> . . .whichever account of the facts is adopted, it seems inescapable that the first respondent took the view, almost as soon as he saw the men inside the hotel, that they were a group of actual or potential Aboriginal 'undesirables' or 'troublemakers'. Looking for a reason to refuse them service, I believe he settled on Mr. Brown's football jumper as a justification on which to rely.

unlawful discrimination. Justice Einfeld concluded that there had been unlawful racial discrimination.

> Nothing in the Act renders it unlawful for a hotel proprietor to refuse service to persons not maintaining reasonably required standards of dress and behaviour in his establishment. It does, however, pronounce as unlawful the refusal of service on racial grounds to an acceptably dressed person one of whose companions failed to comply with the required standards — or another of whose companions had previously behaved in a disorderly or unacceptable manner — when the real reason for the refusal was the race of the person or his companions.

appropriate compensation. The Racial Discrimination Act does not impose a penalty or punishment for unlawful discrimination but HREOC is empowered to determine appropriate compensation for the loss claimed. Justice Einfeld determined the appropriate compensation to be $5 000.

> This was a serious and deliberate breach of the complainants human rights by the first respondent . . . None of the persons were responsible for any words dress or behaviour which justified this conduct. It was a public place and other people were present who could not, on the evidence, have failed to see and hear what was occurring. It involved unlawful instructions to or condoning of unlawful behaviour by waiters and bar attendants. All of this no doubt caused the complainant to suffer additional embarrassment, hurt and personal affront than if it had been private, however deeply distressing all racism is to its victims.

* * *

language difficulties for jurors

> The soldier — that is, the great soldier — of today is not a romantic animal . . . but a quiet, grave man, . . . occupied in trivial detail . . .; perhaps, like Count Moltke, 'silent in seven languages'.
>
> Walter Bagehot,
> *The English Constitution*

the usual rule. In Australia, persons who are unable to read or understand the English language are disqualified from serving as jurors. In Canada the usual requirement in provincial and territorial legislation is that a person must be able to speak and understand either the French language or the English language. This reflects the constitutionally entrenched bilingual policy in Canada. The effect of such provisions is to preclude large numbers of people from serving as jurors and thus participating in the judicial system.

In 1986 the Legislative Assembly of the Northwest Territories passed a Bill to amend the Jury Act and insert the following section:

> 5.2 An aboriginal person who does not speak and understand either the French language or the English language, but who speaks and understands an aboriginal language as defined in the Official Languages Act and is otherwise qualified under this Act, may serve as a juror in any action or proceeding that may be tried by a jury in the Territories.

In the Northwest Territories of Canada aboriginal people constitute both a ma-

jority of the population and a majority in the Legislative Assembly of the Territories.

The amending Bill provided that the section would not come into force until it was proclaimed. However before this was done a report on the amendment was sought from the Committee on Law Reform for the Northwest Territories. The Committee on Law Reform published a Working Paper on the amendment in June 1987 and its final report is due by the end of this year.

mixed juries. As noted in the Committee's Working Paper, the concept of juries being constituted by different language groups is not novel in the English common law. From about the mid 14th century an alien was entitled to be tried by a jury composed of one half of citizens and one half of aliens or foreigners. The use of this jury *de madietate linguae* ceased in England in 1870 and was specifically abolished in the Criminal Code in Canada in 1892. However the concept of mixed juries in Canada did not disappear. Section 555 of the Criminal Code of Canada enables a jury to be empanelled composed of one half of persons who speak the English language and one half of persons who speak the French language. There is however provision for an accused to seek to be tried by a jury composed entirely of jurors who speak the language of the accused if that language is English or French. This provision applies only in certain districts of Quebec but there was until 1982 a similar provision in the province of Manitoba. There is thus strong precedent in Canada for allowing juries to consist of English and French speaking jurors as well as juries comprised entirely of French speaking or English speaking jurors. Canada has always precluded, in common with most Commonwealth countries, those persons who do not speak the official languages used in the courts.

aboriginal people on juries. Aboriginal peoples in Canada, especially in the Northwest Territories, have been significantly affected by the language requirement of jurors. While this has no doubt affected the four major groups of native people in Canada, the Indians, the Metis, the Dene and the Inuit, it is perhaps the Inuit people of the north who have suffered the greatest exclusion.

> According to Inuit customary law, it is the elders who guide us and regulate community standards and behaviours. It is the elders who traditionally deal with community problems and concerns, and who hand down the Inuit laws. Most Inuit elders in the eastern Arctic speak Inuktitut. They do not speak English, and for this reason they would not be allowed to sit on a jury to deal with one of their own people in the way that Inuit customary law demands. The elders are the most knowledgeable and have the greatest wisdom to offer in dealing with those who cause problems in the community, and yet this recourse is denied to the court as it attempts to deal with the accused offenders because of English language requirements. In this way, the communities also lose the benefits of the advice of the elders, and Inuit culture is weakened (Working Paper, page 9).

In the view of the Committee the proposed amendment to the Jury Act of the Northwest Territories would go some way to answering this problem by increasing essential community involvement and allowing uni-lingual aboriginal speaking jurors to take part in the jury process.

practical issues. The proposal to allow persons who do not speak French or

English to be members of juries in the Northwest Territories raises a number of practical problems. First there is the question of determining in which cases a jury involving jurors speaking only aboriginal languages should be permitted. Should the consent of the parties to a trial be required? The right to a fair trial of an accused person must be balanced against court and public interests in the administration of justice. To allow an accused person to have the right to be tried by a jury comprised only of persons speaking an aboriginal language may not be appropriate or justified in all cases. One example of this might be where a non-aboriginal person is accused of committing an offence. A second issue is whether an interpreter be allowed to enter the jury room. While there is no major practical problem to be overcome by allowing interpreters to translate evidence in the courtroom different considerations apply in the jury room and certain safeguards would need to be introduced if such a proposal was to be implemented. A third practical issue is whether special jury lists would need to be prepared which would be more extensive and perhaps state the linguistic abilities of persons specified on the lists.

australian proposals. In the ALRC's report on *The Recognition of Aboriginal Customary Laws*, tabled in federal Parliament in June 1986, a number of issues concerning Australian Aborigines and juries was discussed. The Report observed:

> It is a matter for concern that Aborigines are so disproportionately represented in the criminal justice system, but so seldom appear on juries.

The Report did not specifically consider the question of allowing non-English speaking Aborigines to sit on juries but it urged that better selection procedures for juries should be adopted to ensure that Australia's multi-racial society is better reflected in the composition of juries. It also recommended that in certain cases where evidence of Aboriginal customary laws need to be presented to the court single sex juries may be appropriate. To achieve this, it was proposed that the court should have the power to make an order that a jury of a particular sex be empanelled. This power should be exercised on the application of a party made before the jury was empanelled. However such a jury should be permitted only in those cases where it is necessary to enable all the relevant evidence to be given.

* * *

plain english

> that was a way of putting it — not very satisfactory: a periphrastic study in a worn-out poetical fashion, leaving one still with the intolerable wrestle with words and meaning
>
> TS Eliot, *East Coker*

vlrc report launch. The Victorian Law Reform's Commission plain English Report was published on 13 October 1987.

Speaking at the launching of the report, the Victorian Attorney-General, the Honourable Jim Kennan MLC, drew attention to the resurgence in Australian creative life now presently taking place. He went on to say:

> however, I think the responsibility must fall heavily on politicians who have legal responsibilities and on legal academics to ensure that the sort of brilliantly creative and effective endeavour which characterises many other aspects of Australian intellectual life also informs the law.