- In Britain, an outcry in the press has followed a Court of Appeal decision requiring a television station to disclose confidential sources of journalist information. The British Steel Corporation sought identification of a person who had leaked a document. The decision of the Court of Appeal was denounced as 'against the public interest' in the *Times* editorial (7 May 1980).

  > The Courts are far from being the best judges of what is responsible journalism. Their task should be to determine the balance of public interest, not to judge journalistic ethics.

- Closer to home, Federal Police Commissioner Sir Colin Woods has appealed for police power to tap telephones. 'If the police force is to have any chance of tracking down major criminals' the power to intercept telephones was urged ' not so much for the intrinsic information, but to drive the conspirators into the open'.
- In Queensland the Law Society and other groups have criticised the Police Act Amendment Act 1980 s.69C which empowers the Police Commissioner to release to public and private instrumentalities, details of police information. It is understood that the legislation is now being reviewed. The Melbourne *Age* (10 April, 1980) suggested:

  > The best guarantee that the community's personal freedoms and liberties will not be abused, and that confidential information will not fall into the wrong hands, does not lie in allowing the Police Commissioner to use his discretion. It lies, rather, in insisting that such confidential information cannot be made available in any circumstances.

1984 approaches. Will our legal system be ready?

sentencing federal offenders

If England treats her criminals the way she has treated me, she doesn't deserve to have any.

Oscar Wilde, 1899

Major Review. On 21 May 1980 the Federal Attorney-General, Senator P.D. Durack, Q.C., tabled in the Australian Parliament an interim report of the ALRC *Sentencing of Federal Offenders* (ALRC 15). The report proposes major changes in the punishment of offenders against Commonwealth and Territory laws in Australia. Amongst the major proposals are:

- establishment of a national Sentencing Council to provide detailed, public guidelines to secure more consistency in sentencing and punishment;
- overhaul of the Federal statute book to remove anomalies and inconsistencies in statutory punishments;
- comprehensive new Federal legislation for the victims of crime;
- new rules on prison conditions and grievance machinery for Federal prisoners throughout Australia.
- new alternatives to imprisonment to avoid the costs and other disadvantages of prisons.

Already the report has attracted a great deal of attention and controversy. This should cause no surprise. There are few areas of law reform more likely to raise the emotional temperature. The ALRC terms of reference required it to examine 'the imposition of punishment' on Federal and Territory offenders. The inquiry therefore took the Commission beyond judicial sentencing, to examine the various decisions and actions which affect the content of punishment for Federal crime. Areas examined or called to attention include:

- police discretions to charge;
- Federal prosecutors' discretion to prosecute;
- judicial discretions in sentencing;
- parole and probation discretions;
- differential prison conditions.

Inconsistency. The chief issue tackled in the interim report is that of inconsistency and disparity in sentencing. Despite poor national crime and penal statistics in Australia, the ALRC report calls attention to numerous features of inconsistency, not only within particular State jurisdictions but also in different parts of Australia, in respect of the same Federal crime.

> Experienced judges, daily engaged in the business of punishing convicted offenders, frequently confess that the longer they perform the task of sentencing, the less confidence they have that they know what they are doing. Sentencing has been described as the most 'painful' and 'least rewarding' of judicial tasks. Critics

> assert that this is so because judges are given few sure signposts, little legislative guidance and totally inadequate preparation and training for the tasks of sentencing. Serious, knowledgeable and responsible critics of the system of judicial sentencing in Australia and elsewhere chastise the disparities that exist in sentencing and describe the process as a 'random lottery', depending too much on capriciousness and inconsistent factors and on the personality and idiosyncratic views of the particular sentencing judge.

The interim report urges that publicly available guidelines should be drawn up consistent with law and as a supplement to court decisions, which often 'depend on the haphazard chance factor of appeals'. It is urged that these 'sentencing guidelines' should replace the informal tariffs, tariff books, hurried conversations in the corridor and other such considerations which 'all too frequently affect the current practice of sentencing and punishment'.

A unique feature of the report is the annexed preliminary statement on the outcome of a survey conducted by the ALRC in collaboration with the N.S.W. Law Foundation of the Judges and Magistrates in Australia concerned with sentencing. Nearly 80% of the judicial officers of Australia answered the survey, the first of its kind known to have been undertaken anywhere in the world. The results, and the associated written responses by judicial officers, provide a fascinating insight into the factors which affect sentencing and the directions for sentencing reform. The report also contains detailed reports on other ALRC empirical studies including:

- a survey of Federal Prosecutors;
- an examination of Federal Police files;
- a Public Opinion Survey concerning sentencing, imprisonment, parole and victim compensation; and
- a questionnaire of Federal Prisoners.

Federal Parole. Apart from the creation of the Sentencing Council, a major recommendation of the report is the abolition of parole for Federal prisoners. The report calls instead for the imposition of shorter but determinate periods of imprisonment to replace the discretionary system of punishment involved in parole. It states that whatever the original aims of parole in theory, in practice it has caused deeply felt 'and in many cases justifiably resented' injustices. It is pointed out that parole as administered:

- Promotes uncertainty in criminal punishment.
- Unacceptably assumes that conduct in society can be predicted on conduct in prison.
- Proceeds in secrecy.
- Makes determinations affecting liberty which are substantially unreviewable.
- Is generally seen by the public as a 'charade'. The spectacle of long sentences of imprisonment' no longer deceives the community, which knows that the offender will serve a much shorter period in prison before being released on parole', the report says.

Special criticism is levelled at parole of Federal offenders. It is pointed out that Federal parole decisions are made by busy national officers (the Attorney-General and the Governor-General) in the midst of other pressing duties. The report urges that if parole abolition is delayed, a Federal Parole Board should be established immediately and new, fairer procedures adopted throughout the Commonwealth.

The Attorney-General's reference required the Commission to give special and urgent attention to 'deinstitutionalisation' of Federal punishment. Draft legislation is attached to the report providing broad guidelines designed to limit the use of imprisonment in Federal cases. The legislation also proposes that local State punishments, alternative to imprisonment, should be available in appropriate Federal cases. The report calls attention to the financial as well as the human costs of imprisonment. Recent Royal Commission, judicial and other criticisms of Australian prisons are noted as are the disparities in prison conditions for Federal offenders in different parts of the country. As a step towards removing these sources of differentiation in punishment, the Commission urges Federal steps towards implementation of national minimum prison standards for Federal offenders. Arrangements for monitoring prison conditions and for the effective handling of prisoner grievances are included.

Victims of Crime. High priority is given in the

report to a 'new approach' to the predicament of the victims of Federal crime. It is pointed out that until now victims have been the neglected participants in the 'criminal justice drama'. The Commonwealth and the A.C.T. are the only remaining Australian jurisdictions without a publicly funded crime victim statute. The report attaches a draft Bill for a Federal crime victims Act. It proposed adoption of a scheme drawing on the present Victorian and United Kingdom systems. It specifically rejects the crime victim model adopted in most Australian States. Under this, judges award limited compensation to crime victims at the end of the criminal trial. The ALRC proposes:

- a separate tribunal;
- no statutory maximum;
- clear criteria for calculating victim compensation in crimes of physical violence.

Response to the ALRC interim report has so far been mixed. Because of a deadline for report and the end of a Parliamentary session, the report was tabled in manuscript. Printed copies of the report will be distributed in July 1980. They will be available for the Australian participants in the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders to be held in Caracas, Venezuela in August 1980. Disproportionate attention was given in some media coverage to the results of the Judicial Survey on the issue of capital punishment. Although nearly 80% of Federal judges and 60% of all judges opposed capital punishment in any circumstances, the total of judges and magistrates showed 47% favouring capital punishment in a limited class of particularly violent crime. The *Sun* in Sydney urged that judges should 'lead the nation towards the most effective and enlightened crime-punishment system possible' (28 May). The ALRC cautioned against superficial use of surveys pointing out that neither public opinion polls nor even expert surveys should be followed 'blindly' in criminal law reform. The *Sydney Morning Herald* thought that there was a 'great deal to be said' for the suggestion of a Sentencing Council with publicly available sentencing guidelines. It urged that these should be applicable to 'the States as well', requiring co-operation and agreement 'which has not been forthcoming in the past and will be anything but easy to attain'.

> A disturbing impression of imprecision and inconsistency remains. It may well be that judges and magistrates being human and of varying opinions, total objectivity and consistency are unattainable. It is also true that circumstances differ from case to case, and that sentencing authorities must be allowed some discretion in fitting the penalty to the crime. Yet . . . judges and magistrates need better information services than they have now; they need to consult one another regularly; and it will do no harm – indeed, the result should be a step in the right direction – if some authority produces a set of sensible guidelines to help them in their admittedly difficult task. They can be no more than guidelines, for circumstances alter cases; but surely they would be an improvement on a 'random lottery'.

The Commission's proposals were discussed at a meeting of State Ministers in charge of Prisons, Probation and Parole held on 30 May. As printed copies of the ALRC report were not available Ministers had to rely on a summary of the report and recommendations. Some State Ministers were reported to have had some harsh things to say about the report. In a press statement issued at the conclusion of the meeting the conference of ministers expressed 'its very great concern at the potentially damaging and destructive impact the implementation of some of the recommendations would have on the whole of the State and Territory prison and parole systems throughout the nation'. The statement went on to say that the ALRC recommendations would only apply to less than 400 out of 10,000 prisoners in Australia. The conference resolved that the various administrators of the prisons, probation and parole systems meet at an early date to make a 'detailed, co-operative assessment of the full impact of the implementation' of the ALRC proposals as they relate to correctional services matters and to lay the foundations for a common State/Territory position. Whilst indicating that State criticisms would have to be considered carefully in view of the Commonwealth reliance on State criminal justice machinery, the ALRC Chairman said that the Commonwealth had its own separate responsibilities for its offenders. Speaking to the Second Biennial Convention of the Australian Stipendiary Magistrates' Association in Melbourne on 15 June, he said:

> At present in Australia Federal offenders are frequently

bailed by State police, usually tried by State judges and magistrates and always imprisoned in State gaols. How the Federal Law Commission, with its terms of reference could examine Federal punishment without "sticking its nose in" to State systems, escapes me. Under our terms of reference, where federal offenders go, our nose had to follow. If the alternative is that the Federal Parliament continues to neglect its separate responsibilities, this is unacceptable. There is inconsistent treatment of Federal offenders in different parts of the country and the Federal Parliament has its own responsibility to terminate these inconsistencies. Inconsistent, unequal punishment is injustice.

Meanwhile the debate about crime and punishment goes on in the Australian States and overseas.

- Federal Opposition Leader Hayden has criticism the absence of Federal and State co-operation in criminal justice matters in Australia. He has listed:
  - the failure to establish, after almost twenty years of discussion, a system of uniform crime statistics for Australia;
  - the failure to provide for an effective method of transferring prisoners between jurisdictions;
  - the failure to agree on uniform standards for correctional facilities;
  - the failure to establish any sustained and cohesive effort to combat organised crime;
  - the failure to provide co-ordinated forensic and record-keeping services (1980) 5 *Cwlth Record* 290.
- In South Australia, the Attorney-General Mr. Griffin has established a 10 member committee to report by December 1980 on services and law reform needed to help and advise victims of crime in that State.
- Also in South Australia it has been announced that legislation will be introduced to change parole and sentencing laws. Amongst reforms indicated will be the restructuring of the Parole Board, the provision for police and prison officers to attend hearings of the Board and a requirement of the fixing of non-parole periods in every case.
- In Britain, Oxford University Press has published Professor Hyman Gross' lucid and stimulating book *A Theory of Criminal Justice.* Specially criticised both in Professor Gross' book and in the ALRC report is the 'rehabilitation theory' of punishment. The book is a splendid analysis of the bewildering efforts to justify reform movements in respect of criminal punishments. See review (1980) 120 *New LJ 79.*
- Judge L.K. Newman of South Australia has suggested to the Australian Crime Prevention Council the establishment of a central fund from which payments could be made to the victims of physical violence or property loss and damage by crime. Judge Newman suggests that a 5% surcharge on fines could provide a fund adequate to compensate crime victims. The ALRC interim report urges that if necessary to fund the suggested victim compensation legislation, there should be an increase in Federal fines.
- Mr. David Biles, Assistant Director of the Australian Institute of Criminology told the ANZAAS Congress in Adelaide that the number of people in prison in Australia could be substantially reduced without substantial risk. Specifically, Mr. Biles said that the number of prisoners in Australia could be reduced by about half from 10,000 to 5,000. He said that a surprising finding of A.I.C. analyses of current statistics was that 'those States which have high rates of use for probation and parole do not achieve correspondingly low rates for the use of prisons'.
- Reform of punishment is not confined to the Anglophones. As reported in *Le Monde* (2 May 1980) the French Government has presented a Bill for changes in the penal system. Listed amongst criticisms of the French criminal justice system are:
  - Sentences imposed by courts are often far removed from those provided by law.
  - Sentences served by prisoners are often quite different from the sentence imposed on them (because of remissions, release on parole etc.). This development is said to be 'eroding the credibility of the criminal justice system'.
  - It frequently takes 2, 3 or 4 years for an accused to come to trial.

- The criminal justice system neglects the victims of crime.

To deal with these 'problems, which are not dissimilar to our problems in Australia, measures under consideration include:

- greater specificity in legal punishments, to reduce judicial discretion in sentencing;
- remissions as a reward, not to be secured 'as a right';
- removal of many crimes from the statute book to reflect changing 'moral and social values';
- improved assistance to victims of crime including allocation of damages, leniency to convicted persons who have indemnified the victim and provision for State indemnity in the case of some physical injuries.

These developments just go to prove how universal are the problems of criminal justice law reform.

new high court?

In times of social change and tensions in the world, great are the demands upon the courts and the challenges to them in reconciling competing interests and in accommodating traditional rules to new circumstances.

H.M. The Queen, opening of the High Court, Canberra, 26 May 1980

After nearly eight decades of peregrinating, the Australian federal supreme court, the High Court of Australia, has been settled in its permanent home in the national capital, Canberra. The occasion was one of pomp and spectacle. Judges from nearly a hundred countries, together with judges, politicians and national leaders in Australia, heard the Queen pay tribute to the judiciary and lay emphasis on the need to uphold the rule of law and accommodate long established rules to fast changing times.

The opening ceremony was accompanied by judicial conferences and some public speculation about the role and functions of the judiciary and particularly of the High Court itself. Along with trivia about the new 'jabots' worn as court dress by the seven High Court Justices, there has been a deal of serious discussion about the role of Australia's highest court and particularly in relation to law reform.

Speaking at the opening of the Second Conference of Appellate Judges, Chief Justice Barwick suggested a growing role for the judiciary in calling the needs of law reform to attention.

> It is probably worth this conference taking some time in examining available methods by which a judiciary can properly influence a legislature towards what, for want of a better and more specific term, I shall call, though perhaps inadequately, law reform. In considering such a question, the proper recognition of the limits of the judicial function would need examination and probably precise definition. If the judicial function is concerned, as I would think it is, intensely concerned with the attainment of justice, it may not be enough that defects and inadequacies in the law which custom or the legislature has provided are seen and publicly observed upon, perhaps only in litigation inter partes. The pressing need for change is so often only disclosed by the circumstances of a particular case in the experience of the judge. That he should be alert to observe and identify that need is part of his pursuit of justice. Merely to call attention to the deficiencies in the course of delivered judgment may be felt to be insufficient. What is the desirable course for the judge who has perceived the need for ameliorating change? May it not be that some positive means or formalised apparatus should be available to the initiative of the judiciary whereby the legislature can directly be apprised of the observed defects and inadequacies of the substantive law or of the procedural law and perhaps the executive be furnished by the judge with ideas as to likely ways of its amendment? This might be thought worth exploration for this is part of the relationship of the judiciary to government.

Papers presented to the Judicial Conference included one by Professor Mauro Cappelletti on 'The Judge, Law Maker or Interpreter'. Another paper by Dean Irwin Griswold 'The Judiciary and The Government' included a suggestion that judges, in the British tradition were 'much too concerned about criticism'. Referring to a recent dispute in Papua New Guinea, Dean Griswold contrasted the position in the United States.

> A good many disrespectful things are said about courts in the U.S., occasionally by government officials, and no one pays much attention to them. Such remarks with us are generally regarded as an excess of zeal, and experience shows that they do not in fact interfere with the operation of the courts or lessen public respect for them.

Commenting on this assertion of overconcern to criticism, Sir Harry Gibbs told an Australian Bar Association dinner that High Court Justices in Australia faced by conflicting advice, had to be