

customary laws. It is their assertion that any answer given by non-Aborigines, however well intentioned, is bound to fall victim to the 'ethnocentricity' by which each culture is hostage to its own history and attitude and unable fully to appreciate the perspective of the other.

Reflections of this view can be found in the report of the Customary Law Workshop held during the Conference on Human Rights for Aborigines in the 1980s at the University of New South Wales in early October 1981. The Chairman of the Conference was Professor Garth Nettheim of the UNSW. Both Mr. DeBelle and Dr. Crawford attended the Conference and Mr. DeBelle outlined the progress on and plans for the reference. Amongst resolutions passed at the Conference were:

- that the ALRC should publish a further discussion paper or interim report allowing full time for consultation and response before proceeding to final report;
- that a senior research officer who is an Aborigine be engaged;
- that the Government consider appointing an Aboriginal Commissioner to the ALRC;
- that the ALRC examine overseas experience, designated areas of private law, the establishment of autonomous Aboriginal Community Courts and police relations.

Meanwhile, reports continue to come in of Aborigines who are punished both under traditional law and under Australian general law for offences involving other Aborigines. The *Canberra Times* (7 November 1981) records the case of Joe Jungari who was sentenced to six and a half years' imprisonment. Earlier in the year, Mr. Jungari was released on bail to undergo tribal punishment. In the Supreme Court of the Northern Territory, Mr. Justice Muirhead said that the defendant had undergone his tribal punishment by being beaten with nulla-nullas and boomerangs until he was unconscious. The judge said, however, that there was 'no cultural tinge' to the offence and that it was simply a drunken stabbing. He said that the court paid

regard to tribal law and customary punishments, but Australian laws were designed to protect all Australians and if matters such as the present case were ignored, it could be said that the law did not extend to the protection of black people. A non-parole period of two and a half years was set. Not everybody was happy. Central Land Council anthropologist, Bruce Ryeburn, described the judgment as 'an extremely clumsy application of justice'. He said that it ignored the whole Aboriginal system of justice. (*The Age*, 7 November 1981). However, other commentators supported Mr. Justice Muirhead. The resolution of this issue is now the question before the ALRC and its new Commissioner, Dr. James Crawford.

## human rights reform

I got disappointed in human nature . . . and gave it up because I found it too much like my own

J. P. Donleavy, *Fairy Tales of New York*, 2

**new commission.** In an impressive ceremony in the Australian Senate Chamber on Human Rights Day, 10 December 1981, the Prime Minister and the Federal Attorney-General (Senator Peter Durack QC) inaugurated a Human Rights Commission, which came into being on that day, with an 'imaginative and broad ranging charter'. It represented, he said, a unique approach to human rights and had a capacity to make an 'innovative contribution' to the advancement of rights in Australia:

In considering questions of rights, the Commission has for its points of reference a number of international statements of rights. These include the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and the Declaration of the Rights of Disabled Persons.

The new Chairman of the Australian Human Rights Commission is Justice Roma Mitchell, a Judge of the Supreme Court of South Australia. Justice Mitchell has for many years, until recently, been the Chairman of the South Australian Criminal Law Reform Committee (SACLRC). She was Australia's first woman Queen's Counsel. The Deputy Chairman of the HRC is Mr. Peter Bailey, formerly Deputy Secretary of the Department of the Prime Minister and

Cabinet and a Royal Commissioner of the Royal Commission on Australian Government Administration. The present Commissioner for Community Relations, Mr. A. J. Grassby, is to continue in his Office and his work is to be concentrated on the investigation and settlement of complaints of racial discrimination. When, in September 1981, Senator Durack announced the appointment of the Human Rights Commissioners, he said:

The Commissioners will provide a guarantee that in all matters of Commonwealth responsibility there is an independent group of experienced people watching over the human rights of all Australians.

Not everybody is happy with the new commission structure. The Federal Opposition spokesman on legal affairs, Senator Gareth Evans, described the new Commission as a 'paper mouse'. He said that it was weak and lacked appropriate sanctions:

It has no coercive powers, cannot take even the grossest breaches to court, and has no jurisdiction in relation to the States where the most flagrant breaches of human rights occur.

Time will tell whether the new Commission can mobilise the force of public opinion behind its pronouncements. The Deputy Chairman, Mr. Peter Bailey, said earlier in December 1981 that he hoped there would be joint operations with at least some of the Australian States. However, he conceded that in cases not covered by Federal laws, the HRC would, in the ultimate, be limited to asking State Governments to investigate complaints of breaches by a State or its agencies. The Prime Minister, for his part, had no doubts:

I have no doubt that for Australia, the Human Rights Commission represents a commitment to human rights which is far more profound, relevant and effective than any alternative measure.

*n z experience.* The new Australian HRC will have to examine Canadian and New Zealand experience, where human rights commissions have gone before. In New Zealand, a tremendous row blew up as a result of a decision made by that country's Human Rights Commission on a com-

plaint by a service station advertising for a 'keen Christian person'. The NZHRC upheld the complaint as discriminatory but this decision was denounced by the Government and led to a Human Rights Commission Amendment Bill to exempt preferential treatment based on 'religious or ethical belief' where that treatment is accorded by an adherent of a particular belief or is reasonable in the circumstances.

Human rights being an emotive topic, it seems reasonable to predict a 'rocky road' before the Australian HRC establishes its experience and credentials. The ALRC has invited discussions with the HRC concerning matters of mutual interest. One such matter is the ALRC project on privacy protection. Respect for individual privacy is one of the human rights referred to in the International Covenant on Civil and Political Rights. This Covenant is one of the principal reference points for the HRC in its work.

An article by Ross Warneke, 'Rights Commission Lacks Real Power', in the *Age* (24 September 1981) predicts a busy docket on contentious topics:

Apart from its work in attempting to curb racism, the commission is likely to have to tackle a number of other major issues in its first year of operations. First off the mark with complaints against Commonwealth laws, according to one of Senator Durack's top advisers, are expected to be the Church of Scientology, and various sections of the Right to Life Movement, and prisoner action groups. ... Senator Evans says that until the Government uses its constitutional power to force the States to be bound by the covenant and declarations, measures like the establishment of the commission 'will never be anything more than feeble, whimpering, half-measures in the human rights arena'.

Most Australians will be reserving their judgment, in the hope that these dire predictions prove too pessimistic.

*senate watchdog.* Meanwhile, the Australian Senate in the last quarter accepted a motion by the Government Senator, Senator Alan Missen (Lib, Vic), to establish a Senate committee to scrutinise Federal Bills for breaches of civil liber-

ties. The motion was carried 35:21 after a number of Government Senators crossed the floor to support Senator Missen despite the Government joint parties attitude against the committee. The Opposition Senators supported the proposal, which was opposed by the Federal Attorney-General.

Just prior to the passage of the resolution establishing the committee, Senator Missen claimed that Bills passed through the Parliament during 1980 had contained at least 79 provisions which appeared to infringe civil rights or to give Ministers and public servants excessive administrative power. He said that it was an important proposal, because Governments 'often failed to give much notice when they bring up legislation'. The establishment of this new committee brought a mixed reception from the editorialists. The *Age* (21 November 1981) declared:

The Senate decision may be seen as a significant victory of parliamentary assertiveness over an increasingly overweening executive authority. ... If Senator Missen's committee exercises its self appointed task as a watchdog in the interests of the citizen rather than as an instrument of partisan politics, then it will be a valuable innovation. So long as the Senate curbs its obstructive and destructive impulses and enhances its constructive and protective capabilities, it will deserve popular support.

***other initiatives.*** Other initiatives for the protection of human rights in Australia have come forward in the last quarter. They include:

- the introduction into Federal Parliament of the Criminal Investigation Bill 1981. See above, p. 14;
- the introduction by the Australian Labor Party Spokesman on Women's Affairs, Senator Susan Ryan, of a Private Member's Bill to redress discrimination based on sex and marital status. Senator Ryan said the legislation would make it illegal for employers to discriminate on the grounds of sex or marital status, would provide a Director of Conciliation

and include reference to the HRC and the Federal Court;

- a number of initiatives are being taken in the area of the rights of the mentally ill. In August 1981 it was announced that the NSW Cabinet would shortly be examining the NSW Mental Health Act of 1958 with a view to reviewing the powers of the protective commissioner who can confiscate property of State psychiatric patients. In Victoria, in July 1981, it was announced that a 'totally new Act' would follow towards the end of that year, designed to 'liberalise the rights of psychiatric hospital patients'. In a leader of 26 November 1981, the *Age* called mental health 'our disgrace'. It urged a radical overhaul of the present system with emphasis on 'deinstitutionalisation' and a deadline for a forward program that would take mental health 'off the bottom of the priorities list'. In an address to the Second South Pacific Regional Conference on Mental Retardation in Melbourne at the end of August 1981, Associate Professor Robert Hayes, one of the ALRC Commissioners, reviewed the extent to which the common law protects mentally retarded persons from physical injury and abuse. A new book on the legal aspects of mental retardation by Professor Hayes and Dr. Susan Hayes will be launched early in 1982. In Queensland, on 23 November 1981, it was announced that the Minister for Justice and Attorney-General, Mr. Doumany, had referred to the Queensland Law Reform Commission for consideration and advice a review of the Queensland Criminal Code where antique, pejorative expressions such as 'idiots' or 'imbeciles' are repeated in a number of sections. As the International Year of Disabled Persons drew to its close, there was a widespread feeling that it had promoted, at least to some degree, a heightened appreciation of the special problems of the handicapped in our community.