> we really wish to do something about the problem,we must put polemics aside and choose between two basic paths. Both are costly; both might jeopardise important social values; and neither can assure success. There are no 'rose gardens'. One alternative is to make the cost of violating the law so great — and the prospect of punishment so certain — that would-be offenders, whatever their circumstances, would not dare to commit a crime . . . The other basic path . . . would consist of an effort to determine the causes of crime and a commitment to eradicating them. . . . We do not make our choice easier by ignoring it. Tough talk and promises of the fast cure merely hide the choice from view. Unless we face the harsh realities about crime and confront the difficult alternatives for ending it, crime will grow worse and the pressure to adopt even harsher measures will increase.

Three other United States developments during the last quarter can be noted:

- In the Congress, efforts to revive the reformed federal criminal code seemed likely to fail. A combination of liberal and conservative opponents to the code have proposed more than 60 amendments, most of them on controversial areas such as the death penalty, obscenity crimes and sexual offences. Even school prayer cases and possibly an amendment outlawing abortions were proposed for inclusion. *Congressional Quarterly Weekly Report,* 1 May 1982, 1018.

- In California, which often leads the way for changes in other States of the Union, a Referendum Proposition (8) was offered to the voters in early June 1982 as this issue of *Reform* went to press. Titled the 'Crime Victims Bill of Rights', the measure attracted much political support. However, a great deal of professional legal opposition was voiced. Writing to *The Los Angeles Times* (1 June 1982) the Chairman of the Criminal Law Section of the State Bar of California, Mr. M.H. Oppenheim said that the measure (designed to restrict plea bargaining, secure readier admission of criminal evidence and limit bail) was probably unconstitutional in some respects and likely to become a 'lawyers' full employment Bill'.

- The *New York Review of Books* (1 April 1982) included a book review of the new work by Michael Sherman and Professor Gordon Hawkins *Imprisonment in America: Choosing the Future.* The review, written by Professor Graham Hughes, gloomily reflects upon the growing prison population in the United States. According to the authors there are about half a million people in prison in the United States, about six million gaol admissions of arrested people each year and about one million offenders on probation or parole. Each new secure cell demands an outlay of around $50,000 on average, with maintenance of each inmate costing about $10,000 a year. The criminal trial is likened by Hughes in the United States to a 'creaky coronation coach' that we can afford to haul out only on a few state occasions. The creaks described put pressure on the criminal justice system, especially pressure towards plea bargaining in the United States. And there is a lesson here for liberals as well as conservatives according to Hughes:

> The public needs to learn that the criminal justice system cannot make any great impact on the violent crime rate, but the most it can accomplish is to see that things do not collapse altogether and to do this as efficiently and fairly as possible. Liberals must realise that, in the end, it is the crushing burden of the ornate criminal trial required by modern constitutional interpretation that has paralyzed the criminal justice system.

crimes commission?

> I should count myself a coward if I left them, my Lord Howard, to the Inquisition dogs and the devildoms of Spain.
>
> Tennyson, *The Revenge,* 1880, xi

new inquisition? Hot on the heels of the report of the New South Wales Police Tribunal (Mr. Justice Perrignon) that the New South Wales Deputy Police Commissioner, Mr. Bill Allen, had by his activities bought discredit on the New South Wales Police Force, and Federal demands for access to

State materials about the 'Allen affair', came suggestions from Canberra and Sydney that a new National Crimes Commission might be established to combat corruption in high places and organised crime in Australia.

On 29 April 1982 it was reported that the Prime Minister, Mr. Fraser, had warned the States that the Federal Government was prepared to 'act alone' in creating a National Crimes Commission if adequate cooperation was not forthcoming. Establishment of such a Commission is being studied by the Federal Attorney-General, Senator Durack, and other Ministers. The Attorney-General is about to depart for North America to study crimes commissions in that country and a considered judgment was predicted 'in the not too distant future' *(Australian,* 29 April 1982). The Minister for Administrative Services, Mr. Newman, responsible for the Australian Federal Police, indicated his concern about the implications of the Allen case for leakage of information from the New South Wales Police to syndicated crime in the United States.

Guarded support for the Crimes Commission idea was offered by the Federal Labor spokesman on legal affairs, Senator Gareth Evans. He said that his party was willing to give 'serious and constructive consideration' to proposals for such a Commission.

> A compelling case can be made that the traditional criminal investigation process, and occasional ad hoc Royal Commissions with limited terms of reference, are simply inadequate to deal with this new reality and what is needed is an ongoing inquisitorial process with wide ranging investigative powers set up by Federal-State cooperation.

An independent member of the New South Wales Parliament, Mr. John Hatton MP has been urging the establishment of a National Crimes Commission for some time. A submission on the subject was prepared for the Royal Commission on Drugs headed by Mr. Justice Stewart. According to Mr. Hatton:

> I believe this whole episode [the Allen affair] will lead ultimately to revealing the involvement of politicians with corrupt police. There is a chance that it will come out in the lead-up to the establishment of a National Crimes Commission, if not, certainly as a consequence of the National Crimes Commission.

Calls for a Crimes Commission in Australia are not new. Proposals for a Crimes Commission in Victoria was voiced in 1981 by Chief Commissioner Miller of the Victorian Police. The outgoing Liberal government in Victoria had promised that a Crimes Commission would be established in that State if it was returned to office in the recent election. A press release issued by former Attorney-General, Mr. Haddon Storey QC, on the eve of the State election (23 March 1982) promised:

> The new crime investigation body will give the greatest priority to investigating high-level drug traffickers and organised trafficking as well as combating drug-related crime which has the greatest potential for causing social damage. Traditional law enforcement measures have been hampered in the past in deterring highly organised professional crime in the State, particularly the activities of drug racketeers.

The incoming Cain Labor government in Victoria has been silent about the proposals.

british values. Not all comments on the Crimes Commission idea have been enthusiastic. In an address to the 60th Annual General Conference of the Country Women's Association of New South Wales in Lismore on 3 May 1982, the ALRC Chairman, Mr. Justice Kirby, pointed to the departure which such a permanent crimes inquisition would involve from the traditional accusatorial system of criminal justice inherited in Australia from Britain. Speaking on the topic 'Law reform — in praise of British institutions', Mr. Justice Kirby said that, without commenting on whether such a Crimes Commission should be established, it would be important that certain guidelines were followed if it were. Among the guidelines he mentioned were:

- strict definition of the limits of crimes within the jurisdiction of the new body;
- limitation of the list of such crimes to areas where the current law was clearly failing;
- rationalisation of rights and duties of suspects with those established in the Commonwealth's Criminal Investigation Bill 1981, arising out of the ALRC report on that topic;
- specific attention to rights to silence

against self-incrimination, the right to legal representation and procedures of interrogation;
- protections in respect of public inquiries by the Commission to avoid trial by media; and
- specific attention to the needs of law reform, necessary to remove the causes of corruption and syndicated crime.

The ALRC Chairman told the assembled audience of nearly 2000 country women:

> Where there are crimes in which there are no complaining victims, there is a tremendous opportunity for corruption of officials, including at high level. So long as the basic causes of the corruption remain unattended by law reform bodies and by governments and parliaments, the problems will remain to poison our public administration. You all know that I am referring to such sensitive and difficult issues as the laws on marijuana, the laws on prostitution, the laws on consenting homosexual conduct, the laws on gambling, the laws on liquor intake, the laws on indecent literature and so on. These are the areas in which there are many otherwise good members of our community becoming involved in breaches of the strict letter of the legislation. Yet there are rarely complainants and because there are no complaining victims, the opportunity for corruption arises. Unless we have a society with parliaments and leaders willing and courageous enough to tackle these underlying problems, the opportunities for corruption will continue, nourished by the large profits that can be made because of the large number of fellow citizens involved.

Mr. Justice Kirby stressed the special feature of the accusatorial system of criminal justice inherited from Britain. He said that these features were 'doubtless frustrating in the extreme on occasion to dedicated law enforcement officers'. Furthermore, they undoubtedly led to the escape of some guilty criminals. However, he said that they were principles 'at the very core of the British values we inherited'.

Similar reservations were expressed by the NSW Bar Council. President of the NSW Bar, Mr. Michael McHugh QC, said that a roving crimes commission with the inquisitorial powers of a Royal Commission would 'destroy the individual's common law privilege against self-incrimination'. As reported in *The Australian* (6 May 1982, 3) he said:

> Since the days of the Star Chamber and the Inquisition, the common law has set its face against compulsory answers which may tend to incriminate people. If a Crimes Commission is going to be given inquisitorial powers, we object to it.

To similar effect was the comment of Claude Forell in the *Age* (12 May 1982):

> Proposals for a National Crimes Commission with far-reaching investigative and inquisitorial powers raise serious political, legal and ethical problems. The concept is attractive mainly to three kinds of interest: the romantically idealistic, the frustrated professional and the calculating political.

Mr. Forell mentioned special concern about such a Commission becoming a vehicle for destroying reputations by malicious hearsay gossip which might ultimately prove to be without foundation. But the editor of *The Australian* (6 May 1982) was unconvinced by these concerns:

> There is a need to clear the air and the only way this can be done is by establishing an inquiry able to discover the truth, while ensuring that there are safeguards for ordinary citizens from unnecessary abuse or aspersions on their character or privacy. The selection of a respected Royal Commissioner and sensible terms of reference should be sufficient safeguard. As to the possibility . . . that an inquiry might endanger the individual's common law privileges against self-incrimination, we can only disagree. Those who have nothing to hide should have nothing to fear.

A conclusion more out of line with the accusatorial tradition of the Australian criminal justice system could scarcely be written. Yet the concern about corruption reaching to high places in Australia is a new and anxious one, producing demands for novel solutions.

police complaints. After a few delays, the Complaints (Australian Federal Police) Act 1981, introducing substantially the scheme proposed by the ALRC, came into force on 1 May 1982. New members of the Federal Police Disciplinary Tribunal are Mr. Justice Kelly of the Federal Court, Mr. J.B. Norris QC and Mr. R.J. Cahill SM. Announcing the commencement of the new

scheme, the Federal Attorney-General, Senator Durack and the Minister for Administrative Services, Mr. Kevin Newman said that they believed that the new procedures 'based on the report of the Law Reform Commission would prove one of the most effective ways of maintaining and improving good relations between the public and the police force and the respect in which the Force was held' (1982) 7 *Commonwealth Record* 430. The new Australian federal system may be in place but developments are still happening elsewhere:

- In New South Wales, the State Ombudsman, Mr. George Masterman QC, has reported that he is powerless to protect the public adequately in cases of complaints against the police. As a consequence, he recommended in the report to the New South Wales Premier, Mr. N.K. Wran QC, that his role in receiving public complaints should be abolished. Mr. Masterman drew attention to the deletion from the powers conferred upon him of two functions recommended in the ALRC Report. These were the reserve power of investigation where dissatisfied with a police investigation and the reserve power to refer a matter to the Police Tribunal. He called attention to the new system under which the Commonwealth Ombudsman will operate. The same day, the NSW Police Association registered its 'strong and adverse reaction' to any change in the present NSW system. Mr. Masterman denounced the present system as a 'charade'. He drew from the *Sydney Morning Herald* (11 March 1982) the conclusion that the State Government would have to 'bite the bullet on his ultimatum'. So far no bite.

- In Queensland, a permanent Police Complaints Tribunal has been established to hear complaints against the Queensland Police Force. The Police Minister, Mr. R. Hinze indicated that the Tribunal, since established, would be headed by District Court Judge William Carter who would have powers of subpoena. Establishment of such a judicial tribunal was one of the three component parts in the ALRC scheme now adopted in the Federal sphere. The other components were the establishment of a semi-independent investigation unit within the police and new powers to the Ombudsman.

- In Victoria, the precise reforms that will be introduced by the new Cain Labor government concerning State police are not yet certain. However, the justice platform of the Labor Party before the election included the promise to increase the power of the Victorian Ombudsman to investigate complaints and to set up an 'independent tribunal headed by a judge' to hear them. An editorial in *The Age* (14 April 1982) soon after the election urged a new impetus for law reform in Victoria:

> It is encouraging, although hardly surprising, that Mr. Cain has promised to use reports by the Australian and interstate Law Reform Commissions as a basis for legislation. Given the broad similarity of the law in most areas throughout Australia, it would be futile to duplicate the investigations of the eight law reform bodies working outside the State. The reports of the Autralian and NSW Commissions in particular, provide a solid basis for reforms in such areas as handling complaints against police, human tissue transplants, sentencing of offenders and reform of the legal profession.

It has escaped nobody's attention that Mr. Cain was one of the signatories to the ALRC first reports on Complaints Against Police and Criminal Investigation reform. One announcement by the new government concerning police was made on 12 April 1982. It was that the Victorian Government would use the 11 year old St Johnston report on the Victoria Police (1971) as a basis for re-examining the role and needs of the police in Victoria.

- In South Australia, the State government has 'accepted in principle' the need for reform of the investigation of complaints against the police. This acknowledgment has been welcomed in South Australia. An editorial in *The News* (25 May 1982) points out that the South Australian police record in this regard is 'in shining contrast to eastern forces'. But the anxiety is 'no less

real'. The editorial urged on the government serious consideration of the extension of the authority of the State Ombudsman. The new Commissioner of South Australia Police, Mr. J.B. Giles, was an honorary consultant in the ALRC project on police complaints and criminal investigation reform back in 1975. See below p. 115.

- In New Zealand, reflecting the complaint of Mr. Masterman QC in New South Wales, the Chief Ombudsman, Mr. George Laking, has reported that complaints against the police are inhibited by the existing law (*Auckland Star,* 25 May 1982, 8). In a speech to the New Zealand Council for Civil Liberties, Mr. Laking said that jurisdictional limitations imposed by the Ombudsman Act inhibited a fully effective investigation of complaints against New Zealand police. Whilst the primary obligation to review complaints should remain with police, it was consistent with that principle that 'there should be some form of independent review of the way police conduct the investigation into complaints made against them'. Mr. Laking's comment drew an editorial that suggested police, like other professional groups, must now accept the principle of outside representation in investigation of complaints.

- In Britain the recommendations of the Scarman report on the Brixton disorders proposed many important changes to the police complaints system in England and Wales. Rumours about the proposals of reform can be found in the popular press. (see *The Times* 25 January 1982, 3). But the precise direction of reform is not yet clear. The editor of the *New Law Journal* (3 December 1981) came back to the point of public accountability:

> If public accountability is to be a genuine characteristic quality of policing, effective machinery must be provided for ensuring not only that the police are publicly accountable, but that they are seen to be accountable.

criminal investigation. The progress of the Criminal Investigation Bill 1981 during the last quarter has been limited. Reports have filtered through to the media of representations made by the Australian Police Commissioners for modifications of the reforming Bill. According to a report in the Melbourne *Sun* (25 March 1982), the Federal Attorney-General, Senator Durack, proposes amendments to the Bill to accommodate the concerns voiced by the Police Commissioners. Federal Police Commissioner, Sir Colin Woods, has already reported that his Force can operate under the Bill. Senator Gareth Evans for the Labor Party was reported as warning the government to resist police moves to 'emasculate' the Bill.

Emasculation might be too kind a fate if the views of some police officers are any guide. The 'slanging match' of the criminal investigation seminar held in Melbourne was reported in [1982] *Reform* 62. See also (1982) *Legal Service Bulletin* 85 where Kevin O'Connor reports on the 'ferocity' of police reaction. The pressure has been kept up in the last quarter. President of the Australian and New Zealand Police Federation, Mr. Tom Rippon told an executive meeting of the Australian and New Zealand Police Federation in Canberra in April 1982 that the Bill was 'cumbersome and unclear and needed adjustment to be workable'. Mr. Rippon said that police saw the Bill as derogatory towards them. A heady correspondence has been maintained on the subject, especially in the Melbourne press. Chief Inspector Newman of the Victoria Police wrote to the *Age* (11 March 1982) urging that the Bill be reconsidered with a view to enhancing police powers. In response to an *Age* editorial addressing the need to reduce court delays, Mr. I.G. Cunliffe, Secretary and Director of Research at the ALRC, wrote (22 April 1982) calling attention to the need to reduce disputes about police confessions by procedures such as those proposed in the Criminal Investigation Bill. Mr. P. Sallmann in a major article 'Police Should Think Again on New Powers' (The *Age,* 6 March 1982) pointed to important extensions of police powers already contained in the Bill. He urged police to rethink their position or 'at least be more specific about why they object to it'. A serious review on the Bill is contained in an editorial in

(1982) 6 *Criminal Law Journal* 65. The editor was disturbed by the events of the Melbourne Seminar:

> Perhaps the most disturbing aspect of the seminar was the apparently intransigent opposition of the Victoria Police representatives to the whole idea of statutory regulation of police investigation procedures. Any controls on police procedures seemed to the speakers to invite a wave of criminal behaviour which, it was predicted, would overwhelm society. Whether crime rates in a community have really any relationship to the effectiveness or otherwise of the system of policing in that society was never really argued, but the demand for an untrammelled power in the police certainly came through clearly in the attitudes of the various police speakers. The watering down of many of the provisions which had been proposed in the 1977 Criminal Investigation Bill in the present draft does seem to indicate that the pressure from police forces generally has operated on the minds of the draftsmen in its preparation.

a happy lot? Presumably the Criminal Investigation Bill 1981 will be debated in the forthcoming Budget sittings of the Australian Parliament. It will now be discussed against the background of the National Crimes Commission proposal and concerns being expressed in many quarters about public confidence in the police service. Is public confidence to be secured by affording 'untrammelled power' or by instilling proper conduct by publicly enacted legislation, faithfully observed by police officers? Speaking at a conference on victims of crime at Sydney University in late March 1982 former Queensland Police Commissioner Mr. Ray Whitrod suggested that public confidence in police forces and the criminal justice system in Australia was failing 'partly because they have failed to adjust to modern problems'. Mr. Whitrod urged a return to policing as a visible protective presence in the community. Across the Tasman, Deputy Police Commissioner E.J. Trappitt, replying to the above criticisms of the Chief Ombudsman, said that people nowadays are far more ready to complain about what they see as shortcomings of the police than they were in times gone by. A strategy for community policing seemed necessary if ever we are to return to the 'good old days' of policing — whenever they were.

scitec: anzaas first

> Aristotle could have avoided the mistake of thinking that women have fewer teeth than men by the simple device of asking Mrs. Aristotle to open her mouth.
>
> Bertrand Russell

first law section. The biggest science congress in the Southern Hemisphere is that organised by the Australian and New Zealand Association for the Advancement of Science (ANZAAS). The 52nd ANZAAS Congress was held at Macquarie University in Sydney in May 1982. Three new sections made an appearance, namely robotics, women's studies and law. As the ANZAAS President for 1982, Sir Zelman Cowen observed on 10 May 1982 in the opening Presidential address, law was a 'long time coming'. The first meeting of the Australasian Association for the Advancement of Science, the ancestor body of ANZAAS, had occurred in 1888. So almost a hundred years passed before law was admitted to the scientific sanctum. Chairman of the inaugural Law section, Mr. Justice Kirby, observed that lawyers never believe in 'rushing things'.

The law section opened with a brilliant *tour d'horizon* of the many new interactions of law and science by the inaugural President of the ANZAAS Law section, Professor Douglas Whalan of the ANU Law School. His address was delivered in the presence of the Chief Justice of New South Wales (Sir Laurence Street), a judge of the High Court of New Zealand (Mr. Justice Ian Barker) and many distinguished lawyers and scientists. Prime responsibility for organising the interesting and varied program fell upon Professor John Peden of the Macquarie Law School. Among the interesting papers offered to the section were:

- Professor Robert Hayes (ALRC) on 'Computers and Privacy';
- Professor Carl Wood and Mr. Russell Scott (NSWLRC) on in vitro fertilisation and law;
- Mr. Justice Macken (NSW Industrial Commission) on 'The Challenge to Industrial Law';
- Mr. Barry Jones MP on 'Technology and Trade Unions'; and
- Judge Jane Mathews (NSW District