up this recommendation. Victorian police may hold a suspect for an initial period of up to six hours (the Commission recommended a maximum of four hours), which period may be further extended for a maximum of six hours at a time by a magistrate.

canadian proposals. The Canadian Law Reform Commission has published a paper dealing with the questioning of suspects (Working Paper 32, *Questioning Suspects*). This was another area considered by the Commission in its *Criminal Investigation* Report. The proposals made by the Canadian LRC are in substantial agreement with the recommendations of the Commission. These include:

- the giving of a warning to a suspect of his or her right to silence and right to obtain the advice of a lawyer;
- that the questioning should be recorded at the time of its occurrence, preferably by sound or video recording equipment or, if that is not practicable, then in writing; and
- that a statement taken from a person in contravention of the rules not be admissible in evidence at a trial or preliminary proceeding.

It also understood that at the time of his death, NSW Attorney-General Paul Landa was putting the finishing touches to a Cabinet submission for legislation requiring the electronic recording of police questioning in that State. See below at p 39.

righting wrongs or wrong rights?

We pay for being human and alive,
The price to be entangled and compelled.
Robert John Clark, 'Meditations on the Flesh'

new commission. On 12 September 1984 the former Attorney-General, Senator Gareth Evans, QC, introduced into the Senate a Bill to restructure and expand the functions of the Human Rights Commission. The name of the Commission would also be changed to the Human Rights and Equal Opportunity Commission. With the election of 1 December the Bill lapsed but it is expected to be revived in the early part of this year.

Established by the previous Liberal Government in 1981, the Human Rights Commission was to have a limited life of five years. At that time the then Attorney-General, Senator PD Durack, QC, stated that:

> the essential purpose ... of the Commission is to promote discussion and understanding of human rights in the community generally and to recommend to the Government and to Parliament changes in law or practice required to bring that law or practice into line with human rights as defined by the International Covenant [on Civil and Political Rights] or other human rights instruments ... In an era of social change in which governments exercise wide powers and corporations and large institutions greatly influence the lives of individuals, it is important to have an agency that is active in the protection and promotion of the rights of individuals.(*Senate Hansard,* 10 March 1981).

With the change of government, the Human Rights Commission has assumed a more permanent and activist role in securing human rights. The Human Rights Commission, as well as performing the functions conferred on it by its enabling Act (see [1982] *Reform* 21), has assumed control over administration of the Racial Discrimination Act 1975 and, more recently, the Sex Discrimination Act 1984 (see [1984] *Reform* 147). The new Human Rights and Equal Opportunity Commission would continue these roles and will also be the basic machinery through which the proposed Australian Bill of Rights and any future legislation in the human rights area would be administered. The new Commission will also be the vehicle for implementation of the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention 111). It is also to be given additional powers in the following areas:

- the formulation and publication of guidelines for the avoidance of acts or practices which may be inconsistent with human rights; and
- the ability to act as *amicus curiae* in legal proceedings that involve human rights issues.

prosecutor and jury? One feature of the existing, and proposed, Commission is its power to investigate and attempt to conciliate complaints alleging infringement of human rights or discriminatory activities. While in Opposition, the present Government considered that the conciliation power alone would be ineffective to combat the worst cases of discrimination or disregard for human rights. In the area of sex discrimination the Commission has now been given more extensive powers, including the power to adjudicate upon complaints and make determinations awarding compensation to complainants. The grant of such a quasi-judicial role for the Commission has been criticised by Professor Lauchlan Chipman, foundation professor of philosophy at the University of Wollongong and visiting professor of jurisprudence in the Faculty of Law at the University of Sydney. He is reported as saying that the grant of such powers is outrageously unfair and contrary to legal precepts (*Age,* 16 November 1984). He has also criticised the absence of an absolute right to legal representation, and abrogation of the normal rules of evidence, at adjudicatory hearings before the Commission. He was also critical that the Commission had done nothing to dissuade the Government from giving the Commission such powers. Mr Peter Bailey, Deputy Chairman of the Commission, commented that the Commission did in fact object to the grant of such powers and has now persuaded the Government to shift the quasi-judicial powers away from the Commission to tribunals headed by independent judges.

Under the Sex Discrimination Act, determinations by the Commission regarding sex discrimination are specifically not binding on any of the parties involved. Effective enforcement of any determination, including awards of compensation, may only be achieved by relitigating the complaint before the Federal Court of Australia. Such proceedings would attract the usual rules regarding representation and admission of evidence, and the complainant carries the onus of proving his or her case.

freedom of speech. Criticism has been growing over the Commission's proposals to amend the Racial Discrimination Act to cover incitement to racial hatred and racial defamation (Human Rights Commission, Report No 7, November 1983). In what one correspondent described as an 'unfortunately vituperative' criticism of the Human Rights Commission, an editorial in the *Financial Review* of 25 October 1984 described the Commission as a body having 'no sensitivity to the real issues of human rights at all', and as having 'discredited itself with the campaign which it is promoting to suppress still further freedom of speech on matters of race and community'.

> Effectively, this absurdly named body would prevent anybody from expressing views on race or communal matters which were not anodyne and milquetoast. It proposes, for example, that the law should include a 'prohibition of utterances which would lead to distinction on the basis of race'. . . . [It] also seriously advocates that there should be an offence of 'racial defamation'. So if someone says 'All Irishmen are stupid and dirty' (a paraphrase of a remark by the great Irish philosopher, Bishop Berkeley), all people of Irish descent would be able to sue the author of such a statement. This is obviously pernicious and oppressive nonsense.

The editorial suggested that the Commission was actively campaigning for the destruction of the right of free speech, and should be abolished.

The Commission did not, however, propose a law prohibiting utterances which would lead to a distinction on the basis of race, but rather to make it unlawful for a person to make statements which, having regard to all the circumstances, would be likely to result in hatred, contempt or violence against a person or persons, or a group of persons distinguished by race, colour, descent or national or ethnic origin. It should also be noted that, although the right to freedom of speech was cited in the editorial as a 'fundamental' right, the International Covenant on Civil and Political Rights recognizes that it is a right carrying with it 'special duties and responsibilities' (Article 19(3)). The Human Rights Commissions proposals appear to do no more than recognise that individuals rights and reputations may be infringed or defamed by imputa-

tions regarding race equally with other types of statements.

Professor Chipman has also been critical of these proposals. Delivering the inaugural Sir Earle Page Memorial Trust Lecture on 1 November 1984 he said:

> the Commission's proposals ... are an example of ineffective over-kill. They will not be effective in stemming the lamentable tide of racist invective, but will assign it to anonymity. Moreover they certainly will have the effect of limiting what Dame Roma Mitchell [Chairperson of the Human Rights Commission] calls, in an interesting but increasingly common misuse of the word 'valid', valid discussion of matters with racial import ... Not only is [the outlawing of certain forms of racialist propaganda] known to have a negligible effect on the production of such hate propaganda, apart from making its authorship more difficult to trace, but it is also known to put at risk certain legitimate uses of free speech.

Professor Chipman also condemned as 'snide, calculated and hypocritically racist' Dame Roma Mitchell's comments in her address to the Media Law Association in August. Responding to criticism of the Commission's proposals on the basis that they were 'yet another manifestation of a humourless puritanism that seems to be endemic in Anglo-Saxon communities', Dame Roma had commented:

> [This criticism] will doubtless appeal to many but I think mainly to those of Anglo-Saxon origin whom the critic blames for humourless puritanism. But they are not the complainants whom the Human Rights Commission sees. We hear from the Aborigines, the Greeks, the Italians and the Asians. They do not enjoy the ill-natured jeering. They believe that it has deleterious effects upon them and upon their children. I do not think that we can afford to do nothing.

Responding to Professor Chipman's criticism, Dame Roma said:

> I would not expect my words to have been so interpreted by any fair-minded listener (*Australian,* 10 November 1984).

reverse discrimination? The Human Rights Commission has refused to publish a report commissioned by it on affirmative action programs, reportedly on the ground that its author did not meet usual standards of scholarship and objectivity (*Age,* 13 November 1984). The report, by Dr Gabriel Moens, is said to be generally critical of the concept of the government's affirmative action programs. In an interview with the *Bulletin* (4 December 1984), Dr Moens said that the arguments he developed 'didn't fit the present bias of the Commission and were therefore rejected out of hand'. Commenting on affirmative action programs in an interview with the *Age* (13 November 1984) he said they were part of a trend in which the ideal of equality of opportunity has been replaced by an ideal of equality of result. The government's programs were essentially a replication of the US schemes, which had been highly criticised because of their insistence upon achieving quotas for employment of minority groups and women. The Australian emphasis upon 'targets' and 'goals' rather than 'quotas' is, said Dr Moens, 'a distinction without a difference. The fact that a target is a form of quota is an undeniable truth.' Targets, he said, often ensure the selection of inferior candidates and are discriminatory against those who would have been selected upon a merit system.

> Skills are not equally distributed through the community. That is a regrettable fact. We should be trying through a better education and training system to ensure that everyone can compete in the workforce. Then, if a person is Aboriginal, he gets the job he wants because he is the best applicant and not because some artificial device has been imposed on the employer to force him to employ more Aborigines.

Professor Chipman is equally critical of the 'hard' form of affirmative action programs and of the criticism meted out to those who oppose such programs on the ground that they legitimate reverse discrimination:

> The fact of the matter is that we are going down the American road, a road which has demonstrably failed. The distinction between targets (which are supposedly good) and quotas (which are supposedly American and bad) is actually semantic and political, and is indeed itself American. The only distinction that has ever been drawn between quotas and targets and which is now drawn with hindsight is

> that quotas meant filling positions with members of a particular target group even if it meant appointing quite incompetent people to get the numbers. Targets, on the other hand, are supposedly consistent with the merit principle because you appoint from the target group to the extent of the numerical target only if there are sufficient qualified people available to reach that number. In fact virtually nobody has ever argued that incompetents should be appointed just to get the numbers, so by misrepresenting the quota doctrine in this straw person way, and then giving a 'specious' reassurance that targets are consistent with the merit principle (which in general they are not – they simply do not licence the appointment of incompetent people which is a quite different point) busy managers and the many members of the community who are properly and genuinely concerned about issues of equality are soothed into thinking that claims about reverse discrimination and violation of the merit principle are silly and uninformed.

Both Dr Moens and Professor Chipman argue that the main beneficiaries of 'target' affirmative action programs are middle class white women, not the most disadvantaged women.

rights or wrong? Probably the most controversial measure to be debated in the human rights area is the proposed Bill of Rights. Distributed on a 'confidential' basis to State governments and a number of 'selected interest group', some details of the Bill have nevertheless found their way into the media, particularly through sharp criticism of the proposed Bill during the federal election campaign by the Premier of Queensland, Sir Johannes Bjelke-Petersen. Such criticisms focus on matters of States rights, the 'legislative' role given to the courts under its provisions and the role of the Human Rights Commission in its implementation.

a change of tack? Shortly before taking over as Attorney-General, Mr Lionel Bowen also expressed some misgivings over the present draft of the Bill of Rights. In an interview published in the *Catholic Leader* (December 1984), Mr Bowen said that the Bill raised enormous moral and political issues, but was itself 'just a band-aid job'. In particular, he expressed concern over its intrusion in areas traditionally allotted to the states under the constitution, and the constitutional and political difficulties this may cause. He was quoted as saying that if the Bill caused too much controversy in certain areas then he had doubts about whether it should go ahead. Mr Bowen also said that the Bill of Rights would entrench nothing in the Australian legal system and could be varied, even completely withdrawn, by a successive federal government. He suggested consideration be given to entrenching human rights within the constitution. This would, of course, require a referendum approved by a majority of citizens in a majority of states.

Mr Bowen's comments were made before the constraints of the Attorney-General's office were upon him and he stressed they were personal views. Shortly after the Cabinet reshuffle, both the Prime Minister and Mr Bowen were quick to quash suggestions that Senator Evans' departure spelt any slackening of the government's dedication to law reform. In an interview on ABC radio the new Attorney-General said however that he would only be 'backing winners' So law reformers, to the starter's gate!

child care

A child's a plaything for an hour.
Mary Lamb, *Parental Recollections*

tax deductions. Launching a national campaign seeking tax deductions for child care expenses, the NSW Women Lawyers' Association called on women to take their children to work for a week to highlight the need for taxation relief. They were protesting against the refusal by the High Court to hear an application of appeal against the Commissioner for Taxation. His department had disallowed a deduction claimed by a working mother in relation to child care expenses. Ms Helen Carney, President of the Women Lawyers Association, said the Association had fought the issue through four court cases: 'We have tried the considered and conservative alternatives and now this has become a political issue'. She refuted claims a child care deduction or rebate would only benefit well-off professional women: 'There are no rich women in this country – 90% of them earn below $18,000 a year'.