and the exercise of discretion by prison staff. The discussion paper also contains detailed proposals for the treatment of ACT prisoners, an ACT prison discipline scheme and grievance mechanisms for ACT prisoners.

comment invited. All three Discussion Papers and a summary of them are available from the Commission. The Commission's proposals are tentative and are published in order to attract public comment. Extensive consultations including public hearings in all Australian capital cities will be undertaken later this year. Submissions are invited and should be directed to: Mr George Zdenkowski, Commissioner-in-Charge, Sentencing Reference, Law Reform Commission, GPO Box 3708, Sydney NSW 2001, DX 1165 Sydney, Telephone (02) 231-1733, Fax (02) 223-1203.

* * *

constitutional commission

> There is only one thing in the world worse than being talked about, and that is not being talked about.
>
> Oscar Wilde, *The Picture of Dorian Gray.*

reports of advisory committees. Discussion of the Australian Constitution has increased markedly in recent months. The Constitutional Commission's Advisory Committees on Executive Government, Distribution of Powers, Trade and National Economic Management and the Australian Judicial System have now reported to the Commission and their reports have been published. The report of the Advisory Committee on Individual and Democratic Rights was discussed in the previous issue of *Reform* ([1987] *Reform* 125).

The Constitution is also the subject of a most entertaining book by Associate Professor Michael Coper entitled *Encounters with the Australian Constitution* published by CCH Australia Limited. Professor Coper is a member of the Advisory Committee on Trade and National Economic Management to the Constitutional Commission. Various chapters in the book provide useful background information to the reports of the Advisory Committees. For example, chapter 4, 'How Far Can the Commonwealth Go?' provides a useful background to the report of the Advisory Committee on Distribution of Powers, chapters 5 and 7 entitled respectively 'The Fiery Fiscal Furnace', and 'Guaranteed Free Intercourse and Other Advantages of Border Crossing' provide background to the report on Trade and National Economic Management and chapter 6 'Apocalypse 1975' to the report on Executive Government. Students of the Constitution should also be fascinated by the second chapter which delineates the history of the federal movement and the drafting of the Constitution.

executive government. Four of the matters dealt with in the report of the Advisory Committee on Executive Government are:

- the head of state
- the system of government
- the power of the Senate to block supply
- the position of the Governor-General.

head of state. The Committee recommends that a referendum to make Australia a republic should not be held

at this time. The recommendation is made on the basis that public opinion does not appear to favour a republic and the issue is, for many people, an emotionally charged one. However, the Committee does recommend the repeal of certain outmoded sections of the Constitution which refer to the power of the monarch to disallow legislation and the power of the Governor-General to withhold assent to legislation so that it can be referred to the monarch for decision.

system of government. The Committee considers that neither the presidential nor the parliamentary system is obviously superior to the other. It therefore recommends that the existing parliamentary executive system of government be retained. However, it recommends that the Constitution explicitly state that the head of government is the Prime Minister. The Committee recommended that various practices should be explicitly stated in the Constitution as a democratic safeguard, for example:

- when the Governor-General appoints or dismisses Ministers, he or she should do so on the advice of the Prime Minister except on those occasions when the Prime Minister is also dismissed
- a government holds power by maintaining the confidence of the House of Representatives.

supply. The Committee recommends that the Senate's power to block supply be removed since its exercise 'can threaten the social, economic and political fabric of the nation'. The Committee recommends that the Senate be allowed a period of, for example, 30 days to consider supply Bills. This is the period allowed to Upper Houses in both the United Kingdom and in New South Wales.

In 1978 the Australian Constitutional Convention narrowly adopted a proposal put forward by the then Premier of Western Australia, Sir Charles Court. That proposal was for a double dissolution where the Senate rejected a supply Bill or failed to pass it within 30 days. Where the House of Representatives again passes the Bill after the dissolution, it would be taken to have been duly passed by both Houses of Parliament and would be presented to the Governor-General for assent. Provision would be made for the expenses of the election and the expenses necessary to maintain government until the House of Representatives meets after the election. The Advisory Committee favoured this proposal as a 'second best' option with one alteration. The Committee considered that the government which is forced to the polls by the Senate should have the choice of a dissolution of the House of Representatives only or a double dissolution. A majority of the Committee favoured this amended version. Other members of the Committee preferred the original Court proposal on the basis that it would remove uncertainty and protect the office of Governor-General.

fixed term parliaments. The Committee points out that its proposals for dealing with blocking of supply would alter if proposals for a fixed term Parliament were to be adopted. The Constitutional Commission has recommended a four year term for parliament, fixed for the first three years (*Sydney Morning Herald* 31 July 1987). The only exception to the fixed three year period would be where a vote of no confidence in the government was passed by the House of Representatives and no new government could

formed in that House. Deadlocks between the Houses would be settled by a joint sitting of both Houses rather than by a double dissolution within the three year period.

governor-general. The Advisory Committee on Executive Government formulates various Constitutional practices in relation to the exercise of the powers of the Governor-General, although it is divided as to whether those practices should be embodied in the Constitution, legislation or the resolutions of some authoritative body. The practices include such matters as the following.

- After a general election in which the government is defeated, the Governor-General should appoint as Prime Minister the person who in his or her opinion can form a ministry which has the confidence of the House of Representatives.
- If the House of Representatives passes a resolution of no confidence in the government, and names a person who would enjoy its confidence, the Governor-General must appoint that person as Prime Minister.
- If the House of Representatives passes a resolution of no confidence in the Prime Minister and the Prime Minister neither resigns nor advises dissolution of the House of Representatives or (at the Prime Minister's option) of both Houses, if appropriate, the Governor-General should dismiss the Prime Minister.
- The Governor-General can dismiss the Prime Minister for persisting in grossly unlawful or illegal conduct, including a serious breach of the Constitution.

A majority of the Committee is of the opinion that it would be extremely unwise for the Governor-General to consult any judge for advice and for any judge consulted to respond. However, it recommends that the High Court should be given jurisdiction to give advisory opinions on

- whether the constitutional stipulations in s 57 for simultaneously dissolving both Houses of Parliament have been met and
- whether the constitutional stipulations for a joint sitting for both Houses of Parliament under s 57 have been satisfied.

judicial system. The majority of the Advisory Committee on the Australian Judicial System recommended that separate Federal and State courts should remain and that there should be no structural change in the Australian court system. A minority thought that there should be an amalgamation of the Federal Court (and perhaps also the Family Court) and the Supreme Courts of the States and Territories into one court. All members of the Committee agreed that federal jurisdiction should not be vested exclusively in federal courts since it would be inconvenient if State courts ceased to have jurisdiction in matters once it became apparent that the matter involved a question of federal jurisdiction. In order to maximise the flexibility of the judicial system, the Committee also recommended that there be specific constitutional provision for cross-vesting of jurisdiction. A more radical proposal is for constitutional provisions enabling a State, with the approval of the majority of electors in the State and the agreement of the Parliament of the Commonwealth, to transfer to the Commonwealth all or part of the judicial power of the State.

removal of judges. The Committee recommended that 'proved misbehaviour or incapacity' should remain as the ground for removal of judges. However, it recommended that the words '(whenever occurring)' be added after the word 'misbehaviour' since it doubted whether conduct engaged in by a judge before appointment to the bench would fall within the terms of the existing provision.

The Committee also recommended the establishment of a Judicial Tribunal to determine whether facts existed which were capable of amounting to misbehaviour or incapacity warranting the removal of a judge. The power to request removal would remain with the Parliament but a request could not be made unless the finding of fact by the Judicial Tribunal had first been made. The Committee recommended that the address of each House would be required to be made no later than the next session after the report of the Judicial Tribunal. The Tribunal would be composed of judges of the superior federal courts (other than the High Court) and the Supreme Courts of the States and Territories. The proposal for a Judicial Tribunal has been supported by the Chief Justice of the High Court, Sir Anthony Mason who said in a speech to the Australian Legal Convention in Perth:

> This proposal deserves serious consideration. It provides machinery for the speedy resolution of serious complaints of judicial misbehaviour and incapacity, a machinery which is presently lacking. As things currently stand, it is for Parliament to set up an ad hoc committee or commission of inquiry. Parliament may be reluctant to take such action for a variety of reasons, leading to a delay in the investigation of serious complaints or even failure to resolve them. Moreover, the need for Parliament to initiate action inevitably surrounds the complaints with an aura of political controversy. (*Australian Financial Review* 21 September 1987)

trial by jury. The Committee points out that the apparent guarantee of trial by jury in s 80 of the Constitution can be easily circumvented by Parliament. In order to rectify the deficiencies of s 80 and provide a genuine guarantee of trial by jury, the Committee recommends that a defendant should be entitled to a jury trial on a charge the penalty for which is more than two years imprisonment or the imposition of corporal or capital punishment. However, a right to trial by jury should not apply to fines of any size, to forfeiture of licences or property, to trials of defence force personnel under defence force law or to charges of contempt of court.

economic power. The Advisory Committee on Trade and National Economic Management found that the power of the Commonwealth to legislate with respect to trade and commerce with other countries and interstate trade and commerce was deficient even when considered together with the corporations and external affairs powers. The Committee said that the legislative powers of the Commonwealth are those that were thought relevant in the context of a colonial State with a well developed relationship with Britain. At Federation, there were six separate economies jealously guarding their respective rights and independence. Now, however, markets are national and international in scope and resources are highly mobile. No section of the economy is or can be isolated from wider influences. The Committee says that problems have occurred for the following reasons:

- lack of uniformity of regulations between the States
- the difficulty of co-ordinating policies between the different levels of government
- the ability of sectional interests to affect national policies
- the difficulty of presenting co-ordinated international policies when legislative powers that affect the national economy are shared between the Federal and State Parliaments.

The Committee therefore recommends the inclusion in the Constitution of a new s 51(iA) dealing with 'matters affecting the national economy'. This proposed new power underpins many of the recommendations made by the Committee. For example, the Committee does not recommend that a specific power be vested in the Federal Parliament to establish and regulate national commodity marketing schemes. It regards the proposed s 51(iA) as sufficient to deal with such schemes.

corporations. The Committee recommends that the Federal Parliament have concurrent power to legislate with respect to all aspects of corporate activity and the securities industry, all corporations (the present power is limited to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth), deregulation of financial markets and business and financial activities and undertakings. Such powers would resolve the doubts about the power of the Commonwealth to enact comprehensive companies and securities legislation. The Federal Attorney-General Mr Bowen plans to replace the existing co-operative scheme for the regulation of companies and securities with a scheme based on legislation enacted by the Federal Parliament. He has Cabinet approval to set up a new national body to be called the Australian Securities Commission to take over the functions of the State Corporate Affairs Commissions and the National Companies and Securities Commission.

a byers market. Mr Bowen is relying on an opinion of the former Solicitor-General, Sir Maurice Byers QC, obtained for the Senate Standing Committee on Constitutional and Legal Affairs (see [1987] *Reform* 110). However, it appears that all States except NSW are opposing Mr Bowen's plan. The Queensland Government has said that it has a QC's opinion that it could successfully challenge the constitutional validity of a federal scheme. (*Australian Financial Review* 18 September 1987) Acceptance of the proposal put forward by the Constitutional Commission's Advisory Committee would resolve doubt and may in fact prove to be a prerequisite for the enactment of national companies and securities legislation.

section 92. Section 92 of the Constitution provides that '. . . trade, commerce, and intercourse among the States. . . shall be absolutely free'. The words are simple and apparently straightforward. In the Federal Convention debate on the draft Constitution, George Reid, then Premier of New South Wales and later an Australian Prime Minister, commented

> It is a little bit of laymen's language which comes in here very well.

However, s 92 has given rise to the greatest number of difficulties of any section of the Constitution. Professor Coper comments in his book:

> Section 92 is the lawyer's ultimate cautionary tale, the darkest example of what can go wrong when layman's language is used in a legal document.

The section was essentially designed to prevent the creation of customs barriers between the States. However, it has been interpreted by the High Court in such a way as to provide a virtual guarantee of free enterprise. It has led to such results as permitting interstate trade in wildlife to continue despite State wildlife protection Acts.

The members of the Trade and National Economic Management Advisory Committee were divided on the best solution to the difficulties with section 92. The Chairman of the Committee, Justise Everett, and Professor Coper recommended that s 92 be amended to provide that neither the States nor the Commonwealth may impose on interstate trade restrictions which discriminate against that trade and confer on a State a preferential advantage which is undue and unreasonable or unjust to any State. On the other hand, Dr Rex Patterson and Mr Mark Burrows commended s 92 as a guarantee of freedom of all interstate trading transactions from any executive or legislative actions by the Commonwealth and States. They recommended no change to the section. In the view of the Chairman and Professor Coper, it is inappropriate that interstate traders be placed in a privileged position compared with intrastate traders. They argue that the federal system is predicated upon a diversity of State laws and that, where uniformity is desirable in the interest of sound national economic management, the Commonwealth would be able to rely on the proposed s 51(iA).

excise duties. Section 90 of the Constitution provides that the imposition of customs and excise duties is within the exclusive authority of the Federal Parliament. The States may not impose such duties. The High Court has given a broad intepretation to the section. State sales taxes which fall equally on local and imported goods have been held to be excise duties (in the case of locally produced goods) and customs duties (in the case of imports). On the other hand, the High Court has held some consumption taxes and certain business franchise licence fees not to be excise or customs duties.

Section 90 as currently interpreted by the High Court has caused a number of problems.

- It operates to deprive the States of significant sources of revenue.
- It has caused the States to impose taxes that are regressive, cumbersome, economically inefficient, complex or otherwise unsatisfactory. For example, payroll tax is seen as undesirable because it taxes employment. Also, the business franchise licence fees are an overly bureaucratic way to achieve what might, in the absence of s 90, be done by a simple tax on goods.
- There is so much uncertainty about what constitutes an excise duty that many State taxes operate under the constant threat of constitutional challenge.

The arguments against changes to s 90 include:

- a fear that allowing States to tax goods would increase the tax bur-

den (against this, it may be argued that the States could abolish unsatisfactory taxes like payroll tax)

- the possibility of different tax levels operating in each State and
- the possibility that a State could interfere with federal tariff policy and reduce the federal government's power to control the economy.

The Committee recommended, by majority, that the States should have power to levy some taxation on goods. In particular, the majority recommended that the States be able to levy final consumption taxes but not taxes on the production of goods. Dr Rex Patterson and Mr Mark Burrows opposed this recommendation on the basis that it would severely inhibit the Federal Parliament's ability to manage the national economy efficiently. Professor Coper recommended that the ban on State excise be abolished altogether and that no distinction be drawn between taxes on production and taxes on other elements in the chain from production to consumption.

distribution of powers. The Advisory Committee on the Distribution of Powers looked at the appropriate distribution of powers between the Commonwealth, States, Territories and local government. In particular, it examined whether federal power to make laws should be expanded or contracted in certain areas. Some of the subjects examined by the Committee are:

- industrial relations
- external affairs
- family law
- environmental protection
- local government.

industrial relations. The Federal Parliament has power with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. This power contains a number of limitations:

- there must be an actual or threatened dispute which is industrial in character before the power operates
- the disputes must be 'interstate' in character
- the disputes can only be settled by conciliation or arbitration
- according to the interpretation placed on the power by the High Court, awards must be confined to the parties to the disputes before the tribunals and cannot be given the force of 'common rules'.

Areas of industrial relations which do not fall within the federal power are covered by State industrial awards. This can result in some employees in a workplace being covered by federal awards made by the Australian Conciliation and Arbitration Commission while others are covered by State awards made by State tribunals. The Committee recommends that the existing power be replaced with a power for the Federal Parliament to legislate with respect to industrial relations and employment matters. If this recommendation is not accepted, the Committee recommends that words be added to the existing power to the effect 'or any industrial matter in so much of an industry as is covered by federal awards'. This would enable the Conciliation and Arbitration Commission to deal with a matter in an industry already covered by its awards even though the matter was outside the ambit of the original

dispute or was not interstate in character.

external affairs. The power of the Federal Parliament to make laws with respect to external affairs has been given an expansive interpretation by the High Court and has become the subject of some contention. It was one of the powers relied on by the federal government to stop the building of the Franklin Dam in Tasmania. Some have argued that the use of this power can destroy the federal balance of power between the Commonwealth and the States by the use of treaties to enable the Federal Parliament to enact legislation in areas where it would otherwise be without power. Nevertheless, the Committee recommends no change in this area. In the Committee's view the problem should be dealt with by establishing a Treaties Council involving the States and by improving procedures for Commonwealth and State consultation on treaties. The Committee also recommends that matters referred to the proposed Treaties Council should be tabled in both Houses of the Federal Parliament at the time of referral to the Council.

family law. This area was examined both by the Distribution of Powers Committee and the Committee on the Australian Judicial System. As in the area of industrial relations, limitations in the power accorded to the Federal Parliament mean that family law disputes are dealt with sometimes under the Family Law Act and sometimes under State legislation.

The Distribution of Powers Committee recommends that federal power be extended to cover

- the custody and guardianship of all children (but without affecting the continued exercise of State authority over child welfare)
- the maintenance of all children
- adoption
- the determination of parentage and the legal status of all children.
- property and financial disputes between parties to a de facto marriage.

The Committee says that the changes recommended should preferably be achieved by constitutional amendment but acknowledges that a referral of powers by the States remains an alternative.

The Advisory Committee on the Judicial System suggests that two proposals currently being acted upon, the reference of power over the custody, guardianship and maintenance of children by four States to the Commonwealth and the cross-vesting of jurisdiction between the superior federal courts, including the Family Court, and State and Territory Supreme Courts, should be allowed to take effect before deciding upon the appropriate course of action.

environmental protection. The Commonwealth currently relies on various powers to enact legislation regarding the environment, for example, the trade and commerce power, the corporations power and the external affairs power. The Distribution of Powers Committee is disposed to the Commonwealth having some specific power in respect of environmental protection and conservation but does not recommend such a power because of the difficulty of restricting its scope. As the environment covers such a broad area and is so difficult to define, an

environmental power could lead the Commonwealth to intrude upon many aspects of State responsibility and management, particularly land use. The Trade and National Economic Management Committee also recommends against giving the Commonwealth a specific power over the environment although a minority, Professor Coper and Ms Phillipa Smith, favoured the Commonwealth having a power over the conservation of natural resources. Although Professor Coper and Ms Smith thought that conservation of natural resources would fall within the concept of 'matters affecting the national economy' as used in the proposed s 51(iA), they saw value in an explicit power.

local government. The Distribution of Powers Committee and the Trade and National Economic Management Committee both considered the issue of the constitutional recognition of local government but make opposing recommendations. The majority of the Distribution of Powers Committee recommends against recognition of local government. It considers that the Constitution is a federal compact setting out the framework for the federal system of government, and the inclusion of a chapter on local government would be inappropriate. The majority says that local government is more appropriately placed in the Constitutions of the States. In addition, constitutional entrenchment of local government might oblige remote areas of Australia which do not have local government to set up a form of local government, possibly against the wishes of the persons in those areas. The Trade and National Economic Management Committee recommends in favour of constitutional recognition for local government. It argues that local government has a significant role in planning and environmental protection matters and, indeed, in many areas in the overall federal system of public administration.

agenda for reform. The Federal Attorney-General Mr Bowen has said that he hopes to introduce legislation into the 1988 Budget session of Parliament to permit proposals based on the work of the Constitutional Commission to be put to a vote in December 1988 (*Age* 21 September 1987). In an address to the Convention of the Australian Society of Labor Lawyers, he said that constitutional conventions in the 1970's and early 1980's had been 'degraded in a biannual talk fest that had more in common with a brawl on the Sydney Cricket Ground Hill than serious and objective debate of such an important issue'. He said that the Constitutional Commission, a bipartisan and apolitical group of eminent Australians, had taken the question of constitutional reform away from the political system and associated public mistrust.

* * *

ivf development

> The more people have studied different methods of bringing up children the more they have come to the conclusion that what good mothers and fathers instinctively feel like doing for their babies is the best after all.
>
> Dr Benjamin Spock, *The Common Sense Book of Baby and Child Care*

Contrasting the trend towards legislation regulating new reproductive technologies, the NSW Law Reform Commission (NSWLRC) in its recent Discussion Paper on in vitro fertilisation (IVF) has suggested that legisla-