ARC on proposals for Victorian reform is manifest.

- On 30 August 1982 the new Deputy Presidents of the AAT, Mr Allan Hall and Mr Robert Todd, delivered a paper in Perth WA on 'Action and Reaction' concerning the AAT. Conceding that the system is costly, the paper asks the price which 'a civilised society is prepared to pay for the resolution of disputes between governments and citizens'. It asserts that Australia has 'become a leader in the provision of external review of administrative decisions on the merits'. It illustrates the beneficial effects of external review with a number of examples including the improvement arising out of the jurisdiction to review ACT rates. It urges the value of referring to the AAT 'cases of peak difficulty and/or cases which are difficult to deal with satisfactorily simply by consideration of the written material'. Defending the 'constant criticism' of the AAT for having 'some of the hallmarks of the judicial process' no apology is offered. But reference is made to the innovations in procedures adopted by AAT members. Perhaps the most notable of these are the telephone conference and the preliminary hearing.

- In December 1982, Mr Sebastian Rubera submitted a thesis to the Department of Legal Studies in La Trobe University titled 'The Administrative Appeals Tribunal: A Square Peg in a Round Hole'. Mr Rubera is less convinced about the defence against 'legalism'. The adherence of the AAT to adversial procedures and a perceived 'movement away from its innovative inquisitorial features' is criticised as defeating the purpose of the legislation. A conclusion offered by Rubera? According to him the AAT is very much a 'square peg in a round hole'. However, he does concede 'there is evidence that its members are planing off the edges'.

- Finally, someone who should be able to write about the AAT, its first President, Mr Justice Brennan (now a Justice of the High Court of Australia) offered his view in a paper for the Supreme Court Judges' Conference in Canberra in 1983. The paper titled 'Review on the Merits: A New Frontier or Beyond the Pale?' offers a beginner's guide to origins, functions, context and philosophy of the new Federal administrative law in Australia. Extracted are some of the chief points in the leading judgments of the Federal Court during the six years history of the AAT. The problem of 'policy' decisions and Sir Zelman Cowen's question whether administrative law reform had not gone 'too far' are all tackled leading to the author's conclusion: 'The new Federal administrative law has not simplified administration. Nor is it intended to. Its great achievement to date has been to modify the anonymous activities of government so that they are more responsive to the needs of individuals'.

prosecuting crime

'The Magistrate condemned the fomenting of hatred – and in that he was right – but he condemned also the legitimate exercise of political rights – and in that he was wrong. Legitimate advocacy of change is no matter of aggravation affecting exercise of the sentencing discretion'.

Mr Justice Brennan, *Neal v The Queen* (1982) 56 ALJR 848, 857

dpp arrives. January 1983 saw the appointment of the first Director of Public Prosecutions of Victoria, Mr John Phillips, Q.C. The initiative to establish a DPP in Victoria was one of the first law reforms achieved by the Cain Government. It attracted much applause. The Melbourne

Herald, 12 January 1983 asserted that the backlog of cases awaiting trial in the criminal courts 'has damaged Victorian justice as long as most people connected with the law can remember' defying all attempts to counter it and now exacerbated by increased access to legal aid.

> 'As time passes, the difficulties for people in the no man's land between indictment and trial mount up. Memories fade; witnesses become harder to trace; costs build up; the stress on them and their families becomes intolerable'.

The object of Mr Cain's reform is to take the politics out of most prosecution decisions and thereby to expedite the prosecution process. Writing in the Melbourne *Age* (17 December 1982), Mr Cain said the DPP would work on guidelines which would be available under the Freedom of Information Act. The DPP, who will have the status of a Supreme Court judge, is to report annually to State Parliament and his responsibilities will ensure that the outstanding cases awaiting trial are prepared in time for prosecution, where that is decided upon. Commenting on the new system on 13 January 1983, the *Age* not only complimented Mr Phillips. It also saw in his appointment the 'commitment to reducing the notorious delays in bringing accused persons to trial'. Whilst conceding that some delay between committal and trial was inevitable, remand in custody for more than two months was 'excessive and unreasonable'. The DPP will have the sole responsibility for prosecution of indictable offences, Crown appeals and presentments.

It is noteworthy that in the ALP law and justice policy for the Federal election, Senator Evans promised to investigate the possibility of establishing a Directorate of Public Prosecutions in the Federal domain 'as a semi-independent prosecuting agency'. Reference is made to the recent initiative of the Victorian Government.

prosecution guidelines. One of the suggestions in the ALRC report *Sentencing of Federal Offenders* (ALRC 15) picked up by Attorney-General Durack was the publication of guidelines for the making of decisions in the prosecution process by Federal Prosecutors in Australia. In December 1982 acting on behalf of the Attorney-General, Mr Neil Brown, Q.C., tabled in Parliament a document titled '*Prosecution Policy of the Commonwealth*'. The document makes it plain that it has never been the rule in Australia or the United Kingdom that *all* offences brought to the knowledge of authorities must be prosecuted. Regard has to be had to a number of factors including the public interest. The document sets out factors which should not influence the prosecution decision including the offender's race, political advantage, personal feelings or professional circumstances. So far as the offender's race is concerned, the exclusion of race is understable but might not be appropriate in the case of legitimate reverse discrimination, seeking to correct the gross over-representation of Aboriginals in Australian prisons or to make allowance for extra-curial punishment of Aboriginal Australians under tribal laws. For all that, the document is certainly an important step forward.

Commenting on the document in the Senate, Senator Don Grimes (Tas. Lab), now Federal Minister for Social Security, pointed out that more was known about 'alleged social security offenders' since publication of a research paper of the Australian Law Reform Commission on Social Security Prosecutions. That paper was circulated as part of the ALRC project on sentencing reform. Senator Grimes questioned whether the imprisonment of social security recipients was justified. He also raised questions about a major prosecution in Sydney which followed the arrest of 183 persons most of them of Greek origin.

In Britain, a report in *The Times* (15 February 1983) disclosed the publication of new guidelines issued by Sir Michael

Havers, Q.C., the U.K. Attorney-General to chief officers of police. Police have been urged to prosecute 'only when a conviction is more likely than an acquittal'. The guidelines set out in criteria which have hitherto been used by the English DPP are now to be more widely distributed to other persons making prosecution decisions, including police. As reported, they are aimed at reducing the number of trivial or unsound prosecutions. They reflect growing concern with the cost/benefit issue which must also be considered in criminal justice. Factors mentioned as relevant to police consideration are:

- the likely length and expense of the trial;
- the availability of witnesses;
- the public interest in bringing the prosecution;
- the likely penalty;
- the 'staleness' of the offence; and
- the youth or old age and infirmity of the offender and mental illness.

The publication of the guidelines are among the interim measures promised by the UK Government in response to Part 2 of the report of the Royal Commission on Criminal Procedure. With a touch of irony, it is stated that the so-called 'more than 50%' rule i.e. more than 50% chance of prosecution succeeding, must give way to an even higher standard 'if a prosecution could bring unfortunate results – such as an allegedly obscene book bringing considerable rise in sales'.

alp policies. Amongst the other interesting items in the ALP law and justice policy relevant to crime and punishment are the following:

- review of the structure, functions and powers of the National Crimes Commission;
- enactment of the Criminal Investigation Act to clarify and codify police powers to ensure the adoption of fair procedures – based on ALRC 2;
- establishment of a Federal Sentencing Council, as proposed in ALRC 15, to promote uniform sentencing practices and penalties for Federal offenders in Australia; and
- reform of the law and procedure governing sentencing and parole of Federal offenders along lines suggested in ALRC 15.

Of interest will be the new Government's approach to the Crimes Commission. During the passage of the legislation through Parliament, the new Attorney-General Senator Evans expressed reservations. With the support of a number of Senators he secured a series of amendments, including a reduction of the terms of NCC commissioners from a period of five years to two years. The ground advanced was that lengthy terms could open up the Commission to the risk of corruption. The legislation as enacted by Federal Parliament had many critics. Some contended that essential rights to silence had been eroded. Others asserted that the Commission had been 'robbed of its teeth'. (See the *Age*, 6 January 1983, 1). The investigative incoming Government, whilst supporting the concepts of the Crimes Commission to 'widen the vital investigative work commenced by the Costigan Commission', expresses reservations about the definition of the NCC's jurisdiction and the provision of 'adequate safeguards for individuals'. Early consultation with State Attorneys-General is proposed with a view to establishing 'a truly effective and acceptable national commission'. So far as the Criminal Investigation Bill is concerned the promise is given that the 1981 Bill will be 'immediately reviewed and revised with a view to its early reintroduction'.

new works. A number of new works on crime and punishment have come to hand in the last quarter. They include:

- Ivan Potas and John Walker's *Sentencing of the Federal Drug Offender: An Experiment in Computer Aided Sentencing.* Published by the Australian Institute of Criminology, 1983, the report considers the ALRC sentencing report criticism of the lack of data relating to sentencing in Australia. With the aid of computerised statistics it addresses the '$64,000 question' namely 'whether the present common law system of sentencing (including the system of appellate review) functions adequately' particularly when applied across State boundaries.

- The Sentencing Alternatives Committee of Victoria *Report on Parole and Remissions* (second report) became available early in 198 3. The Committee reviewed the ALRC criticisms of parole in ALRC 15 but concluded that, as practised in Victoria, the benefits of the parole system both for the majority of prisoners and for the community 'far outweigh any defects which are inherent in the system'. Accordingly, it is urged that the system of parole should be maintained and support is drawn from the publication by the Home Office in England, *Review of Parole in England and Wales*, 1981.

- Also tackling the critical problem of structuring judicial sentencing discretion is an essay written by S.A. Lovegrove, just to hand. The essay involved an empirical study of inter-judge sentencing variations in the Victorian County Court. The finding was that disparity exists in a jurisdiction which uses traditional means of curbing inter-judge differences (namely an active full court, reported judgments and the central location of judges able to consult). Numerous methods of curbing disparity are then analysed, including sentencing councils forming guidelines, as proposed by the ALRC.

- Published by 1982 by the Adelaide Law Review Association, is a study by P.A. Sallmann and Professor Duncan Chappell (past ALRC Commissioner) addressed the background and subsequent impact of rape law reform in South Australia. Singled out for special criticism is the duplication of rape law reform activity throughout Australia which has resulted in 'a confused national picture'. Generally speaking, the authors express commendation for the directions of rape law reform in South Australia.

moral laws. Debates about the role of criminal law in enforcing personal morality continues to be active in Australia and overseas. A report in the Australian press (*Age*, 13 February, 1983, 9) indicates that Sweden has proposed legislation to 'decriminalise' incest between consenting adults, whilst at the same time imposing tougher measures against non-consensual rapists. The objective of the six-member Swedish committee established in 1977 is to remove Swedish law from 'interfering in voluntary sexual intercourse between adults' whilst at the same time toughening up laws on incest and sexual assault on children and violent assault against anyone. The Christian and Social Council of the Opposition Liberal Party has indicated its intention to protest the proposed reform of incest laws. However, the Professor of Ethics at the Uppsala University Institute of Theology declared 'there is a growing tendency in Sweden to leave such matters to the individual. You cannot regulate these things by legislation'.

In December 1982 a working paper of the Criminal Law Revision Committee in England offered *Recommendations on Offences relating to Prostitution and allied Offences.* Submissions are called for by July

1983. The Committee avowedly does not adopt 'a fresh approach'. Indeed, it offers an apologia:

> 'If [our proposals for reforming the main offences relating to the practice of prostitution] appear to make no substantial change, that is because we endorse the general principle on which the present law is foundered. In particular, we have suggested various ways in which the law could be relaxed; we have not adopted various radical proposals made to us for taking out of the criminal law soliciting, brothels and other offences relating to prostitution'.

The English Committee's recommendations therefore provide a contrast to the 'victimless' and 'self-regarding' approach adopted in the Swedish report. There is no endeavour in the CLRC's working paper to apply a simple principle for example, of equating homosexual with heterosexual conduct or punishing non-consensual adult offences whilst removing the criminal law from consensual adult conduct. The result is a somewhat cautious list of recommendations, which actually in some areas *extend* the functions of the criminal law in enforcing what the Swedish committee considered an area of private morality of no legitimate concern to the State.

In Australia, disputes in this area have centred in NSW in the wake of expanded and more public operations of prostitutes in certain streets of inner Sydney and police raids on a homosexual club with consequent arrests – including for the common law offence of 'serious affront'. In mid March 1983, the NSW Premier, Mr Neville Wran QC promised legislation in late March 1983 to curtail 'visible prostitution'. Speaking to the Gay Business Association of New South Wales on 28 February 1983 the ALRC Chairman drew attention to the 'mess' in which NSW law on homosexual conduct has now got itself in New South Wales:

- it is a criminal offence for a male person to perform certain homosexual acts;
- it is not and has never has been an offence for a female person to perform homosexual acts;
- a person can be sent to prison and criminally stigmatised for pursuing his 'sexual orientation';
- yet, despite the criminal law, other persons including most employers must *not* discriminate on the grounds of a person's sexual preference following recent amendments to the NSW's Anti-Discrimination Act;
- following reform of rape laws, it is in some cases more serious to perform consensual indecent acts with a male person than it is to commit the act of rape itself.

The ALRC Chairman drew attention to the ALRC project on evidence law reform in which the subject of spousal immunity has come up for consideration. In a research paper (ALRC Evidence RP 5 *Competence and Compellability of Witnesses* (1982)) one approach is raised that would extend present spousal immunity in criminal cases only to parents, children and de facto spouses. An alternative suggestion, which would protect stable homosexual relationships and Aboriginal relationships, proposes that attention should be paid by the court to the nature and extent of personal relationships 'of blood or affection' and the effect which giving evidence would have on that relationship. A call was made for reactions not only from groups favouring homosexual law reform, but also from those opposed.

odds and ends

■ ***family law.*** Among the policy promises on legal reform offered by the incoming Australian Federal Government are a number relevant to the Family Law. The Government has committed itself to seeking a reference of powers or a constitutional amendment to ensure a unified family law jurisdiction; the enactment of the Family Law Amendment Bill