The legislation passed by the House of Representatives takes a different approach. The Commission may, with the consent of the Minister, examine State enactments and report to the Minister as to any conflict between the enactments and the Bill of Rights. When introducing the legislation, the Attorney-General, Mr Bowen, pointed out that the Government had chosen to limit the extent of application of the Bill of Rights to the States 'in order to achieve if possible a co-operative approach to human rights protection' (*Canberra Times,* 10 October 1985). However Mr Bowen reserved the Commonwealth's right to enact specific overriding Commonwealth legislation if the States fail to repeal legislation which offended the Bill of Rights or failed to enact their own Bills of Rights. Such legislation would be enacted in reliance on the external affairs power of the Australian Parliament as interpreted by the High Court in the *Tasmanian Dams Case.* A majority of judges in that case held that the external affairs power enabled the Parliament to enact legislation implementing Australia's international treaty obligations. Valid legislation would override inconsistent State laws.

In response to moves by the Australian Democrats to make specific provisions to ensure democratic elections in all States, Mr Bowen has made it clear that when the Bill of Rights has been passed he is anxious to have the Commission report on proposals for redistributions of the Western Australian Upoer House and the Queensland Legislative Assembly (*West Australian,* 27 November 1985). Mr Bowen pointed out to Parliament in response to a question from the Labor Member for Canning, Mr Gear, that there was an 11 to 1 disparity in the voting power of electors for the Western Australian Legislative Council with 8500 electors in the Lower North province and 95000 electors in the North-East Metropolitan province.

aborigines. Unlike the Canadian Charter of Rights and Freedoms and the proposed New Zealand Bill of Rights the proposed Australian Bill of Rights does not have any autochthonous elements. The Canadian Charter for instance has provisions protecting the rights of English or French linguistic minorities in individual provinces as well as a provision recognising and affirming existing aboriginal and treaty rights of the aboriginal peoples of Canada who include the Indian, Inuit and Metis peoples. Similarly the New Zealand Bill recognises the rights of the Maori people under the Treaty of Waitangi which is annexed to the Bill of Rights in both the English and Maori languages as a schedule. However the Senate Constitutional and Legal Affairs Committee in its report considered that problems of Aboriginal rights were best addressed through specific legislation and pointed out that Australian Aborigines would benefit generally from the introduction of an Australian Bill of Rights (para3.60–2). Article 4 of the proposed Bill of Rights guaranteeing equal protection of the law and Article 5 protecting the rights of minority groups are particularly relevant in this context.

the future of the legislation. The Bill of Rights legislation must now be considered by the Senate. Some delay in that Chamber is likely due to the anxiety of the Australian Democrats to secure a strengthening of the Bill's provisions with respect to the States. The Democrats' spokesman, Senator Michael Macklin, has said that if the legislation is not strengthened or at the very least referred to the Senate Constitutional and Legal Affairs Committee, the Democrats would have to reject it (*Age,* 26 November, 1985).

expungement of criminal records

Stone walls do not a prison make
Nor iron bars a cage.

Richard Lovelace, 1640

endless punishment for past mistakes. The Australian Law Reform Commission has issued a discussion paper on what can be done to enable people to 'live down' criminal records. The paper invites submissions and comments. The final report is expected in 1986. Thousands of people are convicted of

criminal offences in Australia every year. Some are imprisoned or receive some other kind of custodial sentence. But the greater proportion receive non-custodial sentences, such as a fine, probation or community service order – an indication that the court has considered the offence to be not a serious one, that the offender poses no real threat to society and unlikely to offend again. Putting aside areas such as repeated truancy and parking and traffic offences, it is the intelligent guess of at least one Australian criminologist that approximately 30–40% cent of those convicted will be convicted of some further criminal offences.

criminal records. Whether the conviction was for a minor or a serious offence, and regardless of its nature, the age of the offender, the likelihood of repetition of criminal behaviour and the nature of the sentence, a record of it will be brought into existence by, or passed on to, a wide variety of record-keepers. It will be kept and used, and perhaps disseminated, indefinitely. The conviction will haunt the offender and affect his or her prospects and relationships indefinitely. The offender will go on being punished, in various ways and to various degrees, long after the requirements of the sentence imposed by the court have been met. The Commission's discussion paper suggests that this may be a factor encouraging former offenders to relapse into criminal behaviour.

the benefit of living it down. People with criminal convictions want to be free from unjustified discrimination in their subsequent lives. They do not want decision-makers to go on making decisions about them on the basis of their past criminal histories where those histories have simply become out-of-date or irrelevant due to changes for the better in their circumstances of life. They also want an end to the adverse personal, social and economic consequences of the convictions. Society would also benefit from allowing persons with past convictions to live them down. The discussion paper argues that it is in the interests of all members of society that there be a fair and humane criminal justice system – one that is not unnecessarily harsh or oppressive. The community should be able to enjoy the fruits of the initiative, creativity and labours of persons who wish to contribute, but who are being prevented from doing so by the adverse effects of a criminal conviction.

competing considerations. However, there are competing considerations. These include:

- the claims, highly valued by all members of the community, to freedom of expression, and freedom of information so that barriers are not put on the availability, dissemination, and use of information without adequate justification;
- the claim of governments, law enforcement agencies, business, and the community as a whole to use the very best methods available to prevent and detect criminal activity and to apprehend offenders;
- the interest in being able to make the best and most proper judgments about admission to professional practice, occupation or trade, appointment or election to office and employment and promotion and responsibility;
- the interest in efficient and appropriate judicial administration, decision-making and sentencing, particularly with a view to ensuring that courts and tribunals are provided with all relevant and necessary information on which to make judgments and pass sentences in particular cases; and
- the interests of the victims of crime, many of whom feel that the legal system already seems unduly solicitous of the needs and interests of those guilty of crime.

relevance and punishment. A threshold issue is whether the fact that a person has been convicted ought to be regarded as relevant for decision-making in particular contexts. First, is it relevant, in the sense that

knowledge of the conviction would make for better decision-making about the person? Secondly, even if relevant, is it legitimate to link use of criminal records with rehabilitation of former offenders. Thirdly, should the line be drawn at some point in the interests of rehabilitation of the person convicted? Fourthly, even if on objective grounds the information is irrelevant in a particular situation, ought the decision-maker be able to take the conviction into account, either because he or she thinks it relevant or else because it can be regarded as a deserved aspect of punishment for committing a criminal offence that knowledge of that conviction is likely to be used in the future in an adverse and discriminatory way?

aims to be achieved. In the discussion paper the Commission concludes that any scheme for spent convictions should have the following objectives:

- protection of the past offender from the consequences of mishandling his or her criminal record information by record keepers, that is, protection of his or her 'information privacy' interests;
- elimination, so far as this is practical, of the social and economic disabilities faced by the former offender in his or her attempts to re-enter society and resume full citizenship; and
- bringing to an end the legal disabilities flowing from conviction, so far as this is practical and consistent with appropriately maintaining competing interests, in particular, the interest of decision-makers in being able to make fair judgments about admission to practice, occupation or trade, appointment or election to office, employment and promotion, particularly in positions of trust and responsibility, and the interest in efficient and proper judicial administration, decision-making and sentencing.

philosophies to be pursued. There are three bases proposed for a scheme for 'spent convictions':

- It is in the interests of society as a whole that every individual should receive better protection than is possible under existing laws for his or her information privacy interests. The notion of privacy derives from the assumption that every member of society (including those with criminal convictions) has a basic and continuing interest in what happens to his or her personal information and in controlling access to it.
- The legal system should promote equal treatment of all human beings. This value is threatened where employers and others can with impunity discriminate between people on the ground of a characteristic, such as possession of a criminal record, where it is not reasonable to take it into account in making a judgment affecting the interests of that person, or other persons.
- Finally, society as a whole benefits from a fair and humane criminal justice system, one that is not unnecessarily harsh or repressive and from gaining the fruits of the initiative, creativity and labours of persons who wish to contribute to society but who have been prevented from so doing by the adverse effects of a criminal conviction.

spent convictions. The discussion paper proposes that convictions should become 'spent' after a prescribed period or on order of the Commissioner of Police, reviewable by the Administrative Appeals Tribunal. Once 'spent', the impact of a conviction would be reduced by the Bill in five areas:

- Laws which impose a disability on a person with a conviction would read as excluding any reference to a 'spent conviction'.

- Decision-makers (including courts and tribunals), in exercising a power or function, or in performing a duty imposed by law – examples being the power to determine whether a person be admitted to a profession, trade or other occupation – would have to disregard the fact that the subject has a conviction where that conviction is spent. However, there would be an important exception for legal proceedings.
- Where a court or tribunal is determining an issue and evidence that a party or a witness in those proceedings had a previous conviction would be admissible under the laws of evidence, the court or tribunal would be permitted to have regard to it, notwithstanding the fact that it is a 'spent' conviction, if the evidence would be of substantial probative value as to the issue in question and provided that leave of the court or tribunal is first obtained. Other exceptions to the requirement that spent convictions should not be taken into account by courts and tribunals include:
  - where the convicted person seeks to give evidence of his or her spent conviction;
  - where the convicted person consents to the evidence being given;
  - where the proceedings before the court or tribunal are in connection with the spent conviction; and
  - in criminal proceedings, where previous convictions could be taken into account in sentencing the person with a spent conviction for a fresh offence.
- Where a person is asked a question about previous convictions or is under a legal obligation to disclose previous convictions – as in an application for credit or insurance, on applying for a passport, or in relation to job applications – the person would not be required to give information about a spent conviction.
- Record-keepers would be placed under an obligation not to allow access to, or disclose information about, spent convictions. This would cover any person who at some time, for whatever purpose, has recorded information about a person's convictions – including police, government departments and agencies and employers. It would be, however, subject to some exceptions, in particular, the exception that in the case of a law enforcement agency, records about spent convictions could still be used for criminal intelligence purposes. Another exception would allow production in response to a subpoena. There would be a defence that the record-keeper was unaware that the conviction was a spent conviction.
- There would be no duty on record-keepers to take positive action to ascertain whether convictions about which they hold records have become spent. Thus, for example, a newspaper would be under no obligation to investigate whether the previous conviction of a person whose criminal history is discussed in an article intended for publication is a spent conviction. The newspaper would only incur a penalty for circulating information about a spent conviction if it was aware (through its servants or agents) that the conviction was spent. Mechanisms are included in the draft Bill for tracking down the extent of circulation of information about convictions which have become spent, and for notifying record-keepers who might hold such information, so that they might be encouraged to modify their record keeping and disclosure practices.

'major' and 'minor' offences. The scheme distinguishes between 'major' and 'minor' offences. A minor offence is defined as an offence in relation to which the sentence imposed was a non-custodial sentence, such as a fine, bond, or community service order. A

majorr offence is an offence in relation to whichı the penalty imposed is or includes a perioɔd of imprisonment.

presscribed periods after which convictions becomne spent. Convictions for minor offences wouldd automatically become spent 10 years after tthe date of conviction, provided the offenderr has not offended again in the meantime.

applıication for an order that a conviction for a ımajor offence has become spent. Unlike minorr offences, in no circumstances would a conviɔction for a major offence become spent automıatically. Instead, the former offender wouldl have to seek a determination by the Commissioner of Police that the conviction ought to be declared spent; and the Commissionerr would be required to consider the case on thee merits.
Commission of a further offence in the 10 year ıperiod from completion of sentence wouldl not prevent the Commissioner from makiıng the order sought. It would be one of the facctors to be taken into account in considering the case for an order on its merits. Other factors include the length and kind of sentenıce, the length of time since the expiration ɔof the sentence, whether the conviction prevernts engagement in a particular professiorn, trade or business, the nature and seriouɔsness of the offence concerned, and the significɔance of any further offences committed in ıthe 10 year period. An adverse decision by the Commissioner would be reviewable by the Administrative Appeals Tribunal. In conductiıng its review, the Tribunal could undertake itts own inquiries, and could seek submissioɔns from persons or bodies which it considlers would have an interest or be affected by an order that the conviction for the offencce has become spent.

publiic hearings

Refoɔrm means years spent in the mastery of uncoɔngenial and arid themes. Reform is giving up dinneers, holidays and sex in order to pore over deadlly documents in a basement. Is to be isolated, ignorred, insulted, and possibly run over by a goverrnment truck. Reform is concentration and endurance.

Shirley Hazzard, *The Transit of Venus*

community values. Public hearings were held in October, November and early December on Evidence Law and Matrimonial Property Law. Hearings are generally held at least once in the course of a reference. The Australian Law Reform Commission believes there must be dialogue and consultation with the public to ensure that the values of society are reflected in Australian laws. Hearings are designed to ascertain from the public what values they think the law should enshrine, the functions it should perform and the aims it should pursue. The Evidence and Matrimonial Property hearings were conducted after the Commission had carefully considered the issues involved in these references and published detailed proposals. The proposals for the reform of Evidence Law were published together with a draft Evidence Bill in an Interim Report: *Evidence* (ALRC 26), available from Australian Government Publishing Service Bookshops around Australia. The Commission's tentative conclusions on the need for uniformity in and reform of the laws of evidence as applied in the High Court, the Federal Court, the Family Court and the Courts of the Australian Territories were also published in a discussion paper: *Evidence Law Reform Stage II* (ALRC DP23) which is still available from the Commission's office.

matrimonial property. The public hearings on Matrimonial Property were focussed on the Commission's discussion paper (ALRC DP 22 *Matrimonial Property Law*). It deals with the division of property on divorce and the property rights of husbands and wives during marriage. The paper explains the present law and suggests changes. Copies of this paper are also available from the Commission's offices.

around Australia. The Evidence hearings were conducted in all capital cities. The Matrimonial Property hearings were held in each capital city as well as Tamworth, Wodonga