CHANGING THE LAW

Sir Anthony Mason, Chief Justice of the High Court of Australia, discusses trends in law reform in Australia and overseas. He suggests that law reform commissions should be given the role of maintaining a continuous overview of our laws.

I wish to discuss two questions. Are we bringing into existence a distinctive body of Australian law and, how can we best contribute to its future development?

Statutory law

The legislative content of our law is continuing to expand. Because we do not have an entrenched Bill of Rights — we have legislated for statutory protection of fundamental rights, mainly by proscribing discrimination in all its forms. We have also introduced a range of legislative measures for the protection of the environment. A new regime of corporate regulation is now in place. And we have introduced new forms of taxation notable for their complexity.

Replacing judge-made law

Legislation continues to invade the realms of judge-made law. In New South Wales it is proposed to codify the law of evidence. The Commonwealth, following the report of the ALRC proposes to follow suit. The law of contempt has been reviewed recently by the ALRC. Its recommendations for comprehensive reform of the law of contempt in federal courts is now under consideration by the Commonwealth. In each case the body of judge-made law to be replaced by statute would be considerable. Elsewhere it is becoming apparent that the availability of new remedies provided by statute is making traditional common law and equitable remedies less important than they formerly were eg s 52 of the *Trade Practices Act 1974* (Cth), for damages in respect of misleading or deceptive conduct, and the remedies available under the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The evolution of legal principles

In this and other respects, our public law is substantially governed by statute. Private law is also subject to ever-increasing statutory regulation. This has come about partly because it has been recognised that many areas of private law involve public, as well as private, interests. And it has also come about because the courts have been ill-equipped or reluctant to grapple with policy issues which often must be examined before one can decide that an existing rule is no longer serving a useful purpose and that it should be replaced by another and better rule. The inductive and analogical reasoning by which the courts have traditionally proceeded is not appropriate to the resolution of such questions. In a society in which community values change with great rapidity, the inability or the reluctance of the courts to bring about change in the substantive principles of judge-made law has been a catalyst to legislative action in some fields. In saying that, I do not mean to suggest or imply that the courts should have done more than they have done. I am conscious that, in some recent decisions, the High Court has not succeeded in formulating a principle which commands majority acceptance. Inevitably that is one of the possible consequences of the judicial evolution of legal principle. And it is the re-

sponsibility of the courts, in the course of evolving legal principle, to provide clarification. After all, one object of establishing the High Court as an ultimate court of appeal was to enhance uniformity in our law.

Interpreting the law

But it should not be thought that judge-made law has declined to a position of relative unimportance. Large areas of private law such as torts, or civil wrongs, eg defamation, and equity, or fairness and justice, still retain their pristine virtue free from statutory violation. And statutory regulation does not eliminate the need for judge-made rules, even if they come into existence by the process of statutory interpretation. No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values. We know from past experience that statutes which introduce a novel regime of rights and obligations, such as the workers' compensation Acts and the *Trade Practices Act*, require judicial exposition of principle on a grand scale, even if the exposition is expressed in the language of interpretation.

Australian law evolves

Not so long ago, our statutes were, as often as not, modelled on those enacted in the United Kingdom. That is not so now. Statutes introduced in the last ten years are very different from their United Kingdom counterparts. That is not surprising. In various respects our circumstances differ from the United Kingdom. These days, the legislative regime is designed to respond specifically to problems as they exist in Australia and to meet conditions and circumstances in this country. In the course of shaping our legislation we examine overseas solutions to problems and take what is considered to be appropriate and adapt it to our conditions. Four examples are sufficient to make the point: the *Trade Practices Act*, the *Family Law Act*, the Commonwealth statutes dealing with review of administrative decisions and the various Corporations Acts. The *Family Law Act* is perhaps uniquely Australia, the others borrow in some degree from United Kingdom and United States materials but, nonetheless, represent a distinctively Australian solution.

The Administrative Review Council and law reform

The Commonwealth legislation dealing with review of administrative decisions is a very good illustration. The grounds of judicial review draw to some significant extent on United States and United Kingdom sources, the institution of Parliamentary Ombudsman comes from Scandinavia via the United Kingdom and New Zealand, review on the merits by the Administrative Appeals Tribunal is an Australian development and the establishment of the Administrative Review Council ('the ARC'), though having its origins in the United Kingdom, has been fashioned very differently so as to serve Australian interests. An important function of the ARC is to monitor developments in administrative law and to make recommendations to the Commonwealth government for reform. The function of continuing overview is extremely important. It means that shortcomings will be identified and that there is a reasonable prospect of suitable reforms being introduced. In this respect the ARC has done excellent work and has contributed to the development of a very comprehensive system of review.

The courts and law reform

Just as legislative reforms are now fashioned to meet Australian needs, so Australian courts are developing and refining general principles of judge-made law in their own way. Generally speaking, the fundamental principles of the common law and equity are adjusted to the conditions and circumstances of the various countries in which they are applied. The variation in conditions and circumstances between these countries are not so great as to call for the courts to make many fundamental changes, even assuming — and it is a debatable assumption — that they regard it as their role to make such changes. So reform of principle by court decision is a relatively minor feature of the legal landscape compared with the mountain of legislative reform.

Shaping legal principles

The High Court, in developing and refining legal principles, has close regard to the common law as it exists and as it has developed in other jurisdictions. We take account not only of developments in the

United Kingdom but also in Canada, New Zealand and the United States, even in Europe, to mention some of the overseas sources. In this respect the severance of the links between our courts and Privy Council has weakened the authoritative influence of English authority and opened the way to closer acquaintance with legal developments elsewhere. We also pay close attention to academic and other writings both here and overseas. This research is undertaken with a view to shaping legal principle in a way that best accords with our situation and our traditions.

An Australian common law

In recent years the High Court has brought about significant developments in legal principle, so much so that it can now be said that there is an emerging Australian common law. The following areas provide examples: duty of care; unconscionable conduct; the law of contract.

In the field of criminal law, much has been achieved legislatively, administratively and judicially to ensure the fairness of the criminal process. Important advances have occurred in relation to the interrogation of suspects. Arrangements are now in hand for the videotaping or recording of interviews which should have the effect of shortening criminal trials by reducing the time formerly spent on the voir dire. At the same time the High Court has decided that, as a general rule, a jury should be cautioned when it is asked to convict the accused on the basis of a disputed confessional statement allegedly made when the accused is held involuntarily in police custody without access to a lawyer or independent person and when its making is not reliably corroborated.

Another development is the recognition of the width of the power and the responsibility given to courts of criminal appeal in deciding whether to set aside a conviction on the ground that it is unsafe and unsatisfactory (See *Chidiac v The Queen; Asfour v The Queen* (1991) 65 ALJR 207). Part of the answer to the problems which have arisen in England and threatened to erode public confidence in the judicial system lies in the effective discharge of the responsibility by courts of criminal appeal. And I must mention the assertion by the courts of a jurisdiction to stay criminal proceedings for abuse of process in circumstances where delay has jeopardised the accused's prospects of obtaining a fair trial (*Jago v District Court (NSW)* (1989) 168 CLR 23).

Departing from legal formalism

In various ways many of these developments reflect a departure from legal formalism and a willingness to consider the substantive issues and interests which lie behind the legal forms. Nowhere is this more evident than in recent constitutional cases where the Court has been concerned with substance rather than form. The re-interpretation of subsection 92 and 117 turn on that very approach (*Cole v Whitfield* (1988) 165 CLR 360; *Street v Queensland Bar Association* (1989) 168 CLR 461).

Similarities with laws of other countries

It is one thing to say that the developments which I have mentioned that they have no precise counterpart in English law and that they are distinctive in that sense. But it would be quite another thing to say that we are bringing into existence by judicial decision a body of law in this country which has definite characteristics that set it apart from the law as it exists elsewhere. Our common law is, despite variations, very similar to the common law as it exists elsewhere. Furthermore, ease of communication and growing familiarity with other countries and their cultures, as well as the internationalisation of commerce and politics, are encouraging a greater unity and harmony of legal rules throughout the world. So the trend is towards similarity rather than distinctiveness.

Objectives of law reform

It is evident that in Australia the reforms and developments which have taken place serve a number of objects. One is the protection of the rights and interests of the individual against abuse of executive power. That can hardly be described as something which is distinctive; it is a trend common to many systems of law. A second object is an insistence on compliance with procedural fairness in administrative decision-making. Again, that is a feature of many systems of law. A third object, perhaps, is the promotion of standards of fair dealing and good faith, particularly in the field of consumer protection. As we are a nation with vast natural resources, we have a powerful economic interest in their exploitation. Yet we have been extremely active, perhaps more active than other countries, in the matter of environmental protection, in a number of respects setting it above the enhancement of economic interests.

Fairness

Although we have achieved an increased measure of fairness to suspects and accused persons, similar advances have been made elsewhere. In this respect a comparison between recent decisions of the High Court and those of the Supreme Court of the United States would be illuminating. Just as we have succeeded in ensuring greater fairness to the accused, conversely, at the same time, in the United States it now appears that the use of a coerced confession will be regarded as 'harmless error' if there is other substantial evidence of guilt to support a conviction, in which case the conviction will not be set aside (*Arizona v Fulminante* (1991) 113 L Ed 2d 302). I suspect that a comparison would support the view that there is a tendency to convergence between different national versions of the common law.

Simplification

In Australia, economic stringency has perhaps more than elsewhere called attention to the need to simplify rules and procedures. Much has been done but more is needed. Reduction of the costs of justice and the accessibility of justice depend upon it. But the need for simplification is not confined to procedure; it extends to substantive law as well, for example, taxation where complexity is a fertile source of legal costs.

A new role for law reform commissions

The Law Reform Commissions have played a significant part in shaping the law. The procedures which they follow ensure an input from all interested parties and groups. They have, by publicising the relevant issues, holding hearings and publishing well-reasoned discussion papers and report, promoted public awareness and debate. I have always thought that the Commissions should be given the responsibility for maintaining a continuous overview of our laws with a view to drawing attention to those which do not appear to be working satisfactorily. At the same time, more use can be made of expert committees in specific projects.

Government policies

In the legislative area, most of the difficulties arise in areas of contentious policy — areas where government has found it necessary to change its policy from time to time — often in a hurry. Just how one overcomes these problems is by no means obvious. What is obvious is that it is a problem which needs to be addressed.

Judicial law reform

So far as judicial development of legal principle is concerned, much depends upon the contribution made by the lawyers who present the case. They are, I trust, increasingly familiar with what appellate courts expect of them. More use is made of academic writings in the vast array of law journals in circulation and that is all to the good, though it calls for the exercise of discriminating judgment. One important innovation is that the *Sydney Law Review*, published by the Law School of the University of Sydney, publishes articles on cases after the grant of special leave to appeal before the appeal comes on for hearing.

Legal developments in other countries

The emerging trend towards a convergence of different national versions of the common law is in part referable to the regard paid by courts and legislatures to solutions to legal problems operating elsewhere in the world. Comparative law was once considered the province of academics. But now it is important that the focus of practitioners also should extend beyond the domestic boundaries and embrace an awareness of developments in other legal systems.

Academics and law reform

I am left with the impression that more could be made of the vast reservoir of knowledge and experience possessed by the practising profession. True it is that the Law Council and its constituent bodies play a more active part in law reform than was the case a decade ago. Law reform commissions make considerable use of practitioners and governments have resort to expert committees. And there is much greater mobility between academic lawyers and the practising profession. Many academic lawyers have deserted the groves of Academe for the topless towers of the Central Business District. In the final analysis, it is, I think, in the growing cross-fertilisation between academic and practising lawyers that the real prospect of future and productive law reform truly lies. *(This is an edited version of the Chief Justice's address to the 1991 Australian Legal Convention.)* □