MAKING LAW REFORM WORK—THE PROMISE AND LIMITS OF LAW REFORM

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Thank you very much for inviting me to deliver the Mayo lecture, which was established to celebrate the achievements of the inaugural head of the Law School at James Cook University, Ms Marylyn Mayo. When I taught at Melbourne Law School, I had some students who had to transfer to the chilly depths of Melbourne after doing first year law at James Cook. They were not pleased. So it is wonderful that Ms Mayo's dream of establishing a full law degree at James Cook has been realised and that the University is now graduating lawyers who can serve the interests of the people of North Queensland.

The James Cook University Law Students' Society website lists the distinguished speakers who have previously given a Mayo lecture.[1] I am honoured to be among their company. But I am also glad to know that law students still have the right priorities. Any delusions of grandeur I might have had as a result of this invitation were completely deflated when I found out that the Mayo lecture is listed on the students' society website alongside a dinner cruise, race day, and a beer appreciation night.

Tonight I am going to talk about *Making Law Reform Work*. Let me begin by acknowledging that law reform has not always had a good press. Many 19th century law reforms were seen by politicians and social commentators as 'roads to ruin' which would end civilisation as they knew it.[2] As North Queenslanders you may well agree with the member of the House of Lords who vehemently opposed the introduction of daylight saving in Britain, but I hope you do not endorse his reasoning.

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1 JCU Law Students' Society, *JCU Law Students' Society Mayo Lecture* (14 September 2006) James Cook University < http://www.jcu.edu.au/law/JCUDEV_002598.html >.

2 See, eg, E S Turner, *Roads to Ruin-The Shocking History of Social Reform* (1950).

He argued that daylight saving would be a disaster because, if twins were born to a woman on either side of the time that the clock was put back in Spring, the younger twin would be recorded as having been born before the older one, and this would disrupt inheritance laws.[3]

The English judge Sir John Astbury also disliked law reform intensely. He reacted to the suggestion that the 1926 general strike in Britain might be dealt with by conciliation and law reform with the comment: 'Reform. Reform. Are things not bad enough already!'[4]

In 1978 Sir John Young, then Chief Justice of Victoria, said there was a danger that legislative reform would result in 'minorities imposing their views on the community or using the legal system for improper ends'.[5]

Although I do not agree with these sentiments, they contain important reminders. The word 'reform' may be Orwellian double-speak, which is used to put a positive spin on changes which most people regard as backward steps, rather than advances. Sometimes well-intentioned changes have unintended and adverse effects, or they may simply be ineffective.

In calling this lecture *Making Law Reform Work*, I do not want to suggest that I have a recipe to avoid these problems. To continue my cooking metaphor, my purpose is to discuss some of the ingredients which may contribute to successful law reform. I also want to identify some of the problems that may arise in using those ingredients. To put it another way, this lecture is intended to explore both the promises and limits of law reform as it is currently practised in Australia.

Let me begin with two stories to illustrate my theme.

The first story is an example of a law reform which overcame injustice and improved the lives of the powerless. Some of you will be familiar with it from the movie *Amazing Grace*.[6] William Wilberforce became the leader of the parliamentary campaign for abolition of the British slave trade in the 1780s. He and his supporters had to overcome the

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3 Ibid 250–1 citing Lord Balfour of Burleigh.

4 Cited in Thomas R Phillips, 'Comment' (1998) 61 *Law and Contemporary Problems* 127, 128.

5 Sir John Young, 'The Influence of the Minority: The 45th Sir Richard Stawell Oration' (1978) 52 *Law Institute Journal* 500, 512.

6 (Directed by Michael Apted, MMVI Walden Media, 2006).

opposition of wealthy slave owners and slave traders, whose financial interests were at stake. Three parliamentary Bills to abolish the trade were defeated and it was not until a change in tactics was suggested by a maritime lawyer, James Stephen, that legislation was finally passed in 1807. That Bill prohibited British subjects participating in the transport of slaves to the French colonies. It has been argued that the reform worked because the sea power of the British enabled it to enforce the legislation.

Wilberforce and his supporters continued to campaign for the total abolition of slavery, but it was not until 1833, 50 years after Wilberforce began his work, that legislation was enacted to free all British slaves.[7] The moral of this story is that successful law reform requires patience, legal ingenuity, the ability to resist the blandishments of self-interested lobby groups, the tenacity to persuade others that change is justified, and finally, the power to enforce legislation once it is enacted.

My other story is less inspiring. In Victoria in the late 1980s and early 1990s, substantial changes were made to sex offences laws, based on the recommendations of the Law Reform Commission of Victoria.[8] Legislation responded to criticisms about the discriminatory impact of the law on women complaining of sexual assault. The reforms introduced at that time included the re-definition of consent to require 'voluntary agreement' and not simply non-resistance to sexual activity, procedural changes to allow complainants to avoid giving evidence in the presence of the alleged offender, limitations on the admission of evidence of what complainants told counsellors about the circumstance of the offence, restrictions on admission of evidence of the prior sexual history of the complainant, and the introduction of a Police Code of Practice for Investigating Sexual Offences.

At the time these changes were recommended, many defence lawyers were concerned they would lead to false convictions. Unusually, the government set up a three year evaluation of the effect of these changes. The Report which followed showed that, although there had been a few improvements, the reforms had had a very limited effect on

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7 *An Act for the Abolition of Slavery throughout the British Colonies; for Promoting the Industry of the Manumitted Slaves; and for Compensating the Persons hitherto entitled to the Services of such Slaves* (Imp) 3&4 Will IV c 73.

8 *Crimes (Sexual Offences) Act 1991* (Vic); *Crimes (Rape) Act 1991* (Vic).

complainants' experiences of the criminal justice process.[9] On the other hand, there was no evidence that accused had been adversely affected.

The evaluation showed that the changed definition of consent had brought about a change in defence tactics. Where there was no evidence of voluntary agreement, for example, because the complainant said she had been asleep, drunk or frozen with fear when sex occurred, it was argued that the accused believed that the women had consented.[10] Defence counsel often ignored restrictions on the admissibility of prior sexual history evidence and counsel for the Crown often failed to object to the admission of this evidence.[11] Courts sometimes read legislative changes restrictively, perhaps because they believed that a more expansive interpretation would prevent people accused of sexual offences receiving a fair trial.

Complainants continued to find it very traumatic to report offences and give evidence at a trial, and some of the lawyers and judges who were interviewed by the researchers said they would not encourage a family member to report a sexual assault to the police. The procedural reforms had had limited effect in changing the practices of prosecution and defence lawyers and judges. Judges directions to juries sometimes reflected outmoded myths about the typical behaviour of people who were sexually assaulted.[12]

As a result of this evaluation, further changes to law and procedure were made in the mid 1990s. In 2000 the newly formed Victorian Law Reform Commission was asked to make recommendations for reforms of laws and procedures to make the criminal justice system more responsive to the needs of complainants. As I will explain later, this has resulted in a new round of legislative and procedural reforms.

The story I have told has been replicated in other jurisdictions which have reformed sex offences laws and procedures. What does this tell

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9 Victoria, Department of Justice, Attorney General's Legislation and Policy Branch, *The Crimes (Rape) Act 1991: An Evaluation Report*, Report No 2 (1997).

10 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) 352–3.

11 Ibid 205–6.

12 For an overview of these problems: see Victorian Law Reform Commission, *Sexual Offences: Interim Report* (June 2003)*; Sexual Offences Law and Procedure Final Report* July 2004

us about how to do law reform and what makes it succeed or fail? What can we learn about the limitations of the law reform process in producing beneficial social change?

Before I discuss the Victorian Law Reform Commission project I want to make some brief comments about the structures and techniques of law reform as it is practised in Australia today. As you will know, law reform proposals may be made by many different bodies. Recommendations may be made by ad hoc enquiries which are established to deal with a particular issue. For example, in Victoria the legal landscape has been dramatically altered by human rights legislation based on an ad hoc inquiry chaired by Professor George Williams.[13] Law reform proposals may emerge from a Royal Commission which is given powers to summon witnesses and make findings of fact, like the Fitzgerald Royal Commission in Queensland. They may be made by policy units within government departments or by parliamentary committees.

The techniques which are used by these bodies are influenced by the law reform methodology which was developed by state and federal law reform commissions in the late 1970s and early 1980s and has since been refined and improved. For that reason my lecture will focus on the promise and limits of law reform as it is currently done by established law reform commissions. I will begin by identifying the characteristics of those bodies which may be a factor in making law reform work.

I Law Reform Commissions—Characteristics and Methodology

Supporters of standing law reform commissions usually argue that law reform is likely to be most effectively practised by a permanent body with a core of full-time commissioners and research staff.

To cynics these claims look self-serving. Not all successful law reforms emanate from established law reform commissions. Bodies such as the Tasmanian Law Reform Institute, which uses academics to do much of its research, and the Law Reform Commission of Western Australia, which relies mainly on consultants, have produced well researched reform proposals.[14]

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13 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

14 See for example Ralph Simmonds, 'Professional and Private Bodies' in

Professor Roderick MacDonald, the former Chair of the Canadian Law Commission, points out that the notion that the law should respond to social change should also be applied to law reform agencies themselves.[15] There is a danger that established commissions will increasingly provide 'frozen answers to frozen questions'.[16]

I accept that there is a case for ad hoc enquiries staffed by experts appointed to consider a particular social problem and make recommendations for change. But in my view there are considerable advantages in having a full time law reform body with some permanent staff. A body of this kind can provide the corporate memory, intellectual rigour, commitment to quality, and time for consultation and research necessary to produce high quality recommendations.

A standing law reform body can also develop a culture of independence of thought which enables it to resist political partisanship and lobbying from private interests.[17] Legal and social policy proposals emanating from bodies which have a strong ideological stance lack credibility and may be seen as no more than propaganda. Recommendations based on loaded terms of reference or informal government pressure, rather than on rigorous research, will often fail to bring about beneficial change. As Professor David Weisbrot, the President of the Australian Law Reform Commission, has commented:[18] 'To the extent that law reform bodies become politicised, they lose the ability to attract outstanding commissioners and members of advisory committees, and to play the "honest broker" role in policy development.'[19]

Next, I argue that effective law reform often requires an inter-disciplinary approach. Historically, the projects that were given to commissions focused mainly on 'lawyers' law'. Their primary role was seen as eliminating anomalies, and modernising and simplifying

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Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 275.

15 Roderick MacDonald, 'Continuity, Discontinuity, Stasis and Innovation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 87, 100–1.

16 Ibid 95.

17 See, for example, David Weisbrot, 'The Future of Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 18.

18 Ibid 27.

19 Ibid.

the law.[20] Today, law reform bodies are asked to investigate broader questions of social policy. This trend is evident in the joint project on protection of human genetic information undertaken by the Australian Law Reform Commission and the Australian Health Ethics Committee.[21] Its high water mark is probably the recent government announcement that the Victorian Law Reform Commission will be asked to make recommendations on how to decriminalise abortion.

To respond to problems of this kind, both social scientists and lawyers must be involved in identifying relevant questions raised by such issues and examining possible solutions. Lawyers tend to have unwarranted faith in the capacity of law to change human behaviour. As Professor MacDonald, a past President of the Canadian Law Commission, has observed:

> The expression 'if all you have is a hammer, every problem looks like a nail' is a truism; its corollary 'if you have to use a nail, the only problems you are able to see as problems are those where hammering can be an effective activity' is less appreciated.[22]

Along similar lines, Professor Nathalie De Rosiers argues for an approach to law reform based on a law and society analysis:

> A law reform movement that [seeks] to benefit from the law and society analysis first [has] to step away from the idea that behaviours [can] be directly determined by legal pronouncements, or that law reform [is] about finding the perfect legal solution to social ills.
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> [T]he first question suggested by the new methodology [is] to challenge the very characterisation of the problem as a legal problem, or as a certain type of legal problem. For example, the issue of violence against children in institutional settings can certainly be looked at as a torts problem, a criminal law issue, an administrative law conundrum, or a constitutional

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20 See, eg, the *Law Commission Act 1965* (UK) s 3, which established the Law Commission for England and Wales.

21 Australian Law Reform Commission and Australian Health Committee, *Essentially Yours—The Protection of Human Genetic Information*, ALRC Report No 96 (2003).

22 Roderick A Macdonald, 'Recommissioning Law Reform' (1997) 35 *Alberta Law Review* 851, 872.

> law ambiguity; or it can be looked at more broadly as relationships of care, betrayed and distorted. [23]

Finally, community involvement is an essential component in the methodology of law reform. In 1997 the Law Commission of Canada expressed its 'commitment to engaging all Canadians in the renewal of law to ensure that it is relevant, responsive, equally accessible to all, and just'. If law reform is to contribute to social justice, people must have an opportunity to participate in discussion of the changes which may affect them.

Quite apart from these social justice goals, community participation has practical benefits. Research in the area of public health shows that the involvement of affected groups in research-design and policy-making can result in more accurate identification of problems and more effective solutions. Community involvement in law reform can also persuade government of the value of proposed changes.

II The Victorian Law Reform Commission's Project on Sexual Offences

So far I have argued that making law reform work requires us to discard the blinkers which assume that changes to law are sufficient in themselves to resolve social problems. Social scientists as well as lawyers must be involved in the reform process. Community participation is a vital ingredient. But there are difficulties in applying all of these techniques, and none of them guarantee that the recommendations which are made will meet their goals.

The Victorian Law Reform Commission's project on sexual offences law illustrates some of the benefits and challenges which arise in putting these prescriptions into practice. I want to discuss that project under three headings.

- Characterising the problem
- Encouraging community involvement
- The challenge of implementation

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[23] Nathalie Des Rosiers, 'Leadership and Ideas: Law Reform in a Federation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 234.

A *Characterising the Problem*

As is generally the case in Australia, the sexual offences project was referred to the Commission by a reference from the Attorney-General. The terms of reference required it to make recommendations about how to make the criminal justice system more responsive to the needs of victims of sexual assault.[24]

The focus of the project made it necessary for the Commission to analyse the substantive criminal law (for example, the definition of particular offences), to look at procedures in committals and criminal trials, to consider the rules of evidence which are relevant to sexual offences, to examine jury directions, and to understand the behaviour of the main actors in the criminal justice system—police, prosecuting authorities, prosecution and defence barristers and judges.

I have argued that there is a danger in assuming that social problems can be resolved by changes to the law. Research across the common law world shows that the vast majority of offences are not reported, that only a minority of offences are prosecuted, and that only a small proportion of prosecuted offences result in a conviction.[25] Many of the victims of sexual assault we talked to had decided not to report the offence to the police, but they had good ideas about reforms which would have helped them to come to terms with what had happened to them.

Indigenous women identified sexual violence as a pervasive problem, but they were not usually very interested in talking about changes to the criminal justice process and were sceptical about whether reform of criminal law and procedure would improve their lives. Similarly, some women from non-English speaking backgrounds thought it was unlikely that women or children would report offences within families to the police, but they were keen to think of ways of stigmatising offenders and ensuring that better support was available to victims of sexual assault and abuse.

Sexual assault is a form of violence. Women, children and people with a cognitive impairment are the main victims. Does that mean that the Victorian Law Reform Commission was asked to investigate the wrong question? Should it instead have been asked to investigate what causes

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[24] Victorian Law Reform Commission, *Final Report*, above n 10, xv.

[25] For an overview of Victorian statistics see: ibid Ch 2.

the problem of sexual violence and what strategies might help to reduce it? Those questions might have required us to investigate:

- What measures could be used to protect women against sexual assault associated with family violence?
- Has the sexualisation of children and young women in advertising contributed to an increase in the incidence of sexual assault, and if so what should be done about this?
- What procedures are needed to reduce sexual assault by carers in institutions such as community hostels, hospitals and nursing homes?
- Could changes in urban design or other social infrastructure help to reduce sexual violence?
- What types of treatment are most effective in reducing recidivism among adult and young sexual offenders?

All these are very important questions. But broadening the approach to a problem may be difficult to do in practice. The social factors which contribute to sexual violence are poorly understood. Even in the area of public health, where much work has been done on behaviour change, the effects of particular social policies are hard to predict. Perhaps law reform bodies could be asked to come up with a number of different possibilities and to evaluate their outcomes, so that proposals that do not work could be identified and abandoned. But governments seem to be reluctant to use law reform commissions in this way. They prefer concrete recommendations which can be sold to the public as solutions.

Despite these problems law reformers should not abandon the attempt to move beyond legal analysis and to consider the social and institutional changes which may help to address a particular problem.

This was the approach taken by the Victorian Law Reform Commission. The recommendations in the Sexual Offences Report included expanding services to assist sexual assault victims in regional areas, allowing the Children's Court to order young offenders to participate in treatment programs, and establishing processes to make offenders who cannot be prosecuted accountable to their victims outside the criminal justice process.[26]

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[26] Ibid 466–7.

B *Community Involvement*

Community consultation is now widely practiced by law reform commissions and other policy makers across Australia. Many of the consultation techniques which are now used by government departments and ad hoc enquiries were originally developed by law reform commissions in the 1970s. But the word 'consultation' places the proposals made by policy makers at the centre and members of the community at the periphery of the process.

In an ideal world more emphasis would be given to empowering members of the community to make practical suggestions for change. In reality, however, perhaps the best that law reform commissions can do is to establish networks of members of the community who can understand the options put to them and identify their benefits and disadvantages.

Let me give you some examples of the way that community groups were involved in the sexual offences project. The Commission established an advisory committee, which included members of the Victoria Police, the legal profession and the judiciary, and workers who provided support to victims through Centres Against Sexual Assault.

As well as the normal processes of publishing papers and inviting submissions, we deliberately targeted individuals and organisations that had access to information relevant to the project. The Centres Against Sexual Assault supported a small group of women to liaise with us throughout the reference, and we also interviewed a number of victims and parents of children who had been sexually assaulted.

We tried very hard to contact members of disadvantaged groups who usually lack a voice in the law reform process, including indigenous women, women from non-English speaking backgrounds, recently arrived migrants, and people with cognitive impairments.

Our strategies included funding a roundtable to enable indigenous people to discuss sexual abuse in private and to report back to the Commission, working with the Victorian Multicultural Commission to obtain the views of people who assist women from non-English speaking backgrounds, and working with service providers for people with intellectual disabilities. We participated in a roundtable with (mainly male) leaders from NESB communities to discuss ways of reducing sexual assault.

We also obtained funding from a private philanthropic organisation to enable an Islamic women's organisation, an indigenous women's service, and a legal service for people with disabilities to undertake research, consult with victims of sexual assault, and to report back to the Commission.

Were these processes successful? Despite our efforts, most of our recommendations were generated by the Commission, rather than by affected members of the community.

What lessons can we learn from this experience? It tells us that more work needs to be done in helping people to know what the law is and how to use it effectively. We cannot expect people, who have little knowledge of the law and many problems in their lives, to participate in law reform processes. Building their capacity to do so should be seen as part of the law reform enterprise. Perhaps affected groups should be engaged in project design at a much earlier stage of the law reform process, as the Law Reform Commission of Western Australia did for its project on Aboriginal Customary Law.[27] Perhaps disadvantaged people should be offered some incentive to become involved. Funding a researcher to work with the particular group for a reasonable period could be a useful way of identifying problems and generating solutions. Law reform bodies also need to think innovatively about ways of using communication technologies more effectively. I note that some state law reform bodies have links to government websites which have been set up to encourage community feed back. The Queensland Law Reform Commission is an example.

C *The Challenge of Implementation*

If implementation is regarded as a measure of success, the sexual offences law reform project has fulfilled its promise.

Many of the 202 recommendations in the Sexual Offences Report deal with the way the law works in practice.[28] The procedural changes which were recommended include mandatory use of CCTV for complainants[29] and provision for children and people with a cognitive impairment to

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27 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report*, Project No 94 (2006).

28 Victorian Law Reform Commission, *Final Report*, above n 10, xlv.

29 Ibid 194–6.

give their evidence-in-chief and be cross-examined in a special hearing convened by a judge before the trial, so that they will not have to wait for months or even years to testify about events they would rather forget.[30]

Changes have been made to limit the jury warnings which must be given by trial judges, and evidence laws have been amended to provide more protection against admission of evidence of counselling communications and prior sexual history evidence.[31] All these recommendations are now part of Victorian law.[32]

Institutional changes recommended by the Commission have also been made. The police are piloting multi-disciplinary centres which house police investigating offences and workers from Centres Against Sexual Assault in the same premises. Forensic nurses are being trained to conduct medical examinations of sexual assault victims so that sexual assault victims in the country have access to a woman and can be examined by a woman if they prefer it. A specialist sex offences prosecution unit has been established in the Office of Public Prosecutions. Specialist child sex offences' lists have been established in the Magistrates' and County Courts, and judicial officers have received training about how to deal with child complainants. Recently the Attorney-General opened the new Child Witness Service, which will support child witnesses and their families.[33] Children across the State will be able to give their evidence on CCTV from these premises and will not have to attend the unfamiliar surroundings of a court.

Will these law reforms work? As the past history of sexual offence reforms shows, this will require a change to legal culture as well as to laws, institutions and procedures.

The Commission's Interim Report commented that:

> Past experience shows that [changes to laws of evidence and procedure] are unlikely to make the system more responsive to the needs of complainants unless they are accompanied by change to the practical operation and culture within which court proceedings are conducted. Changing the culture of

30 Ibid 165–6.

31 Ibid xxvii–xxviii.

32 *Evidence Act 1958* (Vic) s 37CAA (mandatory CCTV); s 41G (Special Hearings).

33 Rob Hulls (Attorney-General), 'Victoria's First Child Witness Service Officially Opened' (Media Release, 5 September 2007).

> the criminal justice system involves changing the distinctive outlook of prosecution and defence lawyers, magistrates, judges and others involved in the process of a criminal prosecution.[34]

Some of the implementation processes which were put in place after the Commission delivered its Final Report may help to bring about this cultural change. After the Commission delivered its Report to the Attorney-General, the Department of Justice established an Advisory Committee comprising police, lawyers, judges and non-government organisations to work through the changes. I was a member of that Committee and was initially sceptical about whether the process would work. But I was wrong.

Defence barristers on the Committee who resisted the Commission's recommendations were challenged by people who had different perspectives. We heard a very moving speech from a woman whose father pleaded guilty to her sexual assault.[35] This proved an effective way of making lawyers and judges confront the realities of the criminal justice process for complainants.

The Department organised a conference of lawyers, academics and members of non-government organisations. They brought academics from Canada and South Africa to speak about the specialist sexual offences courts that operated in their jurisdictions. At the end of that conference, the Chief Judge of the Victorian County Court said he would establish a specialist sexual offences list in his Court.[36] This proposal had previously been opposed by County Court judges.[37] Judges, magistrates and lawyers who support the reforms are now working hard to fine tune them and to ensure they fulfil their objectives. Some practical problems which have arisen in implementing the Commission's recommendations have already been identified and are likely to be addressed by the government.

Those who campaigned for reform of this area of the law were particularly lucky to have a government and an Attorney-General who were committed to change. But as I have already said, changes to the

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34 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) 157–8.

35 Victorian Law Reform Commission, *Final Report*, above n 10, 225.

36 Ibid 183–4.

37 Ibid 184.

legislation standing alone would not necessarily have improved the experience of complainants who perform the public service of reporting sexual assaults and withstanding the ordeal of giving evidence. Although much more remains to be done, the sexual offence project demonstrates the importance of winning hearts and minds and changing institutional culture in making law reform work.

III Conclusions

I will conclude by suggesting that the lessons we have learned about making law reform work may have broader application.

Over the next 50 years, social, technological and institutional changes will challenge policy makers. Let me briefly refer to three examples. In a recent speech at the Adelaide Big Ideas festival, Professor Robert Reich, the Secretary of Labor during the Clinton presidency in the United States, suggests that globalisation, the increased mobility of skilled labour, and the aging of the population is likely to produce greater income inequality in advanced Western countries.

Historically, government in Australia was regarded as having a responsibility to soften the effects of the market and to provide the social and community infrastructure necessary for nation building.[38] Over the last 20 years there has been a retreat from the ideal of the welfare state and much greater emphasis on the role of the private sector to provide necessary infrastructure and meet the needs of members of the community. In the future I predict we will need to think again about the balance to be achieved between markets and government.

The American sociologist Professor Robert Putnam argues that there has been a decline in trust in government and in civic engagement and civic institutions over the last 30 years.[39] Changes to the way governments operate may force us to redesign the institutions of democracy and to consider new ways of making governments accountable to their citizens.

As the debate about the Murray-Darling Basin illustrates, environmental factors, including concerns about drought and global warning, will

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[38] Geoff Gallop, 'Drawing the line between the public and the private' (2000) 6(1) *Journal of Contemporary Issues in Business and Government* 12.

[39] Robert D Putnam, 'Bowling Alone: America's Declining Social Capital' (1995) 6 *Journal of Democracy* 65.

create pressure for different regulatory mechanisms and for changes in the division of power and responsibility between federal and State governments.

These are only a few of the complex social policy questions which may arise in the 21st century. I am sure you will be able to think of many others. To respond to them we need policy-making bodies which can analyse problems, consider options for addressing them, and make recommendations based on long term calculations rather than short term expediency.

Political reality often trumps more considered decision-making processes. Even good laws and social institutions have limited capacity to achieve social transformations. But although the government in power will have the final call, I believe that policy making processes could benefit from drawing on aspects of the law reform approach I have discussed tonight.

Let me conclude by quoting the doyen of Australian law reform, Justice Michael Kirby who said recently that:

> It is not part of human destiny to finish the task of improving society. Yet, we are not entitled to decline the effort. I believe that our species is genetically programmed to seek justice within a rational civic order. Most people are affronted by injustice and irrationality when it can be drawn to their notice and wrongs explained. That is why we can be confident about the long-term future of law reform, and institutional law reform in particular.[40]

[40] Justice Michael Kirby, 'Are We There Yet' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 433, 447–8.