In the opinion of Mr. Justice Connor it would be "the supreme irony" if the independence of the judges, so hard won long ago, was to be eroded "by the voluntary action of judges themselves". The Editor of the *A.L.J.*, commenting on Sir Murray McInerney's paper, suggests (52 *A.L.J.* 537) that the Victorian misgivings "seem now to be further confirmed" by reactions to a report by a federal judge, Mr. Justice D. G. McGregor, as Royal Commissioner, when he found "impropriety" in the actions of a Federal Minister, which led to that Minister's removal from office.

A somewhat different view on this subject is expressed by Mr. Justice Brennan, President of the Administrative Appeals Tribunal and a Judge of the Federal Court. In an article "Limits on the Use of Judges" (1978) 9 *Fed. Law Rev.* 1, Brennan J. balances the risks involved in extending the role of judges beyond their traditional function against the peril that the judiciary may become irrelevant to the community it serves:

> "There are no absolute or universal rules . . . The answers depend upon where the balance is struck between the necessity to draw upon judicial skills in non-traditional ways, and the risk of thereby diminishing confidence. An undue timorousness in drawing upon judicial skills leads to the development of problem-solving machinery that is less satisfactory than it should be, and to a sense that the judiciary is unduly irrelevant to many issues of community concern. Too adventurous an approach requires the judges to expose themselves to an assessment—political or otherwise controversial—and to a consequent loss of confidence in the judiciary and in judicial institutions." (p. 3-4)

It is especially apt to pay heed to the observations of Mr. Justice Brennan for, not only does he preside over the most important new experiment in the use of judges in Australia (the general tribunal for the review of administrative decisions in the Federal sphere) but he is also Chairman of the Administrative Review Council which is advising Government and the Parliament on the direction of the new administrative reforms.

> "Where the function proposed is significantly different from the traditional function, the risk can be justified, but can only be justified, by the urgency of the community's need to use the judges' skills . . . Caution is needed in moving into the non-traditional area, measuring the risks by the yard-stick of traditional function, and there will be some unwished-for controversies on the way. But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it." (p. 14)

Meanwhile, the wider community seems relatively untouched by this controversy. In the view of some, this will simply illustrate the ignorance of the community about what is good for it and the fragility of trust in judges that ought not, lightly, to be damaged. In the view of others, it will demonstrate that the debate about the use of judges is a sterile one which reflects nothing more than a preoccupation with the preservation of outdated conceits, that have no particular public relevance.

In lighter vein comes the article "Temptations of the Bench" by Sir Robert Megarry, published in (1978) 16 *Alberta L. Rev.* 406. Sir Robert wastes no time on "crude matters such as bribery". He says that Bacon "was our last case" and that the subject "has long had no reality". In a footnote, he points out that this is so much so that when Lord Gardiner recently spoke of the case in the House of Lords, *Hansard* recorded that Bacon had "taken a bride from a litigant". Heady temptations by the Executive are ignored, despite the long-established tradition of using judges for inquiries and other executive functions in England. Instead, Sir Robert lists amongst the chief temptations:

- temptation of the tongue;
- temptation of brevity;
- temptation of the law (inventiveness);
- temptation of discovery (i.e., discovering new cases after argument closed).

A "quiverful of temptations" well worth judicial attention.

Odds and Ends

> "So live that you wouldn't be ashamed to sell the family parrot to the town gossip."
>
> Will Rogers.

■ Victorian Attorney-General, Haddon Storey Q.C., has introduced the *Legal Aid Commission Bill* 1978 into the Victorian Parliament. Amongst the more interesting functions of the proposed Commission are included power to:

- make recommendations with respect to any reforms of the law, the desirability for which has come to its attention in the course of the performance of its function (Clause 10(2)(a));
- inform the public of the services provided by the Commission;
- encourage and permit law students to participate so far as the Commission considers it practicable and proper to do so on a voluntary basis and under professional supervision in the provision of legal aid.

In determining guidelines on the work to be done by officers of the Commission and private practitioners, the Commission is obliged to have regard to the need for legal assistance to be readily accessible to disadvantaged people, the desirability of preserving the entitlement to select a practitioner of one's choice, the desirability of a salaried legal service being used where appropriate and the importance of maintaining the independence of the private legal profession.

■ Senator Neville Bonner (Lib., Qld.) reintroduced into the Senate on 26 October 1978 the *Aborigines and Islanders (Confessions) Bill*, previously before Parliament in 1976. The stated aim of the Bill is to redress unfairness in criminal investigation involving Aboriginal and Island people. Senator Bonner asserted that the Lucas Commission Inquiry in Queensland "did in fact vindicate my argument that [Aboriginals and Islanders] need additional protection in the investigatory process". However, he said that the report of the Inquiry "has been ignored and is no doubt gathering dust in some State archive". The Bill proposes various safeguards in the admission of confessions. The *Criminal Investigation Bill*, based on the A.L.R.C. Second Report, also provides certain protections for Aboriginal accused. However, it is both wider and narrower than Senator Bonner's Bill. It is wider, in that it extends special protection to other disadvantaged groups, e.g. children and non-English-speaking migrants, also disadvantaged when under interrogation by police. It is narrower in that it applies only to the operations of the Commonwealth Police. Senator Bonner's Bill seeks to apply to all police forces in Australia. Debate on the Bill was adjourned.

■ Moffitt P. in the N.S.W. Court of Appeal has again called attention to the hopeless state of Australia's taxation laws as they seek to deal with frank devices "the sole purpose of which is to avoid the tax burden which falls on the whole community which enjoys as a whole the benefits derived from taxation". In *Norfolk Estates Ltd.* v. *Cadiz Corporation Pty. Ltd.* (Court of Appeal, N.S.W. 15 November) he described the sale of a company for the specific purpose of tax avoidance as "much like the sale of a grocery item from a selection of goods in a supermarket". Moffitt P. drew attention to the remarks of Mason J. in *Cridland* v. *Commissioner of Taxation* (1978) 52 A.L.J.R. 96 at 98. He said that legislation was needed to declare new classes of agreements as being contrary to public policy so that courts do not have to lend their aid in their enforcement. "If . . . there is a difference in the justice rendered to different classes of taxpayers, the remedy is within the province of the Legislature. With respect, I suggest to those concerned with reform of the law, that it should not be beyond the ingenuity of a draftsman at least to place cases such as trading in tax advantages outside the assistance of courts overburdened as they all are by the volume of present-day litigation." The decision has been called to the attention of the Federal Treasurer, Mr. Howard, who has already expressed the Government's determination to strike at tax avoidance schemes. In the opinion of some, such schemes unjustly burden little tax payers with the obligation of supporting those who, at present, can so readily avoid tax responsibilities. Is Section 260 of the *Taxation Act* a suitable case for treatment?

■ The A.L.R.C. Report on Defamation law reform (*Unfair Publication*) was given to the Australian Government Publishing Service in October 1978. However, the report was not received in time to be tabled before the end of the Parliamentary Session in November. It is expected to be tabled early in the Autumn Session in 1979. Speaking at the presentation of awards to the winners of the National Book Council Award for Australian Literature, the A.L.R.C. Chairman, Mr. Justice Kirby, re-

ferred to the "legal minefield" in which creative writers have to work. He referred to the submissions that there should be a general defence to defamation and privacy actions if the relevant publication was contained in a work of "literary, artistic or scientific merit". Mr. Harry Gordon of the Melbourne Herald Group, delivering the Paton-Wilkie-Deamer Address, agreed that freedom of the press in Australia was restricted. He was less than happy with the proposal for new protections to privacy in publication. *The Australian* (28 October) took up his theme urging acceptance of the A.L.R.C. proposed laws on defamation whilst leaving the rules on privacy "in abeyance".

■ The common law is alive and well. That is the message spelt out in major decisions delivered in England and Australia in recent months. In *Saif Ali* v. *Sydney Mitchell and Co.* (*Times Law Report*, 2 November 1978) the House of Lords narrowed, by majority, the ambit of immunity from claims for negligence against a barrister in the conduct of the management of litigation. It was held that a barrister might be subject to such a claim for advice given, or work done negligently before a case came to trial. Protection would only be given to a barrister for pre-trial work which was so intimately connected with the conduct of the case in court that it could "fairly be said to be a preliminary decision affecting the way in which the hearing was to be conducted". The decision in *Rondel* v. *Worsley* [1969] 1 A.C. 191 was nudged a little in the direction of the client. Initial comments by Australian barristers evidenced a new inclination to distance the Australian legal system from the House of Lords. Meanwhile, in *Briers* v. *Atlas Tiles Limited*, the High Court of Australia, by a majority, re-examined the correctness of the House of Lords decision in *British Transport Commission* v. *Gaurley*. The court gave new directions for computation of damages which, until now, have been based, before and after hearing, on the nett income of the plaintiff. It is understood that the decision in *Briers*, delivered by five justices, may now be reconsidered in a later case by a court comprising all seven High Court judges.

■ Three corrections to the last issue of *Reform*. Mr. Justice White has replaced Mr. Justice Samuel Jacobs as a member of the S.A.L.R.C. The entry (p. 82) on the W.A.L.R.C. indicated that the Commission had submitted reports on Minors' Capacity and the Small Debts Court. The publications were in fact Working Papers, which are still open for comment. The entry on New Commissioner Mr. Bruce Debelle wrongly stated that his appointment was until 31 December 1978. Already in the midst of busy public sittings and with prospects of field visits to remote parts of Australia in connection with Aboriginal Customary Laws, Mr. Debelle might be forgiven for wishing this were so. In fact, his commission appoints him until 31 December 1980. Editorial apologies all round.

■ Principal Law Reform Officer of the A.L.R.C., Mr. Kevin O'Connor, has returned from a five-week investigation and research visit to the United States and Canada. During the visit, Mr. O'Connor met with Government, legal and business representatives on both sides of the Continent. His inquiries were specifically directed at North American innovations concerning privacy protection and class actions: two of the important references currently before the A.L.R.C. In respect of privacy, institutions visited included: the Data Privacy and Criminal Records Units in the States of California and Minnesota; the Data Privacy Unit in the State of Massachusetts; Criminal Records Units in the State of Iowa and the City of New York, and the Federal Bureau of Census, Law Enforcement Assistance Administration and Department of Justice. In addition, a number of discussions were held with private lawyers involved in the litigation of *Privacy Act* and *Freedom of Information Act* claims. In Canada, discussions were held with members of the Commission on Individual Privacy and Freedom of Information and the Judge heading the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario. On class actions, attention was given to both the Federal rule and the rules applying before the State Courts in California and Illinois. There was widespread agreement that the current Federal rule needs to be reformed in a number of respects. The recently tabled Carter

Administration Bill was discussed with Professor Meador, its principal draftsman. Private practitioners provided a number of instances of the use of class actions in the diverse areas of civil rights, consumer protection, anti-trust law, securities law and administrative law. In Canada, discussions were held with the staff of the Ontario Law Reform Commission. That Commission, like the A.L.R.C., has received a Reference from its Attorney-General to inquire into the matter. It is noteworthy that there have already been a number of attempts to have class actions for damages heard by the Canadian courts. Recently, in one of these cases, the Ontario Court of Appeal indicated its support for the use of class actions. A.L.R.C. Commissioner Bruce Debelle hopes to get out an Issues Paper on Class Actions early in 1979, utilising Mr. O'Connor's report.

■ The Uniform Credit Laws which have at last been made public in the Victorian Parliament have come in for sweeping criticism from the Australian Chamber of Commerce and the Australian Finance Conference. An appeal has been made for more time to consider the "ambitious" proposals.

Meanwhile, the A.L.R.C. presses on with extensive public consultation on its Discussion Paper No. 6, *Debt Recovery and Insolvency*. Seminars organised by the Institute of Credit Management have been held in all States and mainland Territories. The numbers attending the seminars have averaged more than 200 in each centre. Large numbers have also attended the A.L.R.C. public sittings. A record turnout of nearly 300 business or credit managers and debt collectors heard the A.L.R.C. proposals explained in Perth on 14 November. The most radical proposal in the reform package is for: the "telescoping" of debt recovery procedures and the immediate return of all default summonses before an examination hearing. Many practical suggestions have been made by consumers and credit officers for the improvement of the A.L.R.C. package: The most wide-ranging review of debt laws for more than a century.

■ Professor Duncan Chappell, who is leading the A.L.R.C. in its urgent reference on Sentencing reform, is engaged in Australia-wide consultations on the subject. On 4 October he and the A.L.R.C. Chairman met members of the Victorian Sentencing Alternatives Committee headed by the Hon. Frank Nelson Q.C., a former Judge of the Supreme Court of Victoria. Both he and Kirby J. have had numerous discussions with judges, police, community groups and prisoner organisations. On 21 December the A.L.R.C. Commissioners met with the Chief Judge and Judges of the Supreme Court of the A.C.T. The special problems of sentencing in a community with no prison of its own were explored in this session and in a seminar organised on 4-5 December by the Australian Institute of Criminology. The A.L.R.C. is co-operating closely with the A.I.C. in the sentencing reference.

■ Speaking on the 75th Anniversary of the High Court of Australia, the Federal Attorney-General, Senator Peter Durack, told the High Court judges in Melbourne that the move of the Court to Canberra in May 1980 would pose new problems. Questions raised included whether the Court would continue to make even occasional visits to the more distant States, whether the numbers would be kept at seven (surely the most stable "ceiling" in Australia's history), whether the Court's role in its own administration should change, whether the Court should be empowered, by constitutional amendment, to give advisory opinions and whether appointments should remain the sole prerogative of the Federal government. Senator Durack made reference to an undertaking he gave to the Constitutional Convention in Perth, that the present Commonwealth Government would consult State Governments in relation to any appointment to the High Court which it might be called upon to make. Spokesmen for the profession at the ceremony expressed the hope that the High Court would continue to travel: a somewhat belated expression of professional viewpoint but, perhaps, better late than never.

■ Just published! Professor Michael Zander's *Legal Services for the Community* 1978, collects a remarkable amount of information which is particularly apt in view of the Royal Commission on Legal Services current in England and the Inquiry into the Legal Profession by the N.S.W. L.R.C. Topics covered

include a scrutiny of the private profession and the public sector in legal services, details of discipline, complaints, education and restrictive practices, an examination of the unfilled needs for legal services and an exploration of alternatives to lawyers, either to supplement or replace them in some tasks. Also just published by CCH Australia Limited is an Eagle Book and accompanying Teacher Manual on *Jobs and the Law*. Told in simple and vigorous language, the book gives a practical explanation for high school students and other laymen of the Australian law of employment. The inspiration of the book came from Mr. Tjerk Dusseldorp of the N.S.W. Law Foundation, whose efforts to secure interest in community legal education are now finding reflection in school curricula. Legal Studies is now the most popular optional subject in the Victorian high school curriculum. Only English (a compulsory subject) outranks it.

■ Among the most important recommendations in the Report of the Anti-Discrimination Board of N.S.W. were recommendations that "all legislation which affects the parties to a marriage, either by granting of rights, the imposition of obligations or otherwise, should be amended to include the parties to a de facto relationship". This recommendation caused a storm of criticism, notably from church leaders. Reservations were then stated by the N.S.W. Premier, Mr. Wran. Other recommendations also drew fire, doubtless because the report was published on the eve of the N.S.W. State elections. The Board expressed, for example, the belief that consensual sexual conduct by homosexual and heterosexual men and women above the age of consent should not be regulated by the criminal law. Repeal of relevant sections of the N.S.W. *Crimes Act* and the provision of new measures to cover non-consensual sexual conduct were recommended. Other forms of discrimination identified included the rights of non-citizens in employment and voting, discrimination against women and discrimination in the delivery of government services. N.S.W. is not the only State seeking to outlaw discrimination on the grounds of sex, marital status, ethnic origin and physical handicaps. According to the *Examiner* (10 October) the Tasmanian Government plans to introduce such legislation. Other States already have legislation. The National Committee on Discrimination in Employment and Occupation has called to the attention of the Federal government hundreds of cases of alleged discrimination, more than one third involving alleged sex discrimination.

■ The A.L.R.C. has announced that it has revised procedures for the publication of the *Interim Law Reform Digest*. This publication is prepared at the request of Australasian Law Reform Agencies and for the Standing Committee of Australian Attorneys-General. The Commission hopes during 1979 to publish an *Australian Law Reform Digest* which will collect and digest all law reform reports published in Australia between 1916 and 1978. To supplement this Digest, the Commission is proceeding to publish a *Law Reform Index*. This will consolidate previous issues of the Law Reform Digest but will in future be limited to law reform material only. In the past, a great deal of additional information has been included. Staff ceilings and budgetary restraints will require rationalisation of these clearing-house functions. Meanwhile, the Commonwealth Secretariat in London has begun the task of collecting information on the implementation of law reform reports delivered by L.R.C.s within the Commonwealth of Nations. The Secretariat hopes to publish full details so that those interested can trace the legislative history of law reform measures: a facility that will be especially useful in countries where legal draftsmen are in short supply.

New Reports

Australia

A.L.R.C.: 10: *Annual Report 1978.*
: D.P.7: *Insurance Contracts, 1978.*

N.S.W.L.R.C.: *W.P. On the Course of the Trial, 1978.*

Q.L.R.C.: 21: *Crown Proceedings.* Tabled 12 September 1978.
25: *A Report on the Law Relating to Bail in Criminal Proceedings. Tabled 20 September 1978.*

T.L.R.C.: 23: *Report on the Disposal of Uncollected and Found Goods.*

V.S.L.R.C.: *Adoption of Children Act 1964 and Access to Information.* Tabled Oct. 1978.