> Australia in 1980 to take details of the proposed Treaty to the diverse and far-flung Aboriginal communities. Some observers suggest that the forthcoming bicentennial of white settlement in Australia might provide an apt occasion for the signature of a Treaty between the newcomers and representatives of the Aboriginal people, who were living in harmony with the Australian environment for 40,000 years until Captain Phillip hoisted the Union Flag on the banks of Sydney Harbour before his motley crew of convicts and soldiers.

Commissioner Bruce Debelle hopes to complete public hearings on the ALRC discussion paper proposal by May 1981. Extending earlier ALRC hearings, Mr. Debelle plans to sit in many remote parts of Australia, informally consulting Aboriginal communities. In addition to hearings in the capitals, where white opinion too will be sought, the views of Aborigines in centres as far apart as Port Hedland, Mt. Isa, Lismore, Weipa, Gove and Fitzroy Crossing will be sounded, before the ALRC presents its report. The work on Aboriginal customary laws must be seen in the context of many efforts being pressed forward, with bipartisan support to secure a new relationship between the original inhabitants of Australia and the majority population.

judges and courts again

> Let not judges also be so ignorant of their own rights, as to think there is not left to them, as a part of their office, a wise use and application of laws.
>
> Francis Bacon, *Of Judicature.*

the law reform apogee. The last issue of this bulletin recorded the visit to Australia of the first Chairman of the English Law Commission, Lord Scarman. Lord Scarman delivered a notable address in Melbourne, widely covered in the press. In it he urged, amongst other things, a more supportive role by courts in the business of interpreting the legislative will. But from Perth comes a report of his address to a luncheon jointly hosted by the Law Reform Commission of Western Australia and the Law Society of that State. He commenced by referring to the great optimism and idealism which accompanied the establishment of the Law Commission of England and Wales in 1965. He said that in the intervening period much of the optimism and idealism had faded. Recent addresses by the Chairmen of the English and Australian law commissions had indicated that institutionalised law reform had entered a 'more sober and realistic era'. If it was to succeed it would require assistance from the legislative and executive branches of government. Although judicial temperament varied, there was a tendency for judges to abdicate the field of law reform. This made it all the more important that legislators give proper consideration to law reform proposals. If three out of five law reform proposals were accepted and the others rejected after proper consideration, no one could complain. However, if none out of five was adopted, because none of the five had been properly considered, law reform bodies naturally became dispirited and the process of institutionalised reform discredited.

Lord Scarman's successor, Sir Michael Kerr, told the Sixth Commonwealth Law Conference in Lagos, Nigeria, of the need for a more certain and co-ordinated approach to the 'business' of law reform:

> The systematic review of the law was a gleam in the eye of many reformers in our history, going back at least as far as the beginning of the 16th century under Francis Bacon. Before our time, it achieved its apogee under the Victorians. But it was only after a further century of pragmatic and piecemeal attempts at reform that it came to be accepted that a systematic approach is an essential ingredient in a modern legal system.

Sir Michael Kerr, who will himself visit Australia for the 1981 Legal Convention, said that the 'law reform idea' had become a reality and institutionalised throughout the Commonwealth of Nations. But it was very easy to become 'starry eyed and unrealistic':

> Although a law reform agency must necessarily be independent and free to make any recommendations which it believes to be right, it must

> nevertheless be aware of the considerations which government will have to take into account if the proposals are to be implemented. There must therefore be a realistic prospect of implementation by parliament within the limits of legislative programs and parliamentary procedures, if law reform recommendations requiring legislation are not to waste their sweetness in the desert air. We have got to face the fact that law reform ... like politics, is ultimately an exercise in the art of the possible.

Having said this, Sir Michael Kerr said that it was the obligation of the Executive and Parliament to devise means to ensure that 'a better success rate' can be achieved.

lord denning again. One of the most active of English judicial law reformers, Lord Denning, gave the traditionalists another start when delivering the 1980 Richard Dimbleby Lecture on B.B.C. Television in late November 1980. According to *The Times* (21 November 1980) Lord Denning urged that judges in Britain ought to have power to 'set aside' new legislation on the grounds that it was unconstitutional:

> For the longer I am in the law — and the more statutes I have to interpret — the more I think judges here ought to have the power of judicial review of legislation similar to that in the United States, whereby judges can set aside statutes which are contrary to our unwritten constitution in that they are repugnant to reason or to fundamentals.

He instanced a hypothetical case where a Prime Minister sought to appoint a thousand new Peers with the avowed intention of abolishing the Peerage. He also tartly chronicled three cases of what he claimed were 'abuse of power' by the media, two of them in B.B.C. programs about the Irish problem. Not everyone might agree with Lord Denning's illustrations. But Professor Jeffrey Jowell, in a radio talk, said (*The Listener,* 22 May 1980):

> Lord Denning's judgments are neither wayward nor haphazard. They display ... the consistent view of the courts' role and of the rights of the individual against the State. Without Lord Denning the State would be much less constrained and the individual much more exposed to official power.

The Bill of Rights debate continues to exercise judicial and other minds in England. Lord Scarman adverted to it in his addresses in Australia.

high court press release? The impact of changing times on the High Court of Australia was considered by Sir Ninian Stephen in his 1980 Turner Memorial Lecture, delivered at the University of Tasmania, Hobart, on 2 October. The flow of ideas, many of them generated abroad, now 'washes around the foundations of our legal institutions'. An interesting statistic contained in the address was the reference to the '3,000 odd tourists a day' who besieged the 'concrete tower by the shores of Lake Burley Griffin' recently occupied by the High Court. More important than this exposure is the 'greater exposure to public notice' arising from the move to Canberra and 'political events of recent years'. Mr. Justice Stephen talked of the changes which had occurred in media reporting, many of them the product of the electronic media 'which is itself even more concerned than is the print media with the passing moment of sensation':

> The truth is, of course, that to onlookers, court cases in unabridged form are utter tedium. If junior counsel drowse and the court crier nods, what hope is there of scoring high in the rating charts? It is for this reason that I am dubious about proposals that court proceedings should be televised.

Having said this, however, he considered that there was 'perhaps one area' in which we could do better: the explanation of judgments:

> Lawyers have for too long ignored the need to explain the product of their discipline. Obscurity of language may once have been thought to protect the mysteries of the art and lawyers were, perhaps, rather proud of it; but now the social sciences have far outdistanced lawyers in attaining giddy heights of obscurity. We should acknowledge defeat, give up the equal contest and set about the task of simplification or at least explanation. ... What is perhaps worth considering is publication, concurrently with the handing down of judgment, of a detailed press release which does explain, in layman's language, what were the issues, who won and why. Lawyers will be wary of trying thus to translate into common parlance the law's often arcane language and the fear of inaccuracy of translation is a real one. But I doubt whether we can for much longer forego this means of ensuring that justice has an opportunity of being seen to be done.

the 'crippled lawmaker'. Turning to law reform, Sir Ninian Stephen said that the

pressure for judicial law reform was, in part, the product of the failure of modern parliaments to offer proper time for legislative reform. Citing Lord Devlin's 'lugubrious' description of the judge as 'a crippled lawmaker' Sir Ninian urged the need for caution in judicial lawmaking. Although a vital aspect of the judicial process, it demands a clear appreciation of its difficulties and of the responsibilities which it entails.

Although the Turner Lecturer asserted reservations about excursions into travaux preparatoires, prompted by the excursion in *Dugan* v. *Mirror Newspapers* (1979) 53 A.L.J.R. 166, parliamentary impatience with judicial interpretation is evident in a statement by the Federal Attorney-General, Senator Durack, during September 1980. Addressing the Australian Society of Senior Executives in Sydney, Senator Durack proposed that legislative draftsmen of the future might choose general language, leaving it to the courts to effect the parliamentary intent. This could be 'assisted' by providing a memorandum to which the courts would have regard in interpreting the statute. The net result, the Attorney-General suggested, could be legislation which would be easier for laymen to understand and closer to the parliament's will. Some editorial commentators were not sanguine. *The Australian Financial Review* (23 September 1980) said this:

> The difficulty with this proposal is that the courts have shown a reluctance to give the preamble to an Act the same force as the clauses of an Act and have developed elaborate principles of construction and reading down which seem to an outsider designed to exclude any but the exact wording of a specific clause from the consideration when deciding cases.

Anxious lest the High Court of Australia 'usurp the role of legislators', the editorialists considered Senator Durack's suggestion as a preferable means by which parliament could 'instruct' the court on the social and moral considerations they ought to take into account. The editor then noted an historical irony:

> Much of the authority of the courts derives from the long struggle in England to emancipate the community for an arbitrary action by an untrammelled executive. ... It is one of the strange reversals of history that now a parliament is treated by would-be social reformers as the bastion of conservatism and the courts as an instrument of social change and reform, regardless of the will of the electorate.

in on the act. An indication of the heightened awareness of the importance of legislative drafting and its significance also for law reform can be seen in the publication of a new journal by Sweet & Maxwell, London, *Statute Law Review*. First issued in June 1980, it meets a need which exists in the four corners of the world, where English-language statutes are drawn and, generally, narrowly interpreted by the courts. In an age of big government and big legislation, the science of law drafting has now attracted its own journal. Among the initial articles are comments on such topics as:

- The Interpretation Act 1978 (U.K.).
- Comparison of English and continental legislative drafting.
- Teaching legislation in law schools.

An excellent monograph recently published is Sir Harold Kent's *In On The Act*. Published in 1979 by Macmillan, London, it records the recollections of a top English legislative draftsman. On p.44 is the wry comment:

> When I became Treasury Solicitor, acting for many departments, how difficult I found it to formulate proposals for a Bill and how sympathetic I became to the people whom I had previously castigated as unable to think things out, and what a relief to find the familiar grey-blue paper in my hands drafted by one of my late colleagues!

principle v. pragmatism? On the question of judicial lawmaking, two other contributions deserve comment. First is the Inaugural Lecture of Professor P.S. Atiyah, 'From Principles to Pragmatism', now published in 65 *Iowa Law Review* 1249 (1980). Originally delivered at the University of Oxford in February 1978 and described as 'a truly stunning piece', it analyses the move over the past century from strict even unbending application of legal principles to a greater concern, today, with 'doing justice in the particular case'. Professor Atiyah's caution is that principled decision-making, in preference to ad hoc resolutions in

a particular case, may have a greater effect in encouraging or discouraging particular types of behaviour in the future. He warns against too much judicial creativity or too much judicial discretion:

> [I]f ... the trend towards individualised justice and dispute settlement goes beyond a certain point, is there not a real danger that the moral authority of the judges themselves will be greatly weakened? ... At a time when the ideal of egalitarianism rides as high as it does today, it is supremely ironical that we should at the same time be embracing discretion and rejecting principles; for this process must of necessity encourage and legitimise a greater inequality of treatment in the judicial process.

politics of justice. A second important address was that of Senator Gareth Evans, past ALRC Commissioner and now Shadow Federal Attorney-General. On 8 October 1980, Senator Evans delivered the 1980 John Curtin Memorial Lecture at the Australian National University in Canberra. Titled 'The Politics of Justice', it deals with such matters as:

- parliamentary politics of law and justice;
- the political role of the judiciary;
- the appointment of judges;
- proper limits of judicial power; and
- the case for a Bill of Rights.

Speaking before the federal elections, Senator Evans took his stand on law reform:

> An incoming Labor Government will adopt a wholly different approach to law reform in that we will, for a start, promptly legislate to give effect — with only such modifications as time has made necessary — to all the existing reports of the Australian Law Reform Commission and most of those of the Senate Constitutional and Legal Affairs Committee, which are now languishing in pigeon holes. I believe we will adopt a new method of parliamentary and governmental scrutiny — of the kind suggested in the Senate Committee report on 'Reforming the Law' (and now apparently being introduced into Britain) which will ensure that future reports from these bodies are not ignored or emasculated. I would like to think that along with changes of this kind it might be possible to work for more fundamental improvements in the system as it relates to law and justice issues, so as to make much more effective and sensitive (and much less subject to the vagaries of which party or person is in office) parliament's law reform activities.
>
> Improvements in parliament's law reform performance in the reasonably foreseeable future will come not from grand reorganisation of the whole system or the superimposition of gimmicks upon it. Rather it will come from parliament itself, as a result of evolving bipartisan agreement (of which there are some early signs at the moment) significantly altering and improving its own procedures, and developing a much more flexible institutional environment than exists at the moment.

One of the most interesting parts of this wide-ranging address was the statement by Senator Evans of his six criteria for the appointment of a High Court justice. Starting from a denunciation of any diminution of 'judicial independence' he listed intellectual capacity, intellectual creativity, intellectual integrity ('perhaps the most important requirement of all), experience or at least understanding of 'the real political world', personal integrity and the capacity 'to inspire general respect and confidence'.

understanding the brethren. The above debates in Australia and Britain are reflected in other common law countries too. The October 1980 issue of the Canadian Bar Association's *National* discloses concern about 'poor legal coverage' of the Canadian courts. It is asserted that Canadian journalists probably spend 'less time and effort attempting to report on the nation's courts than on any other public decision-making body':

> The journalists mistrust the courts, which they find secretive, the lawyers, whom they find unco-operative, and the law, which they do not understand. The lawyers mistrust the journalists, for searching for simple answers to complicated questions.

In the United States, where there is less secrecy, hot on the heels of *The Brethren* comes an article in the June 1980 issue of the *American Bar Association Journal,* 'What Really Goes on at the Supreme Court', by Mr. Justice Lewis F. Powell, an associate justice of the Court. The author concedes that it is natural to be curious about secrets but he contends that the picture of 'fighting and feuding' is 'just not true'. Rather, boringly enough, the court is described in terms that will be familiar to many Australian judges:

> [It] is a place where justices and their small staffs work extremely long hours; where the work is

> sometimes tedious, although always intellectually demanding; where we take our responsibility with the utmost seriousness; and where there is little or no time for socialising. ... I speak not of the members of the court today or at any particular time. Justices, with varying degrees of wisdom and legal scholarship, come and go. The institution, nourished by its inherited tradition, is what merits respect and confidence. Those who denigrate the courts do a disservice to liberty itself.

In the same spirit of this explanation of the 'precious ideal of ordered personal liberty' dating back to the 'many centuries of English history', is Chief Judge Irving R. Kaufman's piece, 'The Essence of Judicial Independence', 80 *Columbia Law Rev* 671 (1980). Tracing the evolution of judicial independence from England, Kaufman is cautious of the encroachments by Congress on the independence of the judiciary as in the provision of new disciplinary systems which may interfere with judicial impartiality and undermine the doctrine of the separation of powers. Specific is his criticism of the recent U.S. Judicial Conduct Disability Act of 1979.

Judicial independence, judicial creativity, the judicial role, judicial power. All these promise to be live issues throughout the 1980s.

lawyers' future?

> Woe unto you, lawyers! For ye have taken away the key of knowledge; ye entered not in yourselves, and them that were entering in, ye hindered.
>
> *St. Luke's Gospel,* 11, 52.

computerized conveyancing. According to Mr. Justice Kirby (ALRC Chairman) Ebenezer Scrooge is one of the 'least celebrated of the para-legal luminaries of the 19th century'. His 'bah humbug' approach to bright ideas ultimately gave way to personal reform. In an address to the Co-operative Building Societies of New South Wales on 1 December 1980 in Sydney, the ALRC Chairman suggested that the pace of reform in land conveyancing would be forced by modern information technology. He predicted that within 20 years this significant part of the Australian legal profession's activities (estimated to be 50% of fees in eastern States) would be significantly diminished. Referring to the present legislation which guarantees lawyers in most Australian States a 'monopoly' in certain aspects of paid land title conveyancing, Mr. Justice Kirby asked whether banks, building societies and other responsible bodies ought not to be permitted to compete, so as to bring down the costs of conveyancing, usually the ordinary citizen's greatest legal expense:

> Some observers suggest that the days of high cost and talented monopolies are numbered anyway, by reason of the new information technology. Those less familiar with the dynamic movements in automation of complex data can be forgiven a backward looking attitude to the potential of computerisation in the land conveyancing area. For my own part, I have little doubt that in time, probably before the end of the century, the great bulk of land transfer conveyancing will be a relatively simple computerised process. In such a world, the use of skilled lawyers, at least in routine transactions, would simply not be justified. Building societies and the legal profession itself should be preparing for the world of 'informatics'.

Outlining the arguments for and against revision of the lawyers' monopoly, the following points were made in favour of change:

- Most registered land title conveyancing is typically routine. Title insurance has been adopted in the United States to guard against the occasional problems that arise.
- The market for cut-price conveyancing is demonstrated by the growth of 'do-it-yourself' kits and like services.
- In South Australia and Western Australia, where land brokers compete with lawyers, professional fees are lower.
- The present system proceeds by an 'adversary process' whereas most clients look at a land purchase as purely administrative.
- The professional monopoly, excluding even responsible competitors, is inconsistent with the modern philosophy of competition, evidenced in such legislation as the Trade Practices Act.

But the ALRC Chairman pointed out that