injuries. She said that there was not much point in reviewing compensation laws without having regard to the knowledge of victims about the defence of their legal rights.

- Finally, in launching a book, 'Sport, the Law and You', for the Confederation of Australian Sport, the ALRC Chairman called attention to the growing number of sporting contests which 'end up as legal contests'. He referred to the decision of Mr Justice Fox in *McNamara* v *Duncan* (1971) 26 ALR 584 where compensation was awarded for injuries received in a breach of the rules of Australian rules football. He also referred to various moves towards statutory sporting injury compensation schemes. He said that moves for special schemes for sporting injuries, crime injuries, industrial injuries and motor vehicle injuries should all be seen as 'staging posts' on the journey of the law to a more just, coherent and principled approach to the compensation of victims of accidents.

aboriginal law cont'd

Racism is the snobbery of the poor.
Raymond Aron

end fiction? The ALRC continues its work on the inquiry into the recognition of Aboriginal customary laws. The reference, begun in 1977, asks whether it would be desirable to recognise Aboriginal customary laws (ACL) and, if so, what form the recognition should take. Recognition could be partial or complete, geographically confined to Aborigines living in tribal areas only, or not so confined. The most recent report on the work on this inquiry is contained in [1982] *Reform* 125. Since then, under the leadership of Professor James Crawford, the Commission has been actively pursuing its program of research and consultation. On the weekend of 7-8 May 1983 a major workshop was held in Sydney jointly organised by the ALRC and the Australian Institute of Aboriginal Studies. Present were leading consultants of the ALRC, including anthropologists and lawyers from all parts of Australian. The meeting was opened by the new Federal Minister for Aboriginal Affairs, Mr Clyde Holding. Mr Holding gave the participants a 'pep talk' on the need to reconsider the view taken by the High Court of Australia concerning the basic relationship between white and Aboriginal Australians. In the course of his talk, Mr Holding called attention to the decision of the High Court in *Coe* v *Commonwealth* (1979) 53 ALJR 403. In that case, the Court held that Australia owed no recognition to Aboriginal laws because the country had been acquired as a 'settled colony' rather than by conquest. Wherever Britain acquired territory by conquest it followed international law and arranged a treaty with the conquered peoples. Such treaties generally offered some recognition of local laws. Treaties of this kind were effected in America, India and Africa. No such treaties were ever made in Australia, because of the theory that the country had been virtually uninhabited and so acquired by settlement, not conquest. Mr Holding told the ALRC workshop that this was nothing more than a 'legal fiction'. He urged the Commission to reconsider the 'fiction' and to explore the implications of an acknowledgement, 200 years on, that Australia had been acquired from the Aboriginal people by conquest, not by settlement. In the light of the Minister's statement, the ALRC Chairman said that the Commission would be examining this question. The Senate Standing Committee on Constitutional and Legal Affairs, which met the ALRC Commissioners on 21 June, is already inquiring into the constitutional and legal implications of a Makarrata or treaty with the Aboriginal people.

resolutions passed. The 25 participants in the Sydney workshop gave special attention to the feasibility of introducing a form of local justice mechanism within traditional Aboriginal communities. The aim would be to enable the communities to deal with their community disputes and local law and order problems. Various models were discussed, emphasis be-

ing placed on traditional methods of dispute resolution in preference to the European court system followed in Australia. A number of overseas systems were examined, particularly those of Papua New Guinea, New Zealand and South Africa. Professor Crawford reports:

> General concern was expressed that the expertise that has been gathered as a result of the Law Reform Commission's work should not be lost after the ALRC reports to the government. In fact, two resolutions were passed at the Sydney meeting. The first acknowledged the importance of continuing interdisciplinary research into issues concerning Aboriginal customary laws. It recommended that information on Aboriginal laws should be distributed to communities and organisations, as well as to the general public. It was also recommended that review of the issues raised in Aboriginal customary law be accepted as a continuing on-going task of the ALRC. The Commission plans to complete its report on this subject early in 1984. It is continuing its consultation both with Aboriginal and non-Aboriginal people throughout Australia. We recognise that consultation with all interested groups is vital.

The record of the Sydney meeting and a number of important discussion documents, with tentative proposals for reform, are available from Professor Crawford at the ALRC, to any person or organisation willing to comment on it.

regional meeting. Further meetings of the ALRC Commissioners with regional consultants have been held in Canberra (December 1982), Perth (May 1983), and Brisbane (June 1983). Members of the ALRC also engaged in two weeks of discussion and consultation in Central Australia in October 1982. In this lastmentioned inquiry, Professor Crawford and Professor Tay (ALRC members), with the assistance of Dr Diane Bell, a Commission consultant and Messrs P K Hennessy and C J Kirkbright (ALRC officers) conducted meetings in Alice Springs and seven Aboriginal communities of the region. For interested readers, full details of the report can be found in Field Trip Report No. 7 *Central Australia* October 1982. Wherever possible, the ALRC party conducted separate meetings with men and women. In May 1983, Professor Crawford and Mr Hennessy conducted a series of meetings in Perth and ALRC Secretary, Mr Ian Cunliffe, accompanied by Mr Hennessy, visited Laverton, Mt Margaret, Leonora, Kalgoorlie and Cundeelee for meetings with Aboriginal communities and other interested persons. Public meetings were held in Alice Springs and Kalgoorlie. Discussions with relevant government personnel and other organisations have been held in Canberra, Darwin, Perth and Brisbane. The consultations and seminars attracted the glare of media attention.

frightening statistics. An editorial in the *Sydney Morning Herald* (17 May 1983) quoted the 'frightening statistics' of the imprisonment rate for Aborigines of about 800 per 100 000 compared with 67 per 100 000 for the rest of the population. The writer considered that 'the justification for recognising tribal law is that something is seriously wrong with the present way things are done':

> Tribal law can often be rigorous and cruel (as, too, can our law), but it is not a law of the jungle. It addresses itself, in a way our legal system does not, to those matters considered vitally important in Aboriginal traditional communities. Its acceptance, Justice Kirby suggests, might give fresh stability to Aboriginal society and protection against the erosion of Aboriginal identity.

But the journal added a few reservations:

- the implications for non-English speaking migrants who have joined the Australian community and their unlawful practices, including e.g. female circumcision;
- the implications of the suggested failure of Papua New Guinea attempts to combine customary and national laws – a 'failure' that might be disputed;
- the so called 'Apartheid' trap of different legal systems for different people in the same country;
- the difficulty of drawing the line between matters subject to tribal laws and matters subject to the general legal system.

As if in despair, the editorialist concluded:

> If the Commission can reconcile so much that seems irreconcilable, it will deserve the applause it should receive.

Spurred on by the press reports, Senator Patricia Giles (Lab-WA) asked the Federal Attorney-General whether he would agree to give 'prompt attention' to the ALRC report when it was received. Specifically she asked for consideration of the possibility of 'a committee of commitment . . . to set out the legal and cultural relationships between the Aboriginal and Islander peoples and the wider Australian community' CPD (Senate) 17 May 1983 459. Senator Evans replied that it was government policy that the reports should 'not be buried' and that he proposed a 'very different procedural approach':

> Given the enormous amount of public discussion that goes into them – the Aboriginal customary law reference has certainly been no exception in this respect – and given the expertise with which they are prepared, this government takes the view that the onus ought very much to be on those who would wish to resist the implementation of the report, rather than on those who would seek to implement it. This is very different from the approach adopted by the previous regime.

Senator Evans also said that it was government policy for a treaty of commitment to be favourably considered. He noted that the Senate Standing Committee on Constitutional and Legal Affairs, now chaired by Senator Michael Tate, was nearing completion of its report on the legal issues raised by such a treaty.

research progress. In addition to the six ACL research papers described in [1982] *Reform* 126, six further papers have now been issued. As before, limitation of space permits only the briefest statement of the issues addressed:

- *ACL and the Substantive Criminal Law* (RP 6). This paper considers the general principles applicable to the recognition of customary law in the criminal law (including sentencing). Particular emphasis is placed on the handling of such cases by Australian trial and appeal courts. The paper also discusses the ways in which ACL is and should be taken into account in determining substantive criminal liability. Both substantive and procedural rules are dealt with.
- *ACL: A General Regime for Recognition* (RP 8). This central paper discusses the general arguments for and against recognition of ACL. It draws heavily upon evidence and submissions made to the ALRC. It becomes clear that the term 'recognition' conceals a variety of different ways of taking ACL into account. These different ways are analysed and the arguments favouring certain forms of recognition in preference to others [or doing nothing] are outlined.
- *Separate Institutions and Rules for Aboriginal People: Pluralism, Equality and Discrimination* (RP 9). This paper examines the arguments for and against forms of recognition of Aboriginal customary laws. Reference is made to the values of equality, non-discrimination, pluralism and the unity of the law. It is suggested that, with appropriate safeguards, proper forms of recognition are not inconsistent with these values and indeed in some respects are strongly supported by them.
- *Separate Institutions and Rules for Aboriginal Peoples – International Prescriptions and Proscriptions* (RP 10). Various arguments, supporting or restricting recognition of ACL, based on international law and human rights standards, are discussed. It is concluded that while special recognition of ACL is not required by these standards, it is, with appropriate safeguards, fully consistent with them.
- *Aboriginal Customary Law: Problems of Evidence and Procedure* (RP 13). This paper deals with areas of evidence

and procedure in Australian courts which present special difficulties for Aborigines because of conflicts of traditions and cultural perceptions. Matters specifically examined include police interrogation, fitness to plead, dying declarations, oaths, affirmations and unsworn statements, jury trial, and interpreters. On a number of these points, tentative recommendations are made.

- *Proof of Aboriginal Customary Law* (RP 14). This paper analyses Australian and overseas experience with proof of indigenous customary law. Reference is made to expert evidence or evidence of persons who follow that law. It is suggested that the rules on expert evidence in this context do not warrant specific reform. However, the rules with respect to Aboriginal non-expert evidence are unsatisfactory, are not generally applied in practice, and require revision. RP 14 also discusses briefly other methods and problems of proof.

home strait. Senator Evans in his comment in Parliament, expressed satisfaction with the news that the ALRC was now 'in the home strait' in its inquiry into ACL. According to Professor Crawford four further papers have to be completed and are now in preparation. Two deal with Aboriginal community justice mechanisms. Two deal with sentencing of Aboriginal offenders. The ALRC also plans to issue a further short discussion paper summarising the tentative conclusions in the areas of criminal law and sentencing, evidence and procedure, and community justice mechanisms. Squeezed into this busy research program, and leadership of the ALRC projects on foreign state immunity and admiralty jurisdiction, Professor Crawford has not forgotten the conference circuit. In May 1983, in conjunction with the field visits to Western Australia, he delivered a paper to the section on Aborigines and the Law at the 53rd ANZAAS Congress in Perth. In August 1983 he plans to deliver a major paper on Aboriginal Customary Law to a Symposium of the Commission on Folk Law and Legal Pluralism of the 11th International Congress of Anthropological and Ethnological Sciences in Vancouver, Canada. Whilst in North America, Professor Crawford is planning a busy round of discussions with Canadian and United States colleagues, where nearly two centuries of experience has built up in the recognition of indigenous law. Professor Crawford is working towards the completion of the ACL report early in 1984. His careful attention to consultation with all interested organisations and groups (and in particular with Aboriginal people and their organisations) will continue right up to the completion of the report.

other developments. A few other developments in the last quarter might be noted:

- In May 1983 the High Court of Australia held that the NSW Anti-Discrimination Board had no power to investigate or conciliate a complaint by three Aborigines refused a drink in a hotel in Kempsey, NSW. In a joint judgment, the Full High Court held that the Racial Discrimination Act 1975, a Federal statute, 'covered the field' and thereby excluded even beneficial State legislation. Federal Attorney-General Evans immediately announced that the policy of the government was to permit State laws to complement Federal legislation, so long as they satisfied international standards. Amendments were foreshadowed to the Federal Act to preserve State laws.

- In May 1983 Mr Justice Lee in the Supreme Court of New South Wales held that individual Aborigines did not have the right to bring court proceedings in respect of alleged illegality relating to the revocation of Aboriginal reserve land. He held that such proceedings could only be brought by the Attorney-General or by an Aborigine

with the authorisation (fiat) of the Attorney-General. He held that the Crown Lands (Validation of Revocations) Act 1983 had validated the revocation of all of the reserves. The Chairman of the Aboriginal Legal Service Limited, Mr Paul Coe, the plaintiff in the decision criticised by Mr Holding (above) had alleged that the reserves were set aside for Aborigines under a 1909 Act and that they had been illegally alienated. He sought damages on behalf of Aboriginal people and communities.

- The Federal Minister for Aboriginal Affairs, Mr Holding, has continued his major review of Aboriginal policies. According to press reports (*Age*, 27 April 1983) he plans the enactment of Federal land rights legislation involving a number of preliminary stages. The first will be a review of the Land Rights (Northern Territory) Act to be undertaken by the former Aboriginal Land Commissioner, Mr Justice Toohey, as soon as he can be freed from Federal Court work. A panel of lawyers experienced in Aboriginal legal work will then be set up to advise on existing State land rights laws and to draft planned new Federal legislation. The Federal Parliament will then be asked to pass a resolution supporting the assertion of Federal power over Aboriginal affairs and State Sovernments will be consulted. In the run up to 1988, it seems clear that Aboriginal rights, in land and law, will become a much more visible issue in Australia.

constitutional reform

When confronted with that truly horrible accident of nature, the legal hermaphrodite, part retired but unrepentant academic, part new minted Attorney-General, any judge worth his salt will know that such a monster is not one of which judicial notice may be taken.

Sir Ninian Stephen, book launch, 22 April 1983

bitter convention. April in Adelaide is a charming month. The city of churches looks its best. The air is fresh and at night the dry cold of the desert embraces the inhabitants. April 1983 saw the Australian Constitutional Convention gather in a Chamber of the South Australian Parliament. This was the fifth convention since 1973. It was marred by acrimony and bitter debate. On his arrival home in Perth, the new Premier of Western Australia, Mr Brian Burke, declared it was 'a waste of time and a waste of money'. Federal Attorney-General, Senator Evans, ascribed the disappointment to the breach by non-Labor Governments in Queensland and Tasmania of a convention that had previously ensured equal representation of government and Opposition. According to Senator Evans, the 'stacking' of the Queensland and Tasmanian delegations with government supporters illustrated that 'the Labor Party keeps being asked to play the Marquis of Queensbury to Hells Angels'. Editorial commentators were equally sober. The Melbourne *Age* (3 May 1983) declared that politicking had won the day:

> The chief offenders were the two non-Labor States, Tasmania and Queensland. Defying the tradition that the government should have half of the places of the convention and non-government forces the other half, they stacked their delegations with non-Labor delegates. The effect was to distort the balance and therefore the voting pattern, at the convention, and to ensure that on several key issues, conservative opinion prevailed ... The Labor side complained of 'stackings'; but Labor politicians themselves voted commonly on strict party lines and not as individuals. Whilst both sides continue to play politics, the convention's attitude to any question becomes predictable. Perhaps what is needed is a widening of membership to include such persons as unionists, businessmen and academics and the infusion of new ideas which their presence would bring. The economic summit showed what can be achieved when delegates from very different walks of life put the national interest before their own.

Denouncing Senator Evans as 'ham-fisted' and the Shadow Attorney-General, Senator Durack, as 'turning summersaults and going back on proposals which he had supported while in government', The *Age* put a plague on both political houses.

Senator Evans did claim a few achievements at the convention: