> clearly established government policy, particularly when laid down by their Minister. ... Astonishing to the lay mind, brought up in the traditions of judicial deference, will be a head-on conflict with a carefully formulated and perfectly lawful policy of a Minister reached after thorough inquiry and consideration by him of expert, community and political representations.

a a t valuable role. In keeping with the current media vogue in reporting legal matters, some of the lastmentioned comments were recorded as if a criticism of the AAT and its members, rather than an exploration of questions of legal and constitutional principle. Typical was the comment of Peter Robertson in the *Sun Herald,* 2 August 1981:

> If we cannot rely on the judiciary to protect us from venal, self-interested or incompetent politicians, who can we rely upon? If this is what a law reformer thinks about the issue, what can we expect from the true-blue legal conservatives?

The Federal Attorney-General, Senator Durack, issued a statement of praise for the valuable role of the AAT, which he said was 'providing the citizen with an independent review of government decisions which directly affected him'. Senator Durack pointed out that:

- the AAT was operating under powers which Parliament itself had conferred;
- the review of government policy was a difficult question but had arisen chiefly in the special area of deportation;
- the AAT had made it clear that whilst not bound by government policy it would carefully take it into account;
- it was the responsibility of Parliament to spell out the criteria by which the AAT judged the decisions of the government coming before it.

other developments. Meanwhile, a number of other developments can be noted:

- In June 1981 a report of the Administrative Review Council was released criticising the current system of social security appeals tribunals and urging transfer of jurisdiction to the AAT as well as a better system of internal review. The Minister for Social Security has indicated that the report will be closely scrutinised;
- A number of decisions are now being handed down by the Federal Court under the innovative Administrative Decisions (Judicial Review) Act. In June 1981 a decision of the Full Federal Court dealt with the requirement to give public servants an adequate hearing before the Public Service Board could act to suspend or dismiss them. In July 1981, Mr. Justice Fox held that a decision to pass or fail a candidate for a statutory examination was a 'decision' within the meaning of the Act and thus capable of being reviewed by the Federal Court on the criteria stated in the Act;
- At the end of July 1981, the High Court of Australia, in the case of Pochi, withdrew an order granting the Commonwealth special leave to appeal against an AAT decision recommending revocation of a deportation order. The fact that a High Court decision in the case would not be binding on the Minister suggested that the appeal would be futile as the Minister could still proceed to make his own determination.

The area of administrative law continues to expand. Practical problems and issues of principle inevitably accompany the expansion.

bi-centennial constitution?

> A Constitution should be short and obscure
>
> Napoleon Bonaparte.

ark of the covenant? In a letter written in 1816 Thomas Jefferson declared that some men deemed a written Constitution 'like the Ark of the Covenant, too sacred to be touched'. It may

be suspected that some Australian citizens feel this way. Of 36 attempts at formal constitutional amendment in Australia, only 8 have received the required support at the polls. Numerous parliamentary reports and other proposals for constitutional reform, over the years, have simply been shelved.

Nevertheless, as the Governor-General, Sir Zelman Cowen, told a colloquium at the Australian National University on 2 September 1981, dealing with the public policies of Canada and Australia, the events of recent years have thrown some Australian constitutional issues into sharper focus. Sir Zelman referred to the expressions of hope in some quarters that by the year of Australia's Bi-centenary, 1988, we would see a remade Constitution.

In August 1981, the NSW Law Foundation (Director, Mr. Terence Purcell) announced the launching of an ambitious project, designed to:

- identify shortcomings in the present Australian Constitution;
- propose lines of reform;
- give a timetable for actual changes.

The Law Foundation project appears to have attracted multi-partisan support. A committee, convened by Mr. Purcell, includes the Victorian Attorney-General (Mr. Haddon Storey QC), the former Secretary of the Federal Attorney-General's Department (Sir Clarrie Harders), the Chairman of the NSWLRC (Professor Ronald Sackville) and the Labor Party spokesman on legal affairs, Senator Gareth Evans, a past ALRC member.

Senator Evans, who proposed the initiative now adopted by the Law Foundation, identifies four issues for special consideration:

- the shape and character of basic institutions of national government, especially the role of the Senate and of the Governor-General;
- the future of federalism, the existence of two main tiers of government and the division of powers, responsibilities and finances between them;
- constitutional guarantees of human rights and liberties;
- the question of actual machinery for ongoing constitutional change.

tinsel self-congratulations. To assist the committee, an advisory body is to be formed, including multi-partisan and apolitical members from the universities, business and the media, the trade unions, Parliament and public life. Some members of the consultative committee, whose names have already been announced, include the Leader of the Democrats, Senator Don Chipp, Mr. R.J. Hawke, Senator Rae, the Commonwealth Ombudsman (Professor Richardson) and Perth businessman, Mr. Robert Holmes a'Court. To provide a focus for the project, Mr. John McMillan, a Canberra legal consultant, is to be engaged to write a detailed review of the Constitution and its problems. This review will be discussed at seminars in most capital cities. The aim of the whole project is to engender a move over the next seven years, before the Bi-centenary, to create a wave that will lead on to a renewed Australian Constitution. Senator Evans told the Australian on 11 August 1981:

> 'The Founding Fathers who wrote our present Constitution bequeathed us a document which is unreadable, some institutions of national government that are now clearly indefensible and a Federal system that is at best irrational and at worst unworkable. The 1988 Bi-centenary now looming offers us a marvellous opportunity to make a fresh start. There will be a great temptation to turn the occasion into a tinsel orgy of self-congratulation but I believe we can, and should, aim for something much more constructive — nothing less than a new Australian Constitution'.

Of course, some Australians, true to Jefferson's prediction, see absolutely no reason for changes in the present Constitution. By world standards it is remarkably brief and at least it has endured. It is curious to think of it as one of the longest surviving Constitutions in the world. Indeed, on 24 September 1981, the Federal Attorney-General, Senator Durack,

told Parliament that no case could be made for 'scrapping' the present Constitution. Though there were areas of the Constitution needing review and though the 'resurgence of interest' in the possibilities of constitutional reform were to be welcomed:

> we have to frame our thinking on the basis that the Constitution will regulate the affairs of our country into the 21st century.

Senator Durack welcomed the initiative of the Law Foundation in establishing the project aimed at a serious national debate on the need for constitutional change. He pointed out that a sub-committee of the Australian Constitutional Convention was still studying draft proposals for constitutional reform. Whether Mr. Purcell, Senator Evans and their team can encourage a genuine national debate on the shape of the Constitution remains to be seen. Certainly, the world of Australia in the 1980s is very different to the world of the 1890s when the present instrument was framed. Sir Zelman Cowen, speaking to the conference in Canberra in September 1981, is reported to have repeated what had been said to him by a distinguished Australian judge not long ago — that if Australia were seeking to federate for the first time today, it might have difficulty in getting there (*Canberra Times,* 3 September 1981). Nevertheless, support for the broadly-based re-examination of the Constitution has come from a number of quarters. One of them, the prestigious Melbourne *Age* (22 August 1981), urged an open-minded approach to the project:

> It has mustered broad support. Politicians from all parties, business and union leaders, lawyers and academics, have combined [in order] to produce a report on constitutional reform. Their report will then be the subject of public discussion at a series of seminars to be attended by 'key opinion and community leaders' in each capital city. ... It is a heavy agenda, even for an all-star cast. ... That reform is necessary and desirable is beyond question. The events of 1975 proved, if nothing else, the danger of acquiescent reliance on the principles and unwritten conventions of an outmoded Constitution. Less obviously, the Constitution creates havoc in the administration of many branches of the law; it makes for unholy strain between the tiers of government. And it is inflexible: something close to unanimity is required before the rules could be changed. We heartily encourage the Law Foundation in its new project. Whether the Foundation plans to tackle the Constitution gradually, through amendment, or whether it favours a root-and-branch renewal has yet to emerge. The important thing, now, is that the talks cease and the tackling begins.

medico/legal corner

> It should be the function of medicine to have people die young as late as possible
>
> Dr. Ernst L. Wynder.

life comes first. During August 1981, the United Kingdom press carried banner headlines about a case posing legal problems typical of many now presented by modern medicine. In the case of *Re B.* (a minor) the Court of Appeal (Lords Justices Templeman and Dunn) on 7 August 1981 handed down a decision authorising a surgical operation to save the life of a profoundly retarded child. They allowed an appeal by a London Council from an Order of Mr. Justice Ewbank made earlier in the day, upholding the right of the child's parents to refuse consent for the operation. The child was little more than a week old. She was suffering from Down's syndrome. She also had an intestinal blockage which would be fatal unless it was operated on. The parents took the view that it would be unkind to the child to operate and that she should be sedated and allowed to die. It was agreed by all parties that the parents had come to their decision 'with great sorrow, believing that it was in the best interests of the child'. Lord Justice Templeman posed the issue:

> Was it in the best interests of the child that she should be allowed to die, or that the operation should be performed? That was the question for the court. Was the child's life going to be so demonstrably awful that it should be condemned to die; or was the kind of life so imponderable that it would be wrong to condemn her to die? It was wrong that the child's life should be terminated because in addition to being a mongol she had another disability. The judge erred because he was influenced by the views of the parents, instead of deciding what was in the best interests of the child.
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> *Times Law Report,* 8 August 1981, 14.