the anonymity of judges and magistrates responding to the questionnaire. A preliminary interpretation of the responses and of their significance for future patterns of sentencing law will be contained in the A.L.R.C. Interim Report.

Other surveys are being conducted, including a survey of Federal prisoners. The Commission is also receiving a great deal of help from the Commonwealth Police, the Australian Bureau of Statistics and the N.S.W. Bureau of Crime Statistics. The major effort of the project will be to base the Interim Report and its recommendations upon empirical and factual material. There is no real need for yet another impressionistic collection of personal conclusions on sentencing. What is needed is a clear statement of what is really happening in practice and a catalogue of reform based upon actuality, not supposition.

A great deal of help continues to arrive at the A.L.R.C. to supplement the modest resources available for this important national project. The material on sentencing and punishment emanating from the United States is enormous.

From South Africa comes word of the establishment of a permanent Penal Reform Committee under Mr. Justice G. E. Viljoen. The establishment of that Committee follows the report of a Commission of Inquiry into the Penal System of South Africa, delivered in 1978. The recommendations in that report include the admonition that judicial officers should be prevailed upon to consider alternative sentences and "to avoid wherever practicable to do so, imposing short-term sentences of imprisonment". This and the call for improvements in parole and better research and planning statistics represents a common theme in most reports on sentencing reform.

Also available in the last quarter is the latest published report of the Proceedings of the N.S.W. Institute of Criminology #35 *Sentencing* (1978). This report contains a detailed paper by Francis and Coyle on their experiments with television modules used to test disparity in judicial sentencing.

Prisoners and Human Rights

> "Anyone who has been to an English public school will always feel comparatively at home in prison. It is the people brought up in the . . . intimacy of the slums . . . who find prison so soul-destroying."
>
> Evelyn Waugh, *Decline and Fall*, III, 4.

The decision of the High Court of Australia in *Dugan* v. *Mirror Newspapers Limited* (1978) 22 A.L.R. 439 calls attention to the occasional failure of the Common Law to keep pace with notions of individual liberty. It is often said that the independence of the judiciary and the inherited Common Law of England are the chief protections available to Australian citizens. The need for Bills of Rights and general protective machinery for human rights is, according to this view, unproved. *Dugan's case* raises a doubt.

Dugan is a convicted prisoner who was once sentenced to death for the felony of wounding with intent to murder. He later received a licence to be at large. During his freedom he committed another felony for which he was sentenced to 14 years imprisonment. While serving this latter sentence, he commenced proceedings for defamation against a newspaper. The newspaper contended that a prisoner convicted of a felony and sentenced to death could not maintain an action for a civil wrong in the courts of New South Wales. It was alleged that this was the law of England inherited on the establishment of the colony at Sydney. All High Court Judges, except Murphy J., expressed the view that the defence was a good one and that conviction and sentence for a capital felony precluded Dugan from bringing an action in defamation in the courts. An argument that this law was unsuited to the condition of the early colony was rejected. The contention that it could be rejected as inapplicable today was dismissed by Barwick C.J. in these terms:

> "If the Court decides that the common law of England, properly understood, did deny a prisoner . . . the right to sue during the currency of the sentence and that that law was introduced into and became part of the law of the colony, there is no authority in the Court to change that law as inappropriate in the opinion of the Court to more recent times during which capital felony remained. If that were a proper conclusion (a matter on which I express no opinion) it is clearly a question for

> the legislature whether the change should be made in the law; such a change cannot properly be effected by the Court."

Gibbs J. asserted that, although

> "it may be superficially attractive to suggest that . . . the Court should consider whether the rule would now be regarded as appropriate, and reject what seems out of harmony with modern notions, . . . [s]uch a course would, however, lead to a dangerous uncertainty as to matters of fundamental principle."

Reference was made in the judgments of Stephen J. and Murphy J. to the *Criminal Law Amendment Act* of 1833 and the work of the first Law Reform Commission of N.S.W. in the 1870s aimed at repealing this Common Law principle.

Murphy J. referred to the *Universal Declaration of Human Rights* which, by Article 6 declares that "everyone has the right to recognition everywhere as a person before the law". This and other international standards are cited to demonstrate that the suggested rule of the Common Law violates universally accepted standards of human rights. Interestingly, a decision of the European Court of Human Rights in *Golder* v. *United Kingdom* was cited where the European Court said:

> "In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts . . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law."

Following the decision of the High Court, the N.S.W. Attorney-General, Mr. Frank Walker, announced that he would be proposing legislation which enabled prisoners to sue for injuries in gaol. A more fundamental reform, to relieve prisoners of the disabilities brought to light by *Dugan's case*, was not mentioned.

Report #20 of the Tasmanian Law Reform Commission deals with *Civil Disabilities of Convicted Persons* (1978). The Report recommends that no prisoner should be under any civil disability on account of his imprisonment and that subject to the appointment of an administrator of prisoners' property, there should be full access to the courts. An examination of the law in the different States of Australia is contained in the article by Tom Molomby "Making Straight the Way of the Law" (1978) 3 *Legal Service Bulletin* 241. In the Australian Capital Territory, as in N.S.W., all felons are barred from access to the courts until the expiration of their sentences. Molomby urges repeal of the prohibition of the bringing of prisoners' actions. Such repeal was effected in Victoria in 1973.

During a visit in December 1978 to the Council of Europe, in Strasbourg the A.L.R.C. Chairman found great interest in the *Dugan* case. Its sharp contrast to the *Golder* decision of the European Court certainly requires the scrutiny of local law makers. In respect of Commonwealth offenders and offenders in the Capital Territory, the A.L.R.C. is now closely examining the *Dugan* decision in connection with its general reference on sentencing and punishment. There can be little doubt that the deprivation of civil rights, to the extent of access to the courts of the land, represents a most severe and anachronistic punishment, in need of urgent reform.

In the Council of Europe a publication by the European Commission of Human Rights gives a "stocktaking" on the *European Convention on Human Rights.* The registration rate of individual applications has risen steadily since 1967 and now numbers about 460 a year. Important cases on the right to interpreters in criminal proceedings, the length of detention on remand and the law of contempt of court have received a great deal of attention in Europe. A chart showing signatures and ratifications of the Conventions and Agreements of the Council of Europe indicates the very wide measure of accession to conventions and the rapid development of a new European legal regime. The conventions range from matters such as extradition, the suppression of terrorism and the legal status of migrant workers to special provisions on matters such as transplantation laws, the adoption of children and the calculation of legal time limits. It is a matter for comment that the countries of Europe, with different cultures, histories and languages appear to be doing rather better in the development of uniform and harmonious laws than the States of Australia.

On human rights protection in Australia, the Prime Minister, Mr. Fraser, told a Convention in Brisbane on 11 January 1979:

> "We are a Government of social and legislative reform. . . . Like all Australians the young seek a society where the laws of the land are observed, where each citizen has equal access to justice . . . and where there is redress when

> Governments unfairly or unreasonably interfere with their lives. . . . Our programme of reform will continue in 1979 and I will give you just some examples. In seeking to play our part in enhancing human rights in Australia, the Government will proceed with a Bill to ensure that Commonwealth laws, acts and practices conform with the International Covenant on Civil and Political Rights. The Government is also conducting discussions with the States to achieve a comprehensive and co-ordinated approach to protection of human rights throughout Australia. . . . The Government has submitted references to the Australian Law Reform Commission on a number of other areas in which reform may be desirable, including insurance contracts, the law relating to debtors, the incorporation in our legal system of traditional Aboriginal law and defamation. The Government will consider these reports as soon as they are completed."

The human rights debate is not, of course, confined to Australia. In England, a Report of the Select Committee of the House of Lords on a Bill of Rights (May 1978) was debated in the Lords on 29 November 1978. Many of the same arguments were repeated as we have heard lately in Australia. Lord Scarman pointed (col. 1346) to the inability of the common law to handle certain problems:

> ". . . the common law, marvellous as it has been in developing safeguards for human rights in certain fields, never succeeded in tackling the problem of the alien, never succeeded in tackling the problem of the woman and never succeeded in tackling the problem of religious minorities, and it has in our day had to be supplemented by detailed legislation to ensure a measure of justice to racial groups."

Lord Gordon-Walker joined Lord Lloyd of Hampstead in propounding the view that the incorporation of the European Convention of Human Rights would import "a new and formidable element of uncertainty into our law" (col. 1362). Lord Hailsham pointed to the flood of legislation and stood "unreservedly and solidly" behind Lord Scarman. In the end, by a majority of 56 to 30, the Lords adopted a resolution urging the Government "to introduce a Bill of Rights to incorporate the European Convention of Human Rights into the domestic law of the United Kingdom".

The Lords' debate has concluded. The international debate continues.

Census and Privacy

> "He uses statistics as a drunken man uses lamp-posts; for support rather than illumination."
> Andrew Lang, *circa* 1904.

A number of major developments in the A.L.R.C. project on privacy protection. The Report, *Unfair Publication: Defamation and Publication Privacy* (A.L.R.C.11) should be received from the Government Printer shortly. It will be tabled in Parliament and will advance the debate about privacy protection in the context of publication, particularly mass publications.

The Commission has developed a number of in-house papers concerning information privacy: a major international concern, stimulated by the developments of computers, satellites and information technology.

The first public Discussion Paper on this aspect of privacy protection deals with the Australian Census. Shortly after the A.L.R.C. was asked to report on privacy protection generally, in the Commonwealth's sphere, the Attorney-General wrote to the Commission specifically requesting that the implications of the census for individual privacy should be taken into account in the preparation of the Commission's report. Because of this request, the discrete nature of several of the problems raised and urgencies attached to the finalisation of procedures for the 1981 Australian Census, the Commission has proceeded to a Discussion Paper on the subject. That paper will be discussed in all parts of the country before the Commission proceeds to report upon it.

The Commissioner in charge of the Privacy Reference is Mr. D. St.L. Kelly. On 13 February 1979 he led a discussion about the issue, attended by A.L.R.C. Commissioners, the Australian Statistician (Mr. R. J. Cameron) and a number of consultants who are helping the Commission in this project. Those attending put forward different points of view, which included:

- the possible limitation of the Commonwealth's constitutional power with respect to census questions;
- the desirability of protecting civil liberties, including the "liberty" of immunity from privacy invasion by comprehensive inquiries;