform or revolution. But men do not live only by fighting evils. They live by positive goals, individual and collective, a vast variety of them, seldom predictable, at times incompatible.
>
> Sir Isaiah Berlin, 'Four Essays on Liberty', *Political Ideas in the Twentieth Century*

The elevation of Justice Michael Kirby to the position of President of the New South Wales Court of Appeal has not dulled his zeal for pursuing reform of the law. This article looks at some of his recent suggestions for law reform.

aborigines and the law. In a foreword to the book *Ivory Scales: Black Australia and the Law* by the Australian Institute of Criminology, Justice Kirby examined the relationship between Aboriginal people and the Australian legal system as it has developed since 1788. He points to the high rates of aboriginal imprisonment compared with rates of imprisonment for non-aboriginal Australians. Despite recent signs of progress such as the establishment of the Aboriginal Legal Aid Services and the belated recognition by judges of the special disadvantages faced by aboriginal defendants under interrogation by police, the statistical disproportion points to a need for further reform.

Justice Kirby refers to various reports of the Australian Law Reform Commission which are relevant to problems with the legal system encountered by aborigines:

- the interim report on Criminal Investigation (ALRC 2) made special recommendations relating to interrogation of aboriginal suspects by Federal Police;
- the interim report on Sentencing of Federal Offenders (ALRC 15) identified and quantified the special disadvantages suffered by aborigines in the application of Federal criminal laws;
- the interim report on the law of evidence (ALRC 26) gave particular attention to the way those laws may ef-

fectively discriminate against aboriginal witnesses;
- 1986 the Commission's report on the Recognition of Aboriginal Customary Laws (ALRC31) was tabled in the Federal Parliament.

He points out that if the federal Parliament were to implement all of the suggestions and recommendations of the Commission, the result would merely scratch the surface in removing the major sources of injustice. He observes that the notion of timely and appropriate modifications of general rules in order to effect true justice, a notion which can be traced back to the ancient Greek philosophers including Aristotle and which operated in our own legal system as part of the rules of equity, has not been utilised to alleviate the problems of the Aboriginal people.

Justice Kirby raises the hope that, notwithstanding the current public mood against taking further action to rectify the injustices done to the Aboriginal people, the Bicentenary may yet stimulate the national conscience to do so by focussing attention upon our origins, which amounted to a denial of aboriginal Australia, and our subsequent history, which has reinforced that denial. His Honour sees curing the economic deprivations suffered by Aborigines and attention to the ALRC's report on The Recognition of Aboriginal Customary Laws as steps in dealing with the statistics on Aboriginal imprisonment and child welfare inequality which point to the need for reform.

sex reassignment. In his foreword to *The Legal Implications of Sex Reassignment* by HH Finlay and WA Walters, Justice Kirby looks at the social, medical and legal aspects of transsexuality. Transsexuals are those who, while having the physical characteristics of one gender, think of themselves as members of the opposite gender.

Justice Kirby examines the English case of *Corbett v Corbett* in which Mr Justice Ormrod was required to determine the validity of a marriage between April Ashley and Mr Corbett. If Miss Ashley was jugded not to be a woman, the 'marriage' was a nullity. Rather than examining the social and sexual objectives of marriage, Mr Justice Ormrod adopted three criteria to determine April Ashley's sex assignment: chromosomal, gonadal and genital. As Mr Justice Kirby puts it:

> In the face of the chromosomal test, all the external social indicia of a human relationship fell away, melted by the discovery of a genetic pattern, marked before birth, but demonstrable only by peering down a microscope.

The Corbett test has affected the development of the law in Australia but has been rejected in the United States of America. In Europe and other jurisdictions, appeals can be made for relief either to a constitutional bill of rights or an international human rights covenant such as the European Convention on Human Rights. No such avenue is available in Australia.

Justice Kirby points out that the lack of human rights legislation in Australia makes important the development of legislation which will adopt a more realistic and sensitive approach to transsexuals than that taken in *Corbett v Corbett.* The relevant issues covered in the book and to which he draws attention in the foreword are:

- choice of the operation subject;
- counselling the subject to ensure informed consent to the surgery;
- provision for the age of the subject;
- change of the birth register;
- provision for reversal of the procedure;
- implications for conscription and military service;
- implications for insurance where differential premiums are applicable;
- implications for industrial awards, pension benefits and the whole range of legislative and common law rules which apply differentially to men and women.

Justice Kirby advocates legal reform to facilitate a change which would free a human being from a feeling of life imprisonment in a body which is perceived as a trick of nature while taking necessary steps to protect others who may be affected by the change.

drug law. In a speech delivered to the World Congress of the International Commission for the Prevention of Alcoholism and Drug Dependency in Nice on 3 September 1986, Justice Kirby examined factors relevant to the reform of drug laws. He referred to one of the first reports of the Australian Law Reform Commission, *Alcohol, Drugs and Driving* (ALRC 4) which recommended changes in the laws in the Australian Capital Territory and was substantially adopted both in that territory and also to some extent in the States of Australia. However, Justice Kirby points out that the Commission did not have a general mandate to suggest broader reforms of the laws relating to alcohol, tobacco and other drug dependency. He outlines 'ten commandments' as a guide to legislative attempts to deal with drug dependency.

1. Define clearly the object to be attained. Intervention by the state must be proportionate to the established harm done to society and the consequential right of society to protect itself, the neighbours of the person taking the drug and (to a more limited extent) the individual drug taker principally affected.

2. Avoid hypocrisy in drug laws. Draconian laws, including unprecedented powers of telephone interception or search and seizure,have been introduced to combat narcotic drugs. However, the same people who advocate those laws enjoy and defend the use of alcohol and tobacco, even though 4/5 of deaths from drug related causes are directly attributable to tobacco addiction, 16% to alcohol and only 1% to barbiturates and opiates.

3. Consider the basic causes. Justice Kirby points to the images and products presented by advertisements which contrast with the despair, boredom, lack of love and low self-image which affect the long term unemployed, at least in developed countries.

4. Look to science and technology as an aid. Technology can be useful in a number of ways. For example, motor vehicles can be fitted with equipment to prevent intoxicated drivers from starting the vehicle. Also, mass media of communications can be used to promote knowledge about the dangers of drug abuse.

5. Recognise the role of imaginative propoganda. If the media are to be used in fighting the drug problem, the message should be delivered in an attractive, even 'sexy', fashion rather than by taking a cold, didactic approach. A good example is the 'kiss a non-smoker and enjoy the difference' advertisement which appeared in public transport and other public places.

6. Neutralise the economic forces. The costs of drug dependence should be recognised. Justice Kirby refers to a recent concerted campaign in Australia to stop people smoking. The campaign cost $1.5 million but was estimated to have saved the community $120 million in the long run. The long term social benefits secured, health costs saved and opportunity costs saved where a life is saved or extended were enormous. Proposals are also being formulated at the federal level to remove the tax deductibility of advertising by tobacco companies.

7. Avoid ineffective legal measures. Stringent laws for regulating drug use are likely to be ineffective or inefficient. If a law is likely to be ignored, widespread breaches of the law, failure to enforce it, the growth of a black market, official corruption and disrespect for the law will result. Law enforcement is not likely to stop the use of drugs from the supply

side. The demand side should be addressed by informing community attitudes on the dangers of drug use.

8. Remember the politics of drugs. Political factors militating against the control of drug abuse include the support given by legal drug industries to political parties and individual politicians. Law reform measures such as giving political parties public funds may alleviate this factor but severing the bond, particularly in hard economic times, will not be easy.

9. Retain your scepticism. Although the law may have a role in curbing drug abuse (for example, laws forbidding smoking in restaurants, in places of work, on public transport and other public places in defence of the rights of others against the dangers of passive smoking), the effectiveness of laws regulating morality is low. If products are banned, for example, a black market soon develops. As Justice Kirby points out:

> If we cannot persuade and educate people to that self-esteem which will divert them from alcohol, tobacco and other drug abuse, Draconian laws are not likely to be successful. On the contrary, the price they impose is likely to be disproportionately high.

10. Beware of over-reaction. Strong legislative action against drugs may erode civil liberties. Justice Kirby expresses the view that 'in matters so personal and intimate to the individual human being as decisions on drug intake, the law has only a limited and supportive role to play'.

industrial relations. In a speech delivered in Adelaide to the 1986 National Convention of the Industrial Relations Society of Australia on 26September1986, Justice Kirby examined the proposals for reform of the industrial relations system put forward by the recent Hancock report and the points of criticism and praise which have been made of that report. In the course of doing so, he examined recent constitutional developments which he saw as relevant to industrial relations law reform.

- In the *Tasmanian Dams Case*, the majority of the High Court said that the corporations power enabled the federal Parliament to legislate to prevent a trading or financial corporation from building a dam. From this, Justice Kirby argued that it would appear that federal legislation could also determine conditions under which workers for such a corporation might be employed.
- In the *Social Welfare Union Case*, the High Court removed the requirement that an 'industrial dispute' could occur only within 'industries' which had been somewhat arbitrarily defined.
- In the *Coal Industry Case* , the Court held that Federal and State Parliaments could establish joint tribunals which could exercise powers derived from both legislatures.
- In the *Federated Clerks' Union Case*, the Court upheld an award requiring employers to notify and consult with the Union on proposed technological change.
- In *Re Ludecke* the Court made it clear that a 'paper dispute' evidenced by the delivery and acceptance of a log of claims was sufficient to create an industrial dispute within the meaning of the Constitution provided the demands were genuinely advanced, notwithstanding that the purpose of the delivery of the log was to create an industrial dispute.

From these cases, Justice Kirby argues that the federal Government can take direct responsibility for industrial relations by use of the corporations and other constitutional powers and thus avoid 'the 19th Century artificialities' necessitated by the conciliation and arbitration model. The lack of progress towards a new approach to industrial relations law and machinery can no longer be

blamed on the Constitution and its interpretation by members of the High Court.

the law and literature. In the course of an entertaining speech delivered to a 'Literary Dinner' of the Tasmanian Committee of the National Book Council in Launceston on 17October1986 and entitled 'The Law as Literature – A Contradiction in Terms?', Justice Kirby considered the topic of reforming the law of defamation. He pointed out that, at present, an author must look not only to the defamation laws of his own State or the State of publication but also the laws of any State into which his work is distributed. This means that an author must seek the lowest common denominator of permissible publication. Justice Kirby describes the lack of a uniform law governing publications as 'a monstrous blight upon free speech in our country'. He told his audience that the Australian Law Reform Commission's report on Unfair Publication (ALRC 11) which made proposals for removing the 'monstrous blight' has, after a long debate, been shelved.

Justice Kirby said that some have argued that there should be a general defence to defamation and privacy actions for works of literary, artistic, historical, scientific or educational merit. He pointed out that no country gives such a blanket defamation defence which could result in 'scurrilous attacks ... dressed up as literature'. However, 'accidental defamation', where a character with a particular name and occupation is created who happens to share certain characteristics with an actual person, should be cheaply and quickly disposed of. More generally, he argued that 'the blight on artistic writers that arises from the "pot of gold" syndrome of current defamation laws must be removed'.

matrimonial assets and liabilities

The disparity of post-separation incomes is the dominant source of injustice in the present Australian system.

(*Settling Up*, 311)

findings of survey published. The findings of the survey conducted by the Australian Institute of Family Studies (AIFS) entitled '*Settling Up: Property and Income Distribution on Divorce in Australia*' (referred to in the July, 1984 issue of *Reform*) have now been published by PRENTICE-HALL of Australia.

The Study has been described by the Director of the Institute, Dr Don Edgar, as 'the most important yet completed' by the Institute and is based on data from an Australian Family Reformation Project: AIFS Economic Consequences of Marriage Breakdown Survey which 'provides some fundamental, but previously unknown, Australian information about the nature and extent of matrimonial assets and liabilities of people married for specific periods, their distribution of these assets, and their use of the legal process, together with its influence on the way they managed their affairs'.('Settling Up' 13)

relationship of study to alrc matrimonial property reference. The survey, which was designed in close consultation with the ALRC and the Family Court, is also a component of the research program for the ALRC's reference on Matrimonial Property. Together with the ALRC's survey of Family Court property cases, it provides an important empirical dimension to the assessment of the present law. The ALRC's report, which is in the final stages of preparation, draws extensively on the findings of both surveys.

fundamental questions. The study raises some fundamental questions about the principles upon which the Family Law Act is based and its current workings, such as:

- compensation for time out of the workforce;
- a more certain system of payment for child maintenance; and
- the whole issue of 'contributions' versus 'needs' as a basis for matrimonial property settlement.