- Lack of tightness in the day-to-day administration of compensation claims, resulting in over-generous settlements and failure to limit the fraudulent claims.

He further pointed out:

> the Bar Association has advised the Attorney-General and the Minister for Transport that it can see no justification for reducing the rights of injured citizens to compensation when the problem that has arisen results from curable deficiencies in administration and funding.

In response to this WJ Jocelyn, Managing Director of the GIO, in a letter published in the *Sydney Morning Herald* on 21 March, argued that the most important problem in the current third party scheme was that 'the cost of benefits has been rising faster than either wage inflation or consumer prices'. He suggested that changing community standards was the reason for this and that both 'the scope and amount of compensation had been increased as lawyers had been able to convince courts that such increases were justified'. In his assessment the two major factors behind the current plight of the third party scheme are

> the skill with which lawyers prepare and present such claims; and the bias towards the claimant which the community expects and which the courts enforce.

He also pointed out that a significant increase in premiums would be required in order to make up the short fall.

> If there were an immediate 50% increase, with annual increases of about 20%, then the fund would be stabilised. Alternatively, annual increases of about 27.5% over five to seven years would be required before increases could be reduced to an underlying rate of about 20%.

The Law Society has argued in support of this option. It is very much against depriving persons of their compensation rights.

But the crisis in third party compensation is not limited to New South Wales. In South Australia the Government Insurance Commission has recommended:

- a ceiling of $60 000 on lump sum payments for economic loss and pain and suffering;
- annual payments rather than lump sum awards (eg compensation awards of $100 000 or more would be paid on an annual basis rather than as a lump sum).

The Law Institute in Victoria has proposed:

- compensation for minor non-demonstrable injuries (sprain and strains) should be abolished.

It has been estimated in Victoria that for the last three years claims within this category have jumped by 49%. Some Melbourne law firms have taken the step of placing newspaper advertisements to encourage persons injured in motor vehicle accidents to seek legal advice about commencing court action as their rights to sue may be abolished.

No firm proposals have been put forward in any of these jurisdictions but it seems that in the not too distant future some changes will be made. Large increases in third party premiums will not be popular and as a consequence governments are looking for ways to reduce the growth in compensation payments in order to resolve a dilemma.

law reform and resistance to change

> Everyone thinks of changing humanity and nobody thinks of changing himself'.
>
> Leo Tolstoy

the church and slavery. The recently appointed Chairman of the New South Wales Law Reform Commission, Mr Keith Mason QC, gave a speech touching on these matters to the University of New South Wales Law Faculty on 18March1986. Mr Mason noted

that change usually meets opposition. He noted that resistance which presents itself as protecting the public interest may in fact be steeped in self-interest. Mr Mason recalled that in 1794 William Wilberforce managed to carry in the British House of Commons a bill to abolish the supplying of slaves to foreign nations. He said that one would have thought that this step could at least have had the wholehearted support of the Church. But in the House of Lords, Lord Abingdon warned the bishops that the Bill contained seeds of 'other abolitions', and suggested that they might look to their own downfall. The Lords threw out the Bill with only 4 votes in its favour. It then lapsed for a number of years. Mr Mason said that the real reason for the failure of the humanitarian proposal in 1794 was that 'commerce clinked its purse' and that the landed interests in the West Indies combined with those profiting from the slave trade out of Liverpool to organise support in the House of Lords. But the method used to block the reform was to instill fear and to appeal gently to the self-interest of those in power.

compensation for personal injuries. Mr Mason said that a topical example for that phenomenon could be seen in what was happening in New South Wales at the present time as the legal profession geared itself up to meet the prospect of reform in the area of the law of compensation for personal injuries. He said that the reactions in recent weeks of the professional bodies had been misleading, steeped in self-interest and totally uninstructive. Mr Mason noted that there were also other enemies. He said that Justice Kirby had correctly stated that:

> the enemy of a great deal of legal reform in our country is not frank opposition, and the powerful lobbies. All too often, it is governmental indifference, the parliamentary agenda, bureaucratic inertia, or suspicion and intimidation by the technicalities, complexities and sheer boredom with much legal reform.

legislative pneumoconiosis. Mr Mason referred to Professor PM North's phrase 'legislative pneumoconiosis' to describe the fate of law reform proposals which are not rejected but simply left on the shelf to gather a fatal coating of dust ('Law Reform processes and problems', (1985) 101 *LQR* 338, 354.)

Mr Mason said that he could happily say that the Attorney-General's Department in New South Wales had a practice of responding to proposals for law reform emanating from the Commission though: 'it may take time and it may be slowed down by the need for interdepartmental consultation'. Mr Mason said that the Commission is consulted in that 'aftercare' process and that it regarded 'after care' as a vital part of its function: 'experience in the past has shown that sometimes good proposals have foundered simply because the body making them was not given the opportunity to make minor adjustments to meet obvious problems which did not occur to it at the time of its report'.

history of reform. Mr Mason said that in his opinion the judicial climate in 1986 was very different from that in the mid 1960's when institutional law reform had its genesis. Mr Mason speculated whether this change in judicial climate was spurred on by the advent and work of law reform commissions or whether it was just one of those ironies of history. He said that since the late 1960's in England and Australia, the ultimate courts of appeal have adopted a more purposive approach to statutory interpretation, have been prepared to discuss the social implications of their decisions and have explicitly and more frequently used their power to change the common law to meet what were seen as changing needs in society. Mr Mason suggested that this change in judicial attitudes 'accompanies something of a decline in the standing of formal law reform agencies, although the reasons for this are too complex to suggest that a resurgence of judicial activism is anything but one factor'.

catalysts for change. Mr Mason listed a number of catalysts for change. He said that there may be basically a vacuum that de

mands legal intervention. Sometimes changes in social patterns stretch the resources of existing legal rules and practices. Mr Mason said that a third catalyst for change was more internal. Practitioners and academic lawyers involved in a specific area may perceive anomalies and inconsistencies in the theory underlying the field. There may be a rule of law, where the exceptions are so many and great that 'ultimately they gobble up the rule itself'. He said that a fourth catalyst was what he called 'the emperor with no clothes'. A particular rule of practice of longstanding 'may be followed sheepishly by the profession that is complacent or because it suits its self interest. To an outsider the rule – or at least its consequences – may be ludicrous or worse. Yet the outsider may be too cowed or inarticulate to speak up. Suddenly someone has the courage to shout: "But the emperor has no clothes on!"' Mr Mason said that he did not intend to exclude the personal factor as a catalyst for change: 'individuals like Denning and Kirby have a vast influence, despite the inevitable setbacks they strike'.

plain english again

> 'Let the words be sufficient without explanation', said Bill severely 'and as we haven't time to waste talkin' philosophy to a puddin', why into the bag he goes'.
>
> Norman Lindsay, *The Magic Pudding*

The Hon Jim Kennan MLC, Attorney General for Victoria, has struck another blow in the cause of plain English legislative drafting. Giving his report to the Ministerial Council on Companies and Securities at the conclusion of his term as Chairman, Mr Kennan, among other remarks said:

> 'thirdly. I think we need to look at preparing a major Deregulation Bill for 1987 which will sweep away the unnecessary regulation in the Scheme. Can I emphasise at this point that I believe that the Commonwealth must give more attention to a plainer drafting style. The existing provisions in the various Codes are convoluted enough. However, some of the recent amendments have been almost indecipherable. The first draft of the Partial Takeovers Bill contained clauses which were simply incomprehensible.
> We must never accept the tyrrany of some legal experts and some Parliamentary Counsel that there is something legally more effective about a Bill which is drafted in clauses which average say 80–100 words per clause rather than a Bill which is drafted in short simple sentences of 20–30 words.

It must be remembered that all Companies and Securities legislation is drafted with a particular audience in mind – expert lawyers and accountants well versed in corporate law. The test of the effectiveness of such measures is not whether they can be easily understood but whether they will resist the attempts of 'creative misunderstanding' to which they will undoubtedly be subjected. If, in addition, they can be easily understood, so much the better.

The Federal Attorney-General, Mr Lionel Bowen, was quick to come to the defence of Commonwealth Parliamentary Counsel. In a press release issued on 7 April, Mr Bowen pointed out that it was absurd to expect that legislation dealing with complex matters could be drafted so as to be easily understood by the average citizen. He said the work of the talented young draftsman in the Office of Parliamentary Counsel who had prepared the Partial Takeovers legislation had recently been praised by the Chairman of the National Companies and Securities Commission, Mr Bosch, and that he fully supported Mr Bosch's remarks. Mr Bowen said that as Commonwealth Attorney-General, he was quite satisfied with the standard of Commonwealth drafting and that any difficulty in understanding legislation relating to Companies and Securities law was in the nature of the subject and not in difficult drafting techniques.

The question is not a simple one. Lawyers must be on guard against a tendency to use unnecessarily what non-lawyers would justly describe as jargon. On the other hand, in some areas of the law the use of what non-lawyers describe as jargon may be the only professionally competent way of drafting a provision that prevents escape by those to whom it is directed.