> ment finances allow. It is envisaged that such a Commission would undertake research into particular law reform matters, act as a watchdog and initiate inquiries, and have its recommendations considered by parliament.

Other controversial subjects touched on in the Gayler report are:

- Sunset clauses in legislation.
- Simplification of legislative style.
- Spread of community legal education.

Outside the SALRC, significant steps of recent days in South Australia include:

- The Attorney-General, Mr. Griffin, has said that unsworn statements in criminal trials should be 'abolished as soon as possible'. However, the Legislative Council has established a Select Committee to examine the subject.
- A new scheme called the 'Court Companion Scheme' has been initiated by the Director of the Victims of Crime Service, Mr. R.W. Whitrod, former Commissioner of Queensland Police. Mr. Whitrod said that people appearing in court were often nervous and frightened, even as witnesses. Volunteers would be trained by the Police Department and recruited through his Service to help such people.

tasmanian reform. Another southern law reform agency has just distributed its Annual Report. The Fifth Annual Report of the Law Reform Commission of Tasmania has now become available. After noting the extension of the life of the TasLRC (itself subject to a 'sunset' clause) and the new constitution and composition of the Commission, the report points out that there has now been added to the mandate of the TasLRC provisions equivalent to those contained in s.6 of the Act establishing the ALRC. The TasLRC is required to perform its functions 'with a view to ensuring that the law which is applicable in the State does not trespass unduly on personal rights and liberties and does not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions'. Secondly, new responsibility has been conferred on the Commission to advise the Attorney-General 'on a confidential basis' when requested by him 'on any legal matter that involves inter-government relations'.

The closing paragraphs of the Annual Report reflect on 'procedures and methods of work'. The TasLRC is to issue discussion papers and to make arrangements for public hearings or seminars in appropriate cases so that different points of view can be publicly presented and discussed:

> Without wishing to criticise previous procedures, further experience has shown that some of the Law Reform Commission Reports have been presented without sufficient contribution of individuals and organisations particularly affected by the proposed law reform. It is hoped that the new procedures will result in the Attorney-General being able to be satisfied that most interested parties have had a fuller opportunity to express their views before a final Report with Recommendations is submitted to him.

To secure quick law reform for 'minor' matters, the Commission is considering categorising smaller matters which are 'apolitical and non-controversial' as law reform miscellaneous provisions. But the Annual Report points out that care would have to be taken to ensure that all persons affected have been advised of the measure. The report refers to the busy program of work of the TasLRC and to the good co-operation with other law reform agencies, including the ALRC in its work on debt recovery, insolvency and debt counselling.

Law reform in southern Australia is indeed alive and well.

aboriginal law?

> If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

Mr. Justice Blackburn, *Milirrpum* v. *Nabalco Pty Ltd & The Commonwealth* (1971) 17 FLR 141, 267

problems of recognition. During the last quarter, the ALRC has issued a discussion paper, *Aboriginal Customary Law - Recogni-*

tion? (ALRC DP 17). The paper contains a number of tentative proposals for the recognition of Aboriginal customary laws in the Australian justice system. It follows the request of the Federal Government that the ALRC advise on this topic. Putting the ALRC proposals in context, the Commissioner in charge of the reference, Mr. Bruce Debelle, said:

> Broadly speaking, for nearly 200 years, Aborigines have been required to obey Australian law. But Australian law also applies to dealings amongst themselves and this has led to difficulties. Aborigines enforcing traditional laws and using traditional punishments such as killing or spearing would find themselves charged with murder or serious assault and brought before ordinary Australian courts manned overwhelmingly and indeed almost exclusively, by white Australians.

As Mr. Debelle points out, the ALRC discussion paper lists the problems that stand in the way of easy recognition in modern Australia of Aboriginal laws:

- Tribal laws are often secret and in the possession of selected members of the tribe: typically males only. How could Australian law recognise what is not known and cannot be revealed?
- Some breaches of sacred law require death as the punishment, even where the act was unintentional. After prolonged debate leading to abolition of the death penalty in Australia, is it now to be revived and condoned?
- Some traditional punishments such as killing and spearing would be regarded by most of Australian society as 'unacceptable'. There is a clash here of moral values involving important questions of human rights. While white Australia may see death and spearing as cruel, traditional Aborigines may consider imprisonment as cruel and unusual punishment.
- Some marriage rules in traditional Aboriginal society, including polygamy and the promise of young girls in marriage to older men, without their consent, might be regarded as discriminating against modern rights of women. Yet traditional Aborigines say it provided greater peace and harmony among Aboriginal communities than has occurred since the white impact.
- Younger Aborigines are challenging the traditional authority of elders and this too has led to a decline of social and personal discipline and order, to the damage of most Aborigines.
- Customary law is often unable to cope with a number of factors of modern Australian life, the most significant of which is the impact of alcohol on Aborigines.

reform options. Despite the difficulties outlined in the discussion paper, the ALRC says that we should not be 'too pessimistic' about finding a just accommodation between legitimate Aboriginal demands for recognition of some traditional laws and the needs of a modern cohesive Australian society. Approaches which could be adopted include:

- modifying Australian law to accommodate at least some Aboriginal rules;
- utilising some aspects of traditional law;
- improving relations between Aborigines and the police;
- providing for a scheme for Aborigines to administer justice in their own communities.

On the proposal to modify Australian law, the ALRC has pointed out that most Aborigines appreciate that a killing, a serious assault or stealing will be followed by police investigation and possible court action. But it should still be possible to ensure that Australian law in both civil and criminal fields recognises and takes into account relevant Aboriginal customary laws. Amongst specifics noted in the DP are:

- extending existing defences under the criminal law to take account of customs affecting the degree of guilt;
- adjusting the rules of evidence and the conduct of trials to cope with secrecy and other rules governing Aborigines;
- permitting or requiring judges and

magistrates to have regard to aspects of customary law when imposing sentence upon convicted Aborigines;

- enabling courts to have regard to tribal marriages in matters such as social security, workers' compenation, status of children etc.;
- extending the criminal law to include breaches of some customary laws as punishable offences under Australian law.

On the subject of providing means for Aborigines to administer justice to their own communities, the Commission points to experiments and established procedures in Western Australia, the Northern Territory and Queensland. Suggested alternatives include:

- use of traditional authority structures; or
- establishment of Aboriginal courts with limited powers similar to those exercised by justices of the peace in the general Australian community.

The ALRC, however, comes out firmly against killing, spearing and other forms of physical wounding as permissible punishments. It says that these traditional punishments should not be permitted, even though it is frankly recognised that such a judgment involves an 'ethnocentric' assertion by the white majority of its values:

> Aborigines and part-Aborigines throughout Australia have adjusted in varying degrees to European contact. There is a continuing process of Westernisation. At one end of the spectrum are Aborigines living in remote and relatively inaccessible places whose lives are still traditionally oriented. At the other end are Aborigines who have been living for some time in cities and other urban areas where behaviour patterns have a minimum degree of Aboriginality. Traditionally-oriented Aborigines are likely to become less so as the process of Westernisation continues. Some Aborigines wish to take their place in the general Australian society. Others will seek to retain a traditional lifestyle. The object of the Commission's proposals is to provide some means for the Australian legal system to become more relevant to the needs of all Aborigines in Australia today.

towards a new relationship? Meanwhile, other moves in the continuing readjustment between the majority and Aboriginal communities of Australia can be noted:

- *NSW Land Rights.* In New South Wales, in late October, a report of a Parliamentary Select Committee was published with proposals for legislation to provide enforceable Aboriginal land rights in New South Wales. It has been announced that a 10-member Aboriginal field force will travel throughout New South Wales to discuss the report and to consult with the Aboriginal tribes and their elders.
- *S.A. Land Rights.* In South Australia a new land rights agreement has been negotiated in early October 1980 between the South Australian Government and the Chairman of the Pitjantjatjara Aboriginal Council, Mr. Pantju Thomson. The agreement gives to the Pitjantjatjara Aborigines the 'inalienable freehold rights' to more than 100,000 square kilometres of their ancestral land. The South Australian Premier, Mr. D. Tonkin, says of the agreement, 'We have recognised the rights of Aboriginals and we have recognised the rights and needs of all South Australians. It has been a long time coming. But believe me it is worth every minute spent'. The Letters Patent of February 1836 for the foundation of the Province of South Australia required that 'nothing should affect the rights of any Aboriginals of the Province ... to their occupation and enjoyment' of 'any land they now occupy or enjoy'. Only in 1980 are the aims of this viceregal instruction being translated into effective law.
- *The Makarrata.* The National Aboriginal Conference is working towards the drafting of a Treaty or Makarrata to provide a 'constitutional basis' for the relations between black and white Australians. Funded by the Commonwealth, members of the NAC have travelled widely throughout

> Australia in 1980 to take details of the proposed Treaty to the diverse and far-flung Aboriginal communities. Some observers suggest that the forthcoming bicentennial of white settlement in Australia might provide an apt occasion for the signature of a Treaty between the newcomers and representatives of the Aboriginal people, who were living in harmony with the Australian environment for 40,000 years until Captain Phillip hoisted the Union Flag on the banks of Sydney Harbour before his motley crew of convicts and soldiers.

Commissioner Bruce Debelle hopes to complete public hearings on the ALRC discussion paper proposal by May 1981. Extending earlier ALRC hearings, Mr. Debelle plans to sit in many remote parts of Australia, informally consulting Aboriginal communities. In addition to hearings in the capitals, where white opinion too will be sought, the views of Aborigines in centres as far apart as Port Hedland, Mt. Isa, Lismore, Weipa, Gove and Fitzroy Crossing will be sounded, before the ALRC presents its report. The work on Aboriginal customary laws must be seen in the context of many efforts being pressed forward, with bipartisan support to secure a new relationship between the original inhabitants of Australia and the majority population.

judges and courts again

> Let not judges also be so ignorant of their own rights, as to think there is not left to them, as a part of their office, a wise use and application of laws.
>
> Francis Bacon, *Of Judicature.*

the law reform apogee. The last issue of this bulletin recorded the visit to Australia of the first Chairman of the English Law Commission, Lord Scarman. Lord Scarman delivered a notable address in Melbourne, widely covered in the press. In it he urged, amongst other things, a more supportive role by courts in the business of interpreting the legislative will. But from Perth comes a report of his address to a luncheon jointly hosted by the Law Reform Commission of Western Australia and the Law Society of that State. He commenced by referring to the great optimism and idealism which accompanied the establishment of the Law Commission of England and Wales in 1965. He said that in the intervening period much of the optimism and idealism had faded. Recent addresses by the Chairmen of the English and Australian law commissions had indicated that institutionalised law reform had entered a 'more sober and realistic era'. If it was to succeed it would require assistance from the legislative and executive branches of government. Although judicial temperament varied, there was a tendency for judges to abdicate the field of law reform. This made it all the more important that legislators give proper consideration to law reform proposals. If three out of five law reform proposals were accepted and the others rejected after proper consideration, no one could complain. However, if none out of five was adopted, because none of the five had been properly considered, law reform bodies naturally became dispirited and the process of institutionalised reform discredited.

Lord Scarman's successor, Sir Michael Kerr, told the Sixth Commonwealth Law Conference in Lagos, Nigeria, of the need for a more certain and co-ordinated approach to the 'business' of law reform:

> The systematic review of the law was a gleam in the eye of many reformers in our history, going back at least as far as the beginning of the 16th century under Francis Bacon. Before our time, it achieved its apogee under the Victorians. But it was only after a further century of pragmatic and piecemeal attempts at reform that it came to be accepted that a systematic approach is an essential ingredient in a modern legal system.

Sir Michael Kerr, who will himself visit Australia for the 1981 Legal Convention, said that the 'law reform idea' had become a reality and institutionalised throughout the Commonwealth of Nations. But it was very easy to become 'starry eyed and unrealistic':

> Although a law reform agency must necessarily be independent and free to make any recommendations which it believes to be right, it must