because undated, post-dated, antedated or bearing the date of a Sunday. Simplification of crossings will be provided and provision made for the presentation of cheques by collecting banks to the paying bank by transmission of particulars by computer, telex or telephone rather than physical movement of the cheques. It has been suggested that this reform alone will save Australia's four biggest banks of the order of $350 million a year (*Age*, 24 February 1984, 5). If this is true, it shows the wastefulness of delay in some areas of law reform and the urgency of providing swifter attention to reform reports.

- On top of Senator Evans' announcement was the tabling of the Martin Report on the Australian Financial System by the Federal Treasurer, Mr Paul Keating. According to the *National Times* (24 February 1984) the report sets the scene for 'a banking revolution' in Australia. The thrust of the report is the suggestion of deregulation of banking, specifically the suggestion of the removal of interest rate ceilings and limitations on short-term deposits by Australian banks. These limitations have led to the strong growth of merchant banking in Australia. Removal of the restrictions would, it is suggested, remove much of the impetus for non-bank financial institutions. Amongst other things acknowledged in the Martin Report is the ownership by banks of the cheque clearing system and the suggestion of access to that system by non-bank financial institutions under the supervision of the Reserve Bank. Building society and credit union spokesmen have voiced anxiety about the proposals. Writing a financial editorial in the *Sydney Morning Herald* (2 March 1984) John Short predicted that many of the key proposals in the Martin Report would be strongly opposed by people in the present Federal Government.

- The introduction of electronic funds transfers (EFT) in Australia is now well advanced. According to reports in the *Australian Financial Review* (15 February 1984) the Reserve Bank of Australia is seeking to promote the efficiency of EFT in the Australian financial system. However, EFT has legal and social implications, as was pointed out to the Queensland Branch of the Australian Computer Society on 16 February 1984 by the ALRC Chairman. Specifically, Justice Kirby referred to the report of the United States Presidential Commission Into EFT and the changes in United States Federal law designed to preserve the privacy of credit customers and the protection of civil liberties. He pointed out that, with the introduction of EFT and cashless forms of credit, computerised records of transactions could disclose not only the physical movements of the customer but also buying patterns and preferences. The ALRC Chairman said that specific legislation, as in the United States, would be required. In the meantime, he urged attention to the ALRC proposals for general protections for privacy. See [1984] *Reform* 2.

contempt and liberty's receptacle

The obviously corrupt judge asks Mae West, 'Are you trying to show your contempt for this court?' and in her inimitable manner she drawls 'No, I'm tryina hide it'.
'My Little Chickadee', cited *Australian Financial Review*, 17 January 1984

judicial automaton. In mid January 1984 the ALRC published an issues paper in its reference on the law of contempt. Readers of these pages will recall that a reference for the reconsideration of contempt law in Australia's Federal courts, tribunals and com-

missions was given to the ALRC by Attorney-General Evans in 1983. See [1983] *Reform* 95. The reference arose specifically on the heels of the decision of the High Court of Australia not to reverse the conviction of the trade union official, Mr Norman Gallagher, for contempt of the Full Federal Court. Mr Gallagher was gaoled for two months for remarks he made. An important difference of view emerged in the High Court of Australia concerning the limits of the law of contempt, particularly as it affects so-called 'scandalising' of the judiciary. In part to resolve that difference, the matter was referred to the Law Reform Commission.

Under the leadership of Professor Michael Chesterman, full-time Commissioner, the ALRC has now distributed a 42-page issues paper and an 8-page summary version dealing with aspects of contempt law. The paper points to the importance of this area of the law. Contempt, it declares, is the law:

> concerned with people who disrupt legal proceedings, insult judges, disobey court orders, publish written or broadcast material which may interfere with the outcome of a trial, or – most controversially – try to undermine public confidence in the judicial system.

One of the chief merits of the issues paper is the way it illustrates how lawyers use the expression 'contempt' for a range of conduct affecting the due administration of justice in courts, tribunals and commissions. The paper cites a number of interesting historical examples of contempt proceedings:

- in 1773 a man of 'ferocious and terrible disposition' was prosecuted for contempt because he forced a process server to eat the court's subpoena;
- in 1900 a newspaper description of an English judge as 'the impudent little man in horsehair, a microcosm of conceit and empty-headedness' was held in contempt;
- in 1974 a solicitor's clerk in England described the judge as a 'humourless automaton'. He could not be dealt with for contempt because he had already just been sentenced for the same offence for releasing laughing gas into the air conditioning system of the court.

conflict of values. The ALRC issues paper illustrates the way in which the law of contempt in Australia operates to seek to reconcile conflicts between 'fundamental social values' such as:

- the right of free speech and a free press; and
- the right of individuals to have a fair trial.

Commenting on the issues paper, Professor Chesterman illustrated the conflict:

> The press, radio and television feel strongly that they should have substantial freedom to report and comment on court case, that this is an important aspect of the fundamental right of free speech. But if their comments were not restricted in any way at all, either by contempt law or otherwise, the fundamental right of people involved in a particular court cases to have their case tried fairly and properly without undue influence from outside publicity might be jeopardised. By the same token, the right of free speech must include some freedom to criticise judges and courts along with other public figures and institutions. If it did not, a totalitarian form of repression of speech and opinion would exist. But if this right to criticise is not restricted by law in any way whatsoever, society's interests in having a judicial system which enjoys public confidence might be put at risk by repeated and unjustifiable attacks on the judiciary.

key issues. The ALRC paper (the reference is ALRC Issues Paper No 4) lists a number of key issues for public debate. They include:

- Are the media unduly inhibited or too free with prejudicial publicity involving court cases?
- Should abusive allegations about judges be punished as contempt or should judges have to resort, like other citizens, to action for defamation?
- Should it be up to each individual judge to decide what conduct in his

courtroom amounts to contempt or should the law try to define unacceptable conduct?

- Should the judge who is the subject of contempt ever deal with the offender or is there too great a risk of prejudice in the judge being at once the victim, the prosecutor and the person who determines the punishment?
- Should contempt proceedings be used for disobedience of court orders, particularly in the Family Court?
- Should Royal Commissions have different rules for contempt than courts, even when constituted by judges?
- What role should contempt law have in relation to tribunals?

The ALRC issues paper offers no conclusive answers to these questions but poses them for expert and community discussion.

In addition to distributing the issues paper, Professor Chesterman is assembling a group of honorary consultants to assist the ALRC in its inquiry. With the approval of the Attorney-General, a number of judges, magistrates, members of tribunals, practising and academic lawyers, police, civil liberties and media representatives have been appointed to assist in the development of reform proposals. A number of research papers will be published. In addition, the ALRC is embarking on surveys of the opinions of judges, magistrates and tribunal members and is conducting interviews among journalists, current affairs reporters, lawyers, civil liberties groups and other interested parties. Later in the year, there will be a survey of public opinion on key issues of contempt law.

scandalising judges. The issue in the consultative paper which caught the eye of the media (apart from the amusing illustrations of contempt there set out) was the subject of 'scandalising' courts and judges by criticising them. Commented the *Australian Financial Review* (17 January 1984) after setting out the opinions of Mae West on this subject:

> [The view] that 'scandalising' courts or judges by criticising them, and tending to lower them in public esteem, is a sufficient ground for sending someone to gaol . . . is a view which is repugnant to any concept of a free, democratic society; and it can be argued that the presumption by judges that they can punish people for calling their role into question in itself tends to lower judges in public esteem.

The same editorial points to the inevitable political matters that are dealt with by Royal Commissions in Australia and the undesirability of attempts to 'suppress public comment and criticism while the Commission is in course':

> Surely the purpose of legislating for contempt proceedings with respect to a Commission, or a tribunal, should simply be a means of enforcing the co-operation of reluctant witnesses or the protection of the members of such bodies . . . Again, it is necessary to distinguish between interference in a trial and comment upon it . . . The best simple principle to be followed on issues of contempt, the sub judice rule and criticism of courts and judges is simply that the sacredness of freedom of speech and comment should precede any considerations merely applying to the convenience, comfort and self-esteem of judges.

The editor obviously sees the 'balance' of public interests very much from the point of view of his own vocation. But a similar point was made by Laurie Oakes in a thoughtful item in the *Age* (2 March 1984). Under the title 'Judicial Independence at Risk' and commenting on the statements in Parliament by Mr Ian Sinclair about Justice Ronald Cross in New South Wales, Mr Oakes suggests that 'when judges head Royal Commissions or 'Special Commissions' they are not acting in a judicial role'. He cites Justice Lionel Murphy of the High Court of Australia to make it plain that, when acting as Royal Commissioners, judges are 'exercising executive power':

> It may well be that the kind of comments Mr Sinclair made could lead to a weakening of public confidence in the judicial system. But if that is so, it is the fault, not of Mr Sinclair, but of those who appoint judges to carry out non-judicial functions. The independence of the judiciary is put at risk.

star chamber. These comments by Mr Oakes were made on the sequel to a speech to the House of Representatives by the leader of the National Party, Mr Ian Sinclair. Rising in the Chamber on 28 February 1984, Mr Sinclair criticised Justice Cross in respect of a report made by the judge as Special Commissioner inquiring into allegations of corruption which Mr Sinclair had earlier made. These allegations related to a suggested proposition put to Mr Sinclair over lunch that certain criminal proceedings brought against him could be terminated for payment of a sum of money. Mr Sinclair was later acquitted by a jury in respect of these charges. In the course of his speech, Mr Sinclair criticised Justice Cross' findings against himself as 'simply wrong' and claimed that the Special Commission was 'a Star Chamber' or 'kangaroo court':

> Justice Cross gained considerable publicity for the allusion in his report to the Spanish Inquisition. I suggest that in the future, if Justice Cross draws some objective but colourful analogy with the proceedings over which he presided, he might find himself drawn irresistibly to phrases such as Star Chamber or Kangaroo Court.

As a result of the speech, and only for the second time in its history, the House of Representatives passed, along party lines, a motion of censure against Mr Sinclair as a Private Member. A statement issued by Justice Cross' office was reported in the press as saying:

> Judges are traditionally unable to reply to such attacks. The judge is content to let the report speak for itself.

In the report, Justice Cross had concluded, in respect of Mr Sinclair's allegations of a corrupt proposition:

> The Spanish Inquisition would not have convicted the Devil himself on the sort of withdrawing, hedging, qualifying answers in Mr Sinclair's record of interview ... Even Mr Sinclair's very slightly firmer evidence before the Commission [of Inquiry] had too many qualifications, inconsistencies and improbabilities to justify this Commission giving it credibility.

liberty's receptacle. Commenting on Mr Sinclair's criticism of Justice Cross, the Prime Minister (Mr RJ Hawke) told the House of Representatives that such criticism violated fundamental principles of society and attacked the basis of law and order by impugning in Parliament the integrity of a judge. Never in the history of the House of Representatives, declared Mr Hawke, had these principles been so starkly and blatantly jeopardised as by Mr Sinclair. But Mr Hawke made it plain that he was not suggesting that Members of Parliament should not question the reasoning of members of the judiciary. That was a different thing to suggesting that they had acted improperly and without integrity and impartiality. If Parliament sat idly by while judges were attacked, said the Prime Minister, the confidence of society in the system of the judiciary, the judicial process and the relationship between the Executive Parliament and the judiciary would be at risk. He said that the Opposition parties would be quick to criticise Mr Norm Gallagher or any other trade unionist who attacked the integrity of an Arbitration Commissioner or judge.

Mr Sinclair said, in reply, that his criticisms were not in relation to Justice Cross' role as a judge but as a Special Commissioner. He repeated his assertion that he had been denied natural justice and that the findings of Justice Cross had not been expressed in a way consistent with 'normally judicious legal language'. The House of Representatives passed the Prime Minister's motion expressing its full confidence in Justice Cross. The Deputy Prime Minister, Mr Bowen, invited Mr Sinclair to repeat his accusation against Justice Cross without the benefit of the absolute privilege of Parliament 'to let the judge test him in another impartial tribunal'.

Calls were even made, in some quarters, for the limitation of the absolute privilege enjoyed by Members of Parliament in the Chamber. But commenting on these calls, the ALRC Chairman, Justice Kirby, said that the

ALRC inquiry into contempt, like the earlier inquiry into defamation law reform, would draw the line at inhibiting in any way the absolute privilege of Parliament. Speaking on the ABC, he said:

> It is not quite true to say that there is no chance of retribution. There is, of course, the parliamentary retribution . . . in the censure procedure. There are also electoral considerations. We are looking at the whole body of the law of contempt, of people's rights in a free society to criticise the judiciary without the inhibition of imprisonment. We are looking at whether our laws should be closer to those of the United States in respect of legitimate criticism of the judiciary. No institution is beyond criticism. No human institution is beyond fallibility. Therefore, we are looking at these issues. But in respect of parliamentary statements within the Chamber, I think they are in a separate class. People must realise that the parliamentary institution is the ultimate guardian and receptacle of our liberties. Even though sometimes abused, the right of absolute privilege within the Chamber is fundamental to our traditional democratic freedoms.

same width? Addressing himself specifically to the width that should exist for contempt protection of Royal Commissions, Senator Gareth Evans QC, Federal Attorney-General, foreshadowed reforms at a conference organised on Commissions, Contempts and Civil Liberties at the Australian National University in Canberra on 25 February 1984. Pointing out that Royal Commissions can be both useful and potentially dangerous, Attorney-General Evans referred to the problems of privilege in and comment upon Royal Commissions, such as emerged in 1983 in events surrounding the latest Hope Royal Commission on the David Combe affair. But what should be done? Senator Evans:

> The short answer is: accept the need to rethink it completely, and give the task to the Australian Law Reform Commission – which has established a fine reputation for producing sensible answers to delicate questions of legal policy. Which is exactly what I did, on 7 April 1983, in the immediate aftermath of the Gallagher High Court case, and as a result of my own long-standing disquiet about a number of aspects of the law of contempt as it applied to courts, tribunals and Royal Commissions. That reference is now proceeding expeditiously under the direction of Professor Michael Chesterman, with the first visible fruits of his labours, an admirable issues paper published in January . . . The main point I wish to make about contempt in the context of courts and Royal Commissions is that in my view there is no need whatever for Royal Commissions to be armed with contempt powers of the same width as have traditionally been thought appropriate for the courts. This follows essentially from the basic differences in the functions of the two bodies.

The Attorney-General also expressed the view that the Parliament did not need to protect its dignity or reputation by contempt proceedings, such as were brought against journalist Laurie Oakes in 1981. He said that parliamentarians had 'ample opportunities' to reply under cover of absolute privilege. 'We ought to practise what we preach about free speech', declared the Attorney-General.

australian cases. For one reason or another, contempt cases appear to be arising more frequently in Australian courts. The press in recent days includes the following reports:

- The High Court of Australia has reserved its decision in the appeal by a barrister who was fined by a County Court judge in Victoria after he asked the jury to put aside the judge's comments. Mr BJ Shaw QC, on behalf of the barrister, Anthony Radcliffe Lewis, told the High Court judges that the case raised 'critical questions' about what counsel can say in their addresses to the jury in criminal trials throughout Australia. The judge found that remarks made to the jury (to the effect that he had 'obviously' made up his mind on the facts) amounted to a wilful insult constituting contempt. An earlier appeal to the Supreme Court of Victoria failed to secure the quashing of the conviction for contempt now sought from the High Court.

- In the Supreme Court of New South Wales, Justice Hunt fined John Christopher Anderson $500 for contempt of court in publishing defama-

tory statements about a proposed development by Perth businessman Alan Bond. The publication was made in contravention of orders restraining Anderson (*SMH*, 4 February 1984).

- On 28 February 1984, Judge Jane Mathews, in the District Court in Sydney, discharged the jury in the 12th day of a criminal trial, following the screening of comments on the accused, the previous evening, in the Mike Willesee public affairs program on Television Channel 9. The judge, 'with the greatest regret', believed she had no alternative other than to discharge the jury. 'In my view the effect of this material on the mind of even the most reasonable juror, notwithstanding the strongest of warnings, cannot lightly be dismissed'. The judge said that the screening of the program in the midst of the trial amounted to a serious contempt of court which would be referred to the NSW Court of Appeal. According to the report in the *Sydney Morning Herald* (29 February 1984) a juror contacted the *Herald* expressing anger that the Willesee program had gone to air causing the long trial to be aborted. He said that a very little effort on the part of the television channel could have resulted in a check that the trial was still in progress.

moles beware. Meanwhile, a couple of developments overseas:

- In Canada, on 10 January 1984, the Federal Justice Minister, Mr Mark MacGuigan announced his intention to introduce laws aimed at limiting the discretionary powers of judges to convict and punish people for contempt of court. The move follows controversial cases in which two Ontario women were cited for contempt and sentenced to gaol terms for refusing to testify against the men they had accused of being their assailants. According to the *Globe and Mail* (10 January 1984) Mr MacGuigan said that the law failed sufficiently to define what amounted to contempt of court and to fix maximum penalties as well as clear-cut protections for persons charged with contempt. Speaking at the Lawyers' Club of Toronto, he said that he was proposing a maximum two-year sentence for the most serious cases of contempt. 'We have come to believe', said the Canadian Minister, 'that the Rule of Law must at least mean that those persons who are charged must be charged according to clear rules, that they must have clear protection and that they must have defences available to them'. Doubtless in considering the final form of the proposed Canadian contempt laws, the Minister will have regard to the report of the Law Reform Commission of Canada on contempt of court (CLRC 17, 1981) referred to in [1983] *Reform* 96.

- In Britain, the English Court of Appeal on 17 December 1983 had to consider whether s 10 of the Contempt of Court Act 1981 exempted the *Guardian* newspaper from the obligation to disclose a document sent to it in confidence relating to matters of national security. That section provides certain protections for the media from the disclosure of sources; but not where it is established, to the satisfaction of the court, that disclosure is necessary in the interests of justice or national security. The Court of Appeal held that national security required the identification of the informant. It was subsequently disclosed that the 'mole' was 23-year-old Sarah Tisdell, a Foreign Office clerk. The *Times*, in an editorial (17 December 1983) declared that the protection to confidential journalism embodied in the 1981 Act remained 'substantially unaffected'. But in the meantime, it expressed the cautionary words 'Let the mole beware'.