the lawyer's office. This procedure of computerisation and its impact on the law was also discussed by Mr. Justice Kirby at a Housing Cost Conference held in Adelaide on 17 April 1982. He predicted that there would, in due course, be a fall in legal fees for title transfer conveyancing as a result of:

- computerisation of land titles and relevant land data;
- introduction of greater competition between lawyers;
- introduction of advertising by lawyers, including of their fees;
- possible introduction of competition of lawyers with land agents, such as already exists in South Australia and Western Australia but not the other states:

> Within 10 — or at the most 20 — years a very great proportion of Australia's land title and related data will be on computer. The tedious, time consuming attendances, scrutiny and correspondence which are presently cited to justify the significant professional costs may, to a very large extent at least, be reduced to the non-professional tapping of a few keyboards and the automatic printout of aggregate data that facilitates expedites and cheapens the process of land conveyancing. This is not a dream world. It is not science fiction. Torrens, as he contemplated the dream of the future city Adelaide, could well have had the glint of a computer in his eye. The grid procedure lends itself to computerisation, by its central registry, its system of registered transfer and its guaranteed title, open to public inspection.

judicial power?

> Nowadays going to the bench does not change your life greatly. Like anyone else, a judge these days spends his weekends watching footy or painting the house.
>
> Mr. Justice Speight, New Zealand High Court, on his retirement 1982

christian virtues. Mr. Justice Speight, whose observations on his retirement are quoted at the head of this piece, retired after 15 years on the bench, aged 60 and with a potential further 12 years of service ahead of him. (In New Zealand judges retire at 72.) Like Mr. Justice Xavier Connor, who recently retired from the Federal Court of Australia and Supreme Court of the ACT, Mr. Justice Speight went early. 'I just feel I have had enough', he told journalists. It remains to be seen whether, like Justice Connor, he takes on further public duties. The prospect of a peaceful retirement for the Australian judge receded when he was called back to service by the new Victorian Government to head up an inquiry into casinos and the reform of the law of gambling in Victoria.

But the retirement of the antipodean judges looks startlingly premature when measured against the announcement of the late May 1982 that Lord Denning, Master of the Rolls in England was quitting official office at the age of 83. Lord Denning had boasted that he knew every Christian virtue save retirement. The circumstances of his announced retirement were typically controversial. A further book, his third since his 80th birthday, titled *What Next in the Law* was withdrawn by the publishers after two black jurors in a Bristol riot threatened to sue the judge for libel. In the book, Lord Denning had suggested that juries should no longer be selected at random because some racial minorities in Britain had 'different morals' that could lead them to defying the law and being more likely to acquit the accused. The Society of Black Lawyers in London acknowledged that Lord Denning had acted honourably in withdrawing and that his was the retirement 'of a legal giant'. According to Crispin Hull, legal correspondent in the *Canberra Times* (1 June 1982), 'Christian morals and seeing red at the sight of unions were Denning's weak points as a judge. His views on these topics were so strong that his judgments sometimes verged on evangelism, a trait in the judiciary neither expected nor welcomed by the community'. Yet Hull acknowledges that Lord Denning was magnificent in his use of the English language, frank in his identification of public policy reasons for developing the law and determined to press on with law reform from the bench because of inadequate attention to reform by succeeding governments.

> Lord Denning's power will live on in the law reports. The cases he has decided will affect not only future litigants, but, because many actions of people and companies are influenced by the state of the law, they will affect all the travellers on the Clapham bus, whether they know it or not.

Before the announcement of Lord Denning's retirement, the Governor General of Australia Sir

Zelman Cowen delivered an elegant tribute to him at the Lord Denning Society in the University of Queensland on 1 April 1982.

> No name in the contemporary common law would be better known than that of Lord Denning. Distinguished English lawyer and fellow judge, Lord Scarman, wrote in January 1977, that the past 25 years were not to be forgotten . . . They were (he said) the age of legal aid, law reform and Lord Denning. So far as Denning is concerned, there would be general agreement, even on the part of those who disagree with much or some part of what he sees as the role of the Judge. On his 80th birthday in January 1979, the Lord Chancellor, Lord Hailsham, who certainly does not accept all of Lord Denning's views, wrote that he had a fearless, original mind revolving around new ways of accelerating the development of the law, pondering its faults, seeking to remedy its injustices and anomalies and devising fresh and novel solutions to age-old problems.

gone too far? In another speech, Sir Zelman Cowen raised an important question about the judicial role. This time it was in the context of the novel changes in administrative law introduced in the federal sphere in Australia by succeeding Governments over the past decade. Addressing the opening ceremony of the Fifth South Pacific Judicial Conference at the High Court of Australia in Canberra on 24 May 1982 — a day traditionalists would remember was Empire Day — Sir Zelman referred first to the varied tasks of insitutional law reform in Australia.

> One interesting contemporary investigation by the Australian Law Reform Commission involves examination of the co-existence of Customary Aboriginal Law with the general system or systems of law operating in Australia. That such questions should be asked and examined at a time when there is greater awareness and a greater sensitivity to the needs and aspirations of Aboriginal Australia, is not surprising. . . Thus, in Australia, with a quite highly developed science and technology, it is well said that there must be mechanisms for law reform to adapt the law to fast developing technology . . . So it is that the Australian Law Reform Commission has given its attention to matters as diverse as human tissue transplantation and its legal-ethical implications, and the threats to privacy posed by the impact of a range of technological developments in computers and electronic detection devices.

But it was then that the Governor General adverted to the new administrative law. After referring to the 'great debate on the judicial role' and about Bills of Rights he said this:

> For my part, let me say — even if I am to be torn apart for saying it — that I have serious doubts, especially in what I conceive as a democratic framework of society — whether this is a role for judges, or one to which judges ought to aspire. I think that what has been done in Australia in way of administrative law reform is exciting, remarkable and impressive, but in some respects I wonder whether it has not gone too far.

That phrase, 'going too far', was taken out of the editorial in the *Canberra Times* where the respective balance between the elected legislators, the permanent bureaucracy and unelected review bodies had been discussed:

> Going too far is, of course, a problem especially in situations once within the exclusive province of the Executive (and thus ultimately the Minister) and now within the province of a non-elected and not necessarily representative judicial system.

A further editorial in the *Canberra Times* (26 May 1982) titled 'Defining the Limits' quoted Sir Zelman Cowen's speech at length:

> 'We have been involved in a massive reshaping of the law arising out of the way in which public administration has developed in a complex and federal society' he said. 'What we have done is to give sweeping authority in such matters to the judge to substitute his own view of what is good policy or a more just outcome for that Zelman expresses [in asking whether it has not gone too far] must always be at the fore. Whenever one arm of the constitutional balance takes powers from one or both of the other arms, it is wise to ask how more reasonable and accountable that process might be — particularly when the transfer concerned substitutes the view of unelected judges for that of an elected and accountable executive. But the fear Sir Zelman expresses should not be allowed to stymie two rather different processes which are part and parcel of the changes taking place: the improved room for official, non-judicial review of administrative decisions; and the scope provided for permitting examination of the process, if not the result, of executive decision-making.

Apparently fearful of impeding the Commonwealth's administrative reforms by its own editorials, the *Canberra Times* urged this conclusion:

> So far . . . the court seems conscious of the difference between intervening when administrators go too far

> and going too far itself. . . . Sir Zelman is right to point to the dangers; those dangers are not, however, proving themselves to be such that a desirable and worthwhile reform should stop, or should be turned back. If anything, as the *Canberra Times* pointed out in the editorial quoted, there is room for more reform yet.

What the overseas participants in the South Pacific Judicial Conference made of the Australian debate is not recorded. In many quarters the radical federal administrative reforms — especially the establishment of the Administrative Appeals Tribunal with power to substitute decisions 'on the merits' and the enactment of the powerful new Administrative Decisions (Judicial Review) Act, would be regarded as remarkable. Yet the growing docket of the AAT and of the Federal Court under the Judicial Review Act demonstrate that a major community need is being met by these reforms.

can we cope? In an address to the Victorian branch of the Second Division Officers Association of the Federal Public Service in Melbourne on 6 April 1982, the ALRC Chairman, a member of the Administrative Review Council, traced the reaction of federal public servants to the new administrative law reforms. He said that these varied from those who belonged to the 'too bad' school or the 'I told you so' school to those who regarded the new reforms as the 'last straw' at a time when the public service was caught between a 'pincer movement' of new obligations to the public but with reduced staff and resources. Mr. Justice Kirby said that in answering the question whether the public service could cope with the new administrative law reforms, it was important not to exaggerate the costs of the new system. People's complaints have to be dealt with in some fashion. United States statistics showed that following the introduction of the Freedom of Information Act, relatively little increase had been generated in the costs of agencies because most of the enquiries made would have been answered even before the Act was passed. He also said that it was easier to see the costs of administrative reform and less easy to evaluate the intangible benefits. One of these he described as 'often under-estimated'.

> I refer to the value of the symbiosis between a dedicated, professional public servant, a member of an 'administrative culture' on the one hand, and the external civilising body on the other. Though this interaction may itself be weakened if the faults of the 'legal culture' come to dominate the review bodies, the interplay between external and sometimes novel ways of looking at a problem and routine administration is usually healthy and stimulating.

Mr. Justice Kirby urged the development by the Federal Public Service Board of an information pamphlet about decisions involving the new administrative law. He said that on the initiative of Dr. Geoffrey Flick, Director of Research in the Administrative Review Council, steps had been taken by the Law Council of Australia in *Law News* to publicise decisions. Little had been done in the Australian Public Service to call general decisions and rulings of the Federal Court, AAT tribunals and the Ombudsmen to notice throughout the bureaucracy. It is hard to be wise after the event, he said, if you are completely ignorant that the event ever took place.

w.a. moves. Mr. Justice Kirby's address was placed in the context of friendly advice to the new Victorian Government, whose Premier, Mr. John Cain is a past member of the ALRC. Mr. Cain has already announced his intention to move in administrative law reform matters in Victoria, including by the introduction of Freedom of Information legislation. In the other States things also appear to be happening. In New South Wales the long awaited final report of the enqiry by Professor Peter Wilenski has been handed to the NSW Premier, Mr. Wran. In Western Australia, the WALRC has reported on the subject of appeals from administrative decisions. In its report, *Review of Administrative Decisions — Appeals,* the WALRC lists over 250 adminstrative decisions which are subject to a statutory right of appeal in the State. Appeals lie to more than 43 appellate bodies. Like appellate arrangements elsewhere, this was due to ad hoc legislation over a long time without an apparent overall plan. The result was inconsistencies and variations in rights of appeal which the WALRC found to be difficult to justify.

The WALRC studied the possibility of establishing in Western Australia a new general appellate tribunal outside the courts, along the lines of the Federal Administrative Appeals Tribunal. However it decided in favour of the development of an administrative appeal system within the esta-

blished courts. Apart from arguments from principle for this course, the Commission pointed to the relatively small number of appeals likely to arise in a State with the population of Western Australia which, it says, would not seem to justify the cost of establishing a new administrative appeal tribunal, with its attendant expenses. It did, however, propose the retention of a limited number of specialist appellate bodies.

As the centre-piece of the new system, the WALRC proposed the establishment of an Administrative Law Division of the Supreme Court. Under it, there would be an Administrative Law Division of the Local Court to deal with matters of lesser importance. The proposed Administrative Law Division of the Supreme Court would be both an appellate court from certain administrative decision makers and an appellate court on questions of law from the Adminstrative Law Division of the Local Court and the specialist appellate bodies.

By this means the WALRC said that it hoped to develop bodies with a special knowledge of administrative law, expertise in dealing with administrative appeals, and practices and procedures less formal than those generally applicable to appeals in civil and criminal matters. The powers and procedures of these bodies would be, to a large extent, modelled on the Federal Administrative Appeals Tribunal.

Other important recommendations in the report relate to the giving of reasons for administrative decisions and a rule that, generally speaking, there be no orders as to costs in administrative matters. The WALRC report proposes development of an administrative appeal system which it says will combine the virtues of the established courts and the attributes of specialisation and flexibility of procedure avoiding undue delay or cost. The WALRC has also recommended that a permanent review body similar to the Administrative Review Council in Canberra be established in Western Australia, to deal with ongoing administrative law reforms in the State.

The WALRC has yet to submit a report on the subject of judicial review of administrative decisions on which it issued a working paper in June 1981. It has also reserved for later consideration the question of the principles to be applied in determining when rights of appeal should be created from administrative decisions.

more on judges. In the last quarter various items have come to hand on the topical subject of the power of judges to influence or actually fashion the development of the law. First, a few useful articles for reference:

- The tenth Wilfred Fullagar Memorial Lecture of Professor S.F.C. Milsom is devoted to 'The Past and the Future of Judge-made Law' (1981) 8 *Monash Uni L. Rev.* 1. It is perhaps significant that the forthcoming 11th Fullagar Lecture will be delivered by the Chief Justice of Australia, Sir Harry Gibbs, on 20 July 1982 at Monash University on the subject of 'The Constitutional Protection of Human Rights';
- in the same issue of the *Monash University Law Review* Professor Mauro Cappelletti of the Universities of Stanford and Florence examines 'The Law-Making Power of the Judge and its Limits: A Comparative Analysis' — see (1981) 8 *Monash Uni L. Rev.* 15;
- a most useful address by Lord Keith of Kinkel, Lord of Appeal in Ordinary to the British/German Jurists has been published in the new *Civil Justice Quarterly.* See (1981) 1 *CJQ* 22. The paper addresses problems of 'judicial discretion'. The demand for greater flexibility and less rigidity in the law has dramatically increased, according to Lord Keith, the opportunities for and necessities of judicial discretion. Examples are cited in a number of fields of law and lessons are drawn by the author from Scots law, including in the area of the admission of evidence in criminal trials where the evidence was unfairly or unlawfully obtained.

> It must be faced that in modern times judges can very often find no guidance from any body of rules and indeed may be mislead and drawn into error by relying on reports of cases in specialised fields — which seem nowadays to proliferate — and which represent no more than decisions of fact. The judge is better to rely upon his own

> judgment and sense of justice, doing his best to understand comprehensively the whole circumstances of the case, attributing to each of them the significance which its merits deserve. If he does this, he has good prospects of arriving at a just result, and his decision will not be open to successful challenge in any appellate court. (p. 32)

- Another essay by an English judge which has just come to hand and which deserves noting is the presidential address of Sir Roger Ormrod, a Lord Justice of Appeal, to the Holdsworth Club 1980. Titled 'Judges and the Processes of Judging', the address analyses the changes that have occurred in the last fifty years or so in the role of the judge and in the processes of judging. Both, according to the author, have 'radically changed: a change which has attracted astonishing little attention'. Sir Roger suggests that a chief contributor to the change is the elimination of the civil jury. Another is the extension of the judge's discretionary powers, just noted, 'which has been particularly marked in the last decade' and which is now involving the judge in an ever wider range of value judgments and in pushing him further and further into unmapped territory which, on its predecessors' maps, was marked: "here lie dangers" '. The freer the judge's discretion, says the author, 'the closer it comes to resemble an administrative discretion'. However, he acknowledges that in some branches of the law uncertain justice is preferable to certain injustice. And he then makes a bold claim for the judiciary that 'our combined experience is much wider than that of any other group in the country. We are of course, also husbands, wives, mothers or fathers, drivers, gardeners, farmers and so on'.

popular targets? In his maiden speech to the House of Lords, the Lord Chief Justice, Lord Lane also criticised the public stereotype of the judiciary as a 'monoculture'. Judges, he says, are a 'popular target for all sorts of people'.

> They are a . . . target because they make good copy and seldom had an opportunity to answer back. Within the past few days, judges had been heavily and almost hysterically criticised for passing too lenient sentences and also for passing too severe sentences. It was impossible for judges to be right . . . There was a limit to what judges could do.

Defining that limit and clarifying the proper respective roles of judges, Parliament and the bureaucracy was the subject of a recent address by the former head of the Federal Attorney-General's Department in Canberra, Sir Clarrie Harders. Speaking to a seminar at the Australian National University on 'Doing business with Canberra' (23 April 1982) Sir Clarrie offered his observations on the growth of the new administrative law with its tribunals and other officers who, unlike the public service are 'not subject to ministerial control or direction'. The fact that the Administrative Appeals Tribunal can apply its own view of policy has produced, according to Sir Clarrie, 'troublesome questions'. It was, he said, 'detracting from the authority and responsibility of Ministers and also of Senators and Members as a whole'. One little vignette in his address was a reference to a warning delivered by the former Federal Solicitor-General, Sir Kenneth Bailey, before the growth of the modern review of administrative action. Sir Kenneth suggested that the call for new procedures to check the bureaucracy:

> 'reflects a declining belief in the process of Parliamentary Government as a whole . . . removing from the elected representatives of the people the direct responsibility for the administrative process'.

These reservations must not be read out of context. Even in the AAT, the area of policy determination is small. The power is conferred on the AAT by Parliament itself. Attention is carefully paid to established Government policy. But, clearly, this new area of 'judicial power' continues to evoke many comments.

accident compensation

> Five years in the lives of Lord Pearson and his colleagues [reporting on Civil Liability and Compensation for Personal Injury] have been spent in vain. Scurvy treatment by an ungrateful Government.
>
> Lord Denning MR

what next? In his latest book, now withdrawn, *What Next in the Law,* Lord Denning took a