in the study, policy and practice of criminal law, penology and criminology, members of enforcement agencies and custodial institutions, and community representatives.

Judges and magistrates must be substantially involved in any Sentencing Council and in formulating proposals, initiating research, and monitoring its activities. They will be intimately involved in interpreting any statutory guidelines approved by parliament, and in appeal cases as they always have been, but will be armed with better information and statutory guidelines as to the exercise of their discretion and hopefully the availability of better training and information for sentencing. It is misleading to suggest that this involves any erosion of the long-standing tradition of a robust and independent judiciary.

Nothing in the proposal for a Sentencing Council reduces parliament's power to set limits of decision-making, since any change must receive parliamentary approval.

A Sentencing Council would provide a forum in which public debate can take place about punishment policy in relation to existing offences and any new offence, thus reducing the likelihood of ad hoc decisions made without the opportunity for deliberation.

The Judicial Officers Act 1986 (NSW) has taken a useful first step in establishing a Judicial Commission whose functions will include monitoring sentences imposed by courts and disseminating information and reports about them.

the 'new right' and the constitution

> No one can fail to realize that a large share of Australia's glorious achievements have been won by the heroic privates in the industrial army of Australia.
>
> John Gregory, *Australia*, Cambridge 1916

The current political debate concerning the possible deregulation of industrial relations has focused attention on the Commonwealth's Constitutional power in this area. The so-called 'New Right' has suggested that deregulation of the industrial relations system could be achieved by reducing the role of the Conciliation and Arbitration Commission and encouraging individual contracts between employers and employees about wages rates and conditions of employment. They further suggest this can be achieved through the existing provisions of the Constitution.

However, to do so calls into question the traditional approach to Commonwealth labour legislation, which is based principally upon s51(xxxv). This provision enables the Commonwealth to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State'.

Mike Taylor, commenting on the issue in the *Australian*

> The greatest impediment to wholesale labour market deregulation in Australia is the Constitution and its established interpretations. As successive federal governments have found to their cost, Australia's Constitution is an unyielding document, and no more so than in the area of industrial relations.
>
> (17 December 1986)

The Advisory Committee on the Distribution of Powers of the Constitutional Commission in its issues paper notes the limitations inherent in s51(xxxv):

- Parliament cannot legislate directly on terms and conditions of employment. Moreover, the Commonwealth is not free to set up bodies like wages boards or conciliation committees because it has been held by the High Court that these would not be engaged in conciliation and arbitration within the meaning of the Constitution.
- The section also limits the kind of matters with which the institution created by the Commonwealth, the Australian

> Conciliation and Arbitration Commission, can deal with under the terms of the Constitution. These are *industrial disputes* which are interstate in character.
>
> (*Issues Paper: Committee on the Distribution of Powers*, p18)

The 'New Right' has proposed that the various limitations of the power could be overcome by the use of the external affairs, trade and commerce, corporations or incidental powers of the Constitution. For example, the external affairs powers could be used to allow a government to cite international treaties to enforce private employer-employee contracts.

There is some concern as to the propriety of such a course. One person with serious reservations on this score is the Hon Ian McPhee, MP, a former Federal Minister for Employment and Industrial Relations.

Mr McPhee accepted the invitation of the Distribution of Powers Committee to address it on the matter of industrial relations and constitutional reform. He states that the use of powers other than s51(xxxv) for the purpose of industrial relations would establish a dangerous procedent and would distort the Constitution. He notes a common concern that if other heads of power were used to deregulate the labour market, this could establish a precedent for a Labor government to gain control of prices and wages.

In the article in the *Northern Territory News* (6 November 1986) Bill Goff notes:

> The Constitutional Commission's committee on the distribution of powers addressed the industrial relations issue from a quite different angle.
>
> This committee drew attention to the imbalance in powers between the Commonwealth Conciliation and Arbitration Commission and the various State tribunals, most of which have greater direct influence than the federal body because of its limited constitutional power.
>
> But the Commission's discussion paper seriously questioned the efficiency of having both State and Federal regulatory bodies adjudicating in the same industry.
>
> While not saying so, the Constitutional Commission was acknowledging what the High Court, in several recent decisions, and most participants in labor negotiations also have recognised – Australia has a national economy and institutions which stress State-by-State solutions to economic problems are a drag on economic efficiency.

The Distribution of Powers Committee has noted the difficulties which occur on the factory floor because some employees are covered by federal awards made by the Australian Commission and others by a State award made by the appropriate State tribunal, and others by no award. More importantly the powers Committee mentions that if the Commonwealth vacated the field of industrial relations this would not necessarily result in the cessation of awards covering an industry:

> Automatically with the abolition of the Commonwealth system the State systems would operate and people who had been bound by federal award would then be bound by the appropriate State award. Therefore the abolition of the federal system would not create the free market in labour relations which from time to time is proposed for this country. If one were seeking to achieve this result it would be necessary to abolish all institutions, federal and State, before a market uninfluenced by tribunals could be seen to operate in Australia.
>
> (*Issues Paper: Committee on the Distribution of Powers, p 19)*

However, as Bill Goff notes, a final irony has arisen out of the current debate:

> The 'new Right', by proposing its radical solution of keeping Government and judicial regulation right out of industrial relations, has served to concentrate the minds of those who want to streamline and improve that very Government and judicial regulation.

odds and ends

■ ***social security fraud.*** The 1985-6 Annual Report of the Director of Public Prosecutions (Cth) has expressed concern at the investiga-