Commonwealth scheme should recognise as spent those convictions that are recognised as spent under any State or Territory scheme. The States and Territories should be encouraged to adopt similar provisions.

new anti-discrimination legislation. Former offenders who are unreasonably discriminated against on the basis of their criminal record should have a legitimate ground of complaint. To give real protection to former offenders, Commonwealth legislation should be enacted along the lines of the Sex Discrimination Act 1984 (Cth) making it unlawful to discriminate unreasonably on the ground of criminal record. The Commonwealth should encourage adoption of similar anti-discrimination provisions by the States and Territories. Federal legislation should not limit State protections that would be capable of operating concurrently. The protection should extend to all convictions, whether they are 'spent' or not.

Spent convictions (ALRC 37) is available from Australian Government Publishing Service bookshops. The cost of the report is $9.95.

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constitutional commission

> It is really quite annoying to see how people who have been educated, and ought to know better, will persist in going home to England, and living in barbaric London or uncivilised Paris; in spending their useless lives among pictures, and statues, and books, and other unpatriotic things, instead of enlightening and enlarging their intellects by the contemplation of the grand simplicity of a red-gum, and learning refinement of manner from a member of Parliament.
>
> Marcus Clarke, *Australian*, 8 May 1869

work of advisory committees. The Constitutional Commission's five Advisory Committee's — Individual and Democratic Rights, Executive Government, Distribution of Powers, Trade and Economic Management and the Judicial Committee — are nearing the end of their work. Their reports to the Commission as a whole are being launched over a four-week period beginning on 20 July.

Three months will be allowed for discussion in the community, and for people to make further submissions to the Constitutional Commission.

The Commission will report by 30 June 1988. Its final report will cover the subjects of the five Advisory Committees as well as other areas.

In the past 12 months the Constitutional Commission has held 92 public hearings in 27 different places in all States of Australia. It has received more than 3 000 submissions and has distributed over 30 000 copies of the Australian Constitution.

individual and democratic rights report. Previous issues of *Reform* have reported on background papers issued by the Advisory Committee on Individual and Democratic Rights to the Constitutional Commission [1986] *Reform* 200.

That Committee has now reported to the Constitutional Commission and its report has been published.

The Report proposes a number of significant amendments to the Constitution to entrench certain rights in the Constitution. In addition, in respect of some rights, the Committee recommends that, although they would be included within the Constitution, they would not be entrenched: States could 'opt-out' of those particular provisions of the Constitution.

legal procedures. One set of recommendations includes rights in respect of legal proceedings. According to the Committee, the Constitution should provide for jury trials for offences punishable by more than 12 months imprisonment, the presumption of innocence and protection against self-incrimination, double jeopardy and unreasonable search or seizure. In addition, there would be a prohibition on cruel or degrading treatment or punishment. There would be further provisions that

> 80. The Commonwealth or a State shall not deny to any person
> (i) access to the courts;
> (ii) a speedy trial (sic);
> (iii) reasonable access to legal representation and to an interpreter;
> (iv) reasonable information to enable any proceedings to be understood;
> (v) an appeal from a final verdict or judgment.

However for all of these, including even the prohibition on cruel or degrading punishment, States could opt out.

socio-economic rights. The Committee considered inserting in the Constitution a number of rights loosely described as 'socio-economic rights'. These included the right to private property, the right to work and an adequate standard of living, the right to strike, rights to education, privacy and to cultural linguistic and environmental heritages. For all of these, the Committee concluded that Constitutional provision was not appropriate. The only exception was a limited form of right to private property extending the present protection from arbitrary deprivation of property without compensation to deprivation by a state and to Commonwealth action in the territories.

aboriginal concerns. The Committee devoted a considerable part of its report to Aboriginal concerns, finally recommending that the present 'races power' should be deleted and instead there be a power to make laws 'for the benefit of Aboriginal people and Torres Strait Island people'. In part, the reasoning behind this recommendation seems to be a desire to make it clear that laws passed under the races power in respect of Aborigines must be for the benefit of Aborigines. However, the only reason given in the Report for the removal of the power to make laws benefiting the people of other races is

> The Committee considers that section 51(xxvi), even its present form, is offensive in its operation, turning as it does upon a concept of 'race' which is not a valid physical or scientific concept.

elector referendums. The Committee recommends that a proposed amendment to the Constitution which is supported by at least 500 000 petitioners must be put to a referendum.

voting. Further recommendations are concerned with voting at elections. The first is that the size of electorates should not vary by more than 10% in terms of electors in each electorate. That recommendation would apply to elections for the Commonwealth Parliament and in elections to State Par-

liaments which are run on a electorate basis.

The Individual and Democratic Rights Committee report on these matters recommended that restrictions on qualifications for office should be removed. The Committee considers that every citizen entitled to vote should be qualified to be elected. This also would apply to State and federal Parliaments. Disqualifications from office by reason of dual citizenship, attaintive treason or other offences punishable for more than one year or undischarged bankruptcy or insolvency should be removed. Instead the only disqualification of this kind should be a disqualification of persons convicted of treason who are not pardoned.

other work – qualifications of members of parliament. An example of one section of the Constitution which may need up-dating is s 44(iv) which relates to the disqualification of members of Parliament in receipt of 'any pension payable during the pleasure of the Crown out of any revenues of the Commonwealth'. This phrase is designed to prevent the Crown influencing members of Parliament by threatening to withdraw their pensions. It originated from an 18th century English statute and its meaning was debated recently when Mr John Stone, former Secretary of the Treasury, announced that he would run as a Senate candidate in the July election. He had resigned from the Public Service and is in receipt of a Commonwealth Superannuation Pension.

There are at least two views of what this phrase means. On the one hand some commentators argue that the words do not apply to pensions granted under statute such as Mr Stone's, because the Crown does not have power to vary the pension at will. On this view it is argued that the sub-section applies only to those pensions dependent upon Crown pleasure such as pensions paid in 18th century England to highly successful military officers. In 1981 the Senate Standing Committee on Constitutional and Legal Affairs advanced these arguments to support their proposition that disqualification of MP's on this basis served no useful purpose today and therefore should be deleted from the Constitution.

In contrast, Professor Blackshield, Professor of Legal Studies at LaTrobe University, considers that the phrase relates to any pension which the Government has power to vary or withdraw. This would be the case even if the pension was covered by statute because the statute could be changed. The British Government legislated in 1869 specifically to allow a retired public servant on a pension to become a member of Parliament after deciding that the 18th century statute probably did preclude such persons from sitting.

Professor Blackshield's argument is that the founding fathers chose to adopt the words used in the 18th century statute, not that of the 1869 statute, leading to the presumption that they intended to exclude statutory pensioners from becoming members of Parliament. This reading of the founding fathers' intention is not borne out by at least one author of the Constitution. Sir Samuel Griffiths stated that 'the only pensioners during pleasure are military pensioners'.

Webster's case. Section 44(iv) has not been the subject of proceedings before the High Court however Professor Blackshield mentioned, in a television interview relating to John Stone's position, that Chief Justice Barwick had

ruled in another case that the original meaning of the words used in the Constitution had to be taken. The case to which he was referring was *Webster's case.* (In re Webster [1975] 49 ALJR 205) This case turned on the meaning of sub-section 44(v) which makes any person having 'any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth' incapable of being chosen or sitting as a member or senator (subject to some exceptions). Barwick CJ interpreted this section narrowly in holding that its scope was confined to the purpose of the 18th century statute from which it was derived. This purpose was to 'secure the freedom and independence of parliament from the Crown and its influence' (per Barwick CJ 208). The 17th century statute was not, according to Barwick CJ, intended to prevent a conflict of interest and duty on the part of members who had a pecuniary interest in a government contract. Barwick CJ came to this view despite the use of the words 'pecuniary interest' which did not appear in the 18th century statute, and the intention of the founding fathers gleaned from the convention debates that the subsection was intended to prevent such a conflict. He stated that the provision 'however vestigial, must be enforced' and decided on the facts that Senator Webster should not be disqualified.

* * *

telephone tapping

> These words hereafter they tormentors be!
>
> Shakespeare, *Richard II*

> These are but wild and whirling words, my lord.
>
> Shakespeare, *Hamlet*

A recent issue of *Reform* carried a story about the recommendations of the Joint Select Committee of the Australian Parliament on the Telecommunications (Interceptions) Amendment Act 1986 ([1987] *Reform* 21). The Bill was assented to on 5 June 1987. Police phone-tapping powers will be extended considerably when the legislation is proclaimed.

new phone-tapping powers. The Bill makes provision for a phone tapping agency to be set up within the Australian Federal Police. It will act on behalf of the States, the New South Wales Drug Crime Commission and the National Crime Authority.

At present, interception of a telephone communication may only be carried out by the Australian Security Intelligence Organisation in relation to national security or by the Australian Federal Police in relation to a narcotics offence.

Under the Bill, the power to intercept is extended in relation to offences to include

- murder
- kidnapping
- a narcotics offence
- an offence for which the punishment is imprisonment for life or a maximum period not less than 7 years where the conduct of the offender constitutes