be kept to a minimum to ensure as fair a trial as possible.

NSW judge charged. Judge John Foord of the NSW District Court has also been charged on two counts of attempting to pervert the course of justice, in relation to the same case concerning the Sydney solicitor. The charges were laid by a member of the Australian Federal Police, as a result of allegations referred to the Federal Police by Mr Ian Temby QC. The case will also be tried in the ACT.

contempt powers and the public interest

Nye Bevan once said of the British Press that you cannot muzzle a sheep.

H Evans, 'The Half-Free Press', in Granada Guildhall Lectures, *The Freedom of the Press* (1974), p 12.

a parliamentary muzzle? An Australian newspaper which seems little inclined to be sheeplike is the *National Times.* In June of this year, it provoked the Commonwealth Senate into exercising its contempt powers by publishng in-camera evidence given to the first of the two Senate Committees inquiring into the allegations made against Justice Murphy. Those accused of contempt were John Fairfax & Sons Limited (publisher), Mr Brian Toohey, (editor) and Ms Wendy Bacon (the writer of the offending article). At the hearing by the Senate Committee of Privileges they declined the invitation to apologise and raised instead the defence that the disclosure of evidence was in the public interest. This, they argued, overrode any power of the Senate to discipline them on grounds of contempt. In taking this stand, they were subsequently supported by the Press Council. The Committee showed little liking for this argument and resolved unanimously that the publication constituted a contempt, being directly in defiance of a long established principle that the publication or disclosure of proceedings of committees conducted with closed doors should constitute a breach of privilege. The question of what punishment, if any, should be ordered was reserved by the Committee, on the basis that an opportunity should first be given to the persons affected to make submissions on the matter of penalty. In the view of Mr Michael Sexton, a Sydney lawyer writing in the *Financial Review* (2 November 1984), the Senate Committee might however have come to wish that the matter had never been referred to it in the first place. Mr Sexton's argument is simply that none of the options for punishment open to the Senate is satisfactory. Imprisonment is a possibility but 'the spectacle of journalists and publishers climbing into prison wagons outside Parliament House with television cameras whirring is one to make even the most resolute politician think twice'.

A second possible option is a fine, but the legality of this has been in doubt for some time. A Senate Privileges Committee thought in 1971 that this power subsisted but a House of Representatives Privileges Committee thought otherwise in 1978. So did the recent report of the Joint Select Committee on Parliamentary Privilege, which issued its Final Report in October of this year. The third option, that of recording the Senate's disapproval of what was done and possibly issuing a reprimand, did not seem adequate in view of the refusal of the persons charged to adopt an apologetic attitude. Mr Sexton's article also expresses the view that Parliamentary Committees are not appropriate for conducting inquiries such as are normally performed by courts. 'Overall', he wrote, 'there seems a strong argument for confining the activities of Parliamentary Committees to what they have always done best – the examination of non-partisan issues with a view to producing new policies and new legislation.' The Joint Select Committee on Parliamentary Privilege, in its Report was not inclined to question the role of Parliamentary Committees in this regard, but made a clear recommendation to the effect that their contempt powers should be exercised sparingly, and with great restraint.

muzzles on parliamentarians? Accusations of contempt of parliament were cast at the NSW Premier, Mr Wran, following a remark of his, made while overseas, that the evidence given by the NSW Chief Stipendiary Magistrate, Mr Clarrie Briese, to the second Senate Committee dealing with the Murphy affair raised doubts as

to Mr Briese's suitability for the post of Chief Magistrate. Mr Wran was unrepentant in his assertion that his remarks did not pressurise Mr Briese to such an extent as would constitute contempt. He added, in terms reminiscent of the defence raised by the *National Times* in its Senate contempt case;

> However, there are wider interests to be balanced by the administration of justice in this State and I will not be muzzled or intimidated in what I perceive as my duty (*Australian*, 9 October 1984).

muzzles on judges? The allegation, put to the Prime Minister in the course of the 'Great Debate' between him and the Leader of the Opposition during the election campaign, that ASIO had tapped the telephone of Mr Brian Toohey, Editor of the *National Times* and had recorded a conversation between him and his legal advisors during the preparation of a defence to a prosecution for publishing secret documentary material, raised yet again an allegation of contempt.

Mr Ron Castan, QC, the President of the Victorian Council of Civil Liberties, told the *Age* that 'spying on a litigant's conversation with his legal advisers would be an outrageous contempt of the High Court, deserving of severe censure'. Authorisation under the ASIO Act would not amount to a defence, because 'it would be an interference with the High Court and with the judicial process' (*Age*, 30 November 1984).

In a speech delivered on December 2 at the College of Law in Sydney, Justice Kirby, former ALRC Chairman, suggested that the media's reaction to the matter involved 'double standards'. The media, he said, were prepared to publish transcripts of the illegally-obtained '*Age* tapes' without any concern for issues of privacy and legality, but 'cries of horror and outrage filled the land' when their own telephones were tapped. This speech provoked Mr Leon Punch, Leader of the National Party in NSW, to suggest in the Legislative Assembly the next day that in his new post as President of the Court of Appeal, Justice Kirby should be less inclined to make out-of-court speeches. (Mr Punch did not, however, actually talk of applying a muzzle).

secrecy of investigatory commissions. The *National Times* is also facing contempt proceedings for disclosing sections of the report of the Slattery Special Commission of Inquiry into early release of prisoners in NSW, in defiance of an order by the commission, Justice Slattery, that these sections should be withheld from publication in order to ensure a fair trial for those charged with offences arising out of the Inquiry. Once again, the *National Times* has put forward the defence that disclosure was in the public interest. The use of the Special Commissioner's contempt powers in this situation furthers a purpose which according to more familiar patterns is achieved by the common law of contempt: that is, the restraint of publications which may prejudice a pending trial. But underlying the defence of 'public interest' raised by the *National Times* in both the Senate Committee case and the Slattery Inquiry case is the assumption that, when investigatory bodies such as these choose to prohibit the publication of evidence or of conclusions reached, there is a risk that they will never see the light of day and that prosecutions and other remedial measures which ought to be set in train will never occur because they are politically unpalatable. By publishing the material in question, the *National Times* has pre-empted the possibility of discovering how serious this risk is. On the other hand it would argue that, if it had not published the public would never have discovered that evidence justifying remedial measures was in the hands of the relevant government but was not being acted upon. This dilemma has reappeared in even sharper form in the context of the Costigan Report.

The contempt hearing arising out of the publication of the Slattery material has been adjourned pending the conclusion of the criminal trials recommended by the Report. It remains to be seen whether the NSW Court of Appeal, in hearing the contempt charges, will investigate the full depth and ramifications of this dilemma.

contempt everywhere. The merry-go-round of 1984 contempt prosecutions and accusations has been kept in motion by many other incidents as well. ALRC staff working on the Contempt reference (see [1984] *Reform* 62) are not worried about the topic becoming obsolete, despite intermittent use of the word 'consensus' in public life. Some further examples are:

- The Federal Minister for Territories and Local Government, Mr Tom Uren, was strongly warned by the Registrar of the Family Court, Mr LJ Gilroy, that a letter written by Mr Uren to Justice Hogan, of the Family Court, bordered on contempt of the court because it expressed views as to how a case coming before Justice Hogan should be decided. No further action was taken against Mr Uren. Mr Uren's chief concern was that imprisonment of a woman for contempt for failing to obey a Family Court order might continue for an indefinite period.

- Proceedings in relation to the contempt charges brought against Sydney's Channel 9 TV station and the producers of the Mike Willesee television program in respect of the alleged contempt of the trial of James McCartney Anderson in March of last year took a further step forward when on 16 July the NSW Court of Appeal refused an application to have the matter heard by a jury. This was the first time for many years that the question whether jury trial was appropriate for a prosecution for contempt under the *sub-judice* rule had been argued. The Court of Appeal was not prepared to discontinue proceedings already commenced by its Registrar so as to make way for an indictment by the NSW Attorney-General which could lead to a jury trial. An application for leave to appeal against this ruling was rejected by the High Court on 7 December, 1984.

- Activists campaigning in Sydney for abolition of 'police verbals' have found an extra subject to campaign about in recent months, namely, the law of contempt. Leaflets were allegedly distributed on the footpath outside the Supreme Court building in Darlinghurst, containing material which might influence prospective jurors who received the leaflet because it suggested that police officers were inclined to fabricate evidence.

On October 9, two men – one of them the well known prison activist, Mr Brett Collins – were remanded on bail to the Court of Appeal for allegedly committing contempt by distributing the leaflets. The matter is part heard before the Court of Appeal and was set down for further hearing on 10 December. On 15 October, two more men were charged by Justice Cantor for distributing the same leaflet in the same place and after a series of short adjournments were convicted of contempt and sentenced to four months' imprisonment. These convictions were however reversed on 9 November by a majority of the Court of Appeal (Justice Kirby, and Justice McHugh; Justice Mahoney dissenting) and the convicted men were released from gaol. In the majority reasons for judgment, handed on 30 November, Justices Kirby and McHugh explained that the adjournment granted to the accused had not been sufficient to allow them to prepare a proper case in defence and that they had not been permitted by Justice Cantor to make unsworn statements from the dock in their defence. But the reasons for judgment also contained criticisms of the use of this informal mode of summary trial in cases where the events in question do not occur within the sight or hearing of the presiding judge. In this respect, they take issue with dicta of the former President of the Court of Appeal, Justice Moffitt in a 1982 decision on similar but not identical facts, also involving Mr Brett Collins. The dissenting judge in the recent decision, Justice Mahoney, was concerned that the adjournment granted by Justice Cantor may not have been long enough, but took the view that this was not sufficient to vitiate the conviction. The conflict of views in the two judgements highlights the difficulties of maintaining standards

of 'natural justice' in the context of the informal, summary procedure whereby judges who are confronted with an apparent instance of contempt within or near their court rooms may try the contempt on the basis of what they perceive with their unaided sense, or of matters reported to them by court officials. The advantages of this summary procedure are that it is swift and efficient, but these advantages are outweighed if the trial which takes place is not conducted in a manner which is wholly fair to the accused. Indeed, the advantages are wholly dissipated if through erring on the side of informality or demonstrating bias the presiding judge provides the basis for a successful appeal on the ground that natural justice has been denied.

who needs family law anyway

Our Ford . . . has been the first to reveal the appalling dangers of family life.

Aldous Huxley, *Brave New World*

yet more constitutional problems. Ever since the Family Law Act came into operation 10 years ago, there has been continuing conflict between the State Supreme Courts and the Family Court over the jurisdiction of each to deal with disputes arising from the breakdown of marriages. Moves to sort out the confusion received a severe set back in December last year with the handing down of two decisions by the High Court and with the defeat of the referendum on the interchange of powers.

In the first case, *Cormick v Cormick,* the High Court considered the question of what children fall within Commonwealth power. The definition of 'child of a marriage' has had a chequered history. As originally enacted the definition was wide enough to cover all children who were being cared for by a married couple and formed part of their family. However, the High Court in *Russell v Russell* said that this definition was too wide, and the Parliament amended it to cover only children born to or adopted by both spouses. As soon became all too evident, this left awkward gaps in the Family Court's jurisdiction. Children from spouses' previous marriages and any adopted or ex-nuptial children of either of them fell into the jurisdiction of State Supreme Courts. This often meant that parallel proceedings had to be instituted in two courts in relation to children from the same family unit.

This situation was plainly unsatisfactory. Many argued that Parliament had overreacted to the *Russell Case,* narrowing the definition of 'child of a marriage' further than was warranted by the majority's reasoning, and that in any event the court might be willing to reconsider the whole question afresh. Parliament decided to chance its arm and amended the definition of 'child of a marriage' to restore to the Family Court much of the original jurisdiction. As a cautionary measure, the definition was broken into six separate categories, permitting the High Court to strike out those it considered invalid without bringing the rest down.

The *Cormick* case fell into the last, and widest, category, covering children not born to or adopted by either spouse but who lived with them as part of their family. Mrs Cormick had brought proceedings in the Family Court seeking the custody of her illegitimate grandson, now aged six, who had lived with her and her husband since he was 22 months old. The grandmother said that the little boy had been reared by her as if he was her own child. Her daughter, the biological mother, opposed the making of the custody order and argued that the Family Court had no constitutional power to hear the grandmother's application. She said it had to be heard in the State Supreme Court. The case was removed to the High Court and the Commonwealth intervened on the grandmother's side and the States of Queensland and Tasmania intervened on the daughter's.

The Commonwealth argued that the connection with the marriage power lay not in how the children came to form part of the married couple's family but rather in the fact that the couple had assumed parental responsibility for their care and nurture. In other words the married couple do not have to be the biological parents, it is enough that they stand in *'loco parentis'* to the