ployment and poverty, she said. A decade ago 50 % of Fairlea prisoners were on unemployment benefits or pensions, but now the proportion is 67%.

limited opportunities. The report said 'the imprisoning of women in gaols is merely representative of the imprisoning that goes on in many ways — lives following a path of limited opportunities, traditional role expectations, inability to achieve economic independence and frequently, sole responsibility for children.'

electronic zoo. Another problem which is of concern to prison activists in Victoria is the use of K Division at Pentridge for women prisoners. In October last year K Division, then known as Jika Jika, was closed after five men died in a fire they had lit in protest at the conditions within the division. After the fire, Mr Kennan, Attorney-General at the time, announced the closure of K Division describing it as an electronic zoo unfit for human habitation. Features of the division were electronic doors and cameras, permanantly sealed windows, no natural ventilation, caged exercise yards and no grass or trees.

modified electronic zoo. Less than a month after the closure the government foreshadowed moves to place women in a modified K Division. Prison activists protested against these suggestions stating that if the division were not fit for men it certainly was not fit for women who have committed mainly non-violent crimes and are not in need of high security imprisonment.

a rose by any other name. After these protests the Government reconsidered the position and in May 1988 it was decided K Division would be a special privilege unit, reclassified as medium security. However, when two members of the Federation of Community Legal Centres Corrections working group were taken on a guided tour, they concluded that although modified, K Division still looks and feels like a maximum security unit.

demonstration. Following the release of the Fitzroy Legal Service report a demonstration called by 'the Coalition Against Women's Imprisonment' was held outside Fairlea Women's Prison in Melbourne. About 700 demonstrators linked hands in a chain of support for the prisoners inside. Bands played and speeches were made by a solicitor and a Queensland aborigine whose brother was found hanged in a cell last July. The rally, from the bands to the speeches, was broadcast 'live' on community radio and prisoners inside Fairlea could hear the event in their honour.

Ms Amanda George, speaking at the rally,said the government should:

- close K Division in Pentridge to women immediately
- begin a 24 hour medical service at Fairlea with a duty doctor
- change weekly visiting entitlements so that women prisoners who saw their children would also be allowed to see other people
- put an immediate end to the indignity of strip searches in Fairlea immediately after all visits
- provide child care to allow women to serve out sentences in community centres.

* * *

lands acquisition reform

> Good God! What a genius I had when I wrote that book
>
> Jonathan Swift,
> of *The Tale of A Tub*

A Bill to give legislative effect to the Government's decisions on the issues arising out of the ALRC's 1980 report, *Lands Acquisition and Compensation* (ALRC 14), was recently read in Parliament for the second time.

Following the reading, the Bill was placed on the table on the House of Representatives. Mr West, the Minister for Administrative Services said this had been done to provide:

> time to examine the detailed provisions of the new legislation and for people to provide comment.

Mr West said one of the reasons the Bill was introduced was that there is no mechanism within the current Act whereby an owner may require the acquiring authority to justify publically the need for and choice of his or her property. Mr West said the Bill provides:

> a balance between the protection of the rights of individuals and the ability for the government to meet its property needs. It offers to property owners the ability to question the Government's decision to acquire their property. It clearly specifies the wide range of factors to be taken into account in assessing compensation.

The Commissioner in charge of the ALRC Division responsible for ALRC 14 is the Hon Justice Murray Wilcox, now a Federal Court judge. He recently addressed the Lands Acquisition Reform Committee Forum about the Lands Acquisition Bill. In his address he commented favourably on several aspects of the Bill but was sharply critical of others.

Justice Wilcox commended the Government on proceeding with the Bill which was the initiative of a previous government. He also paid tribute to Opposition members' interest in the project. He praised many positive features of the Bill and said that 'if enacted in its present form, the Bill will considerably improve the position of those whose property is compulsorily acquired'. He added:

> in some respects, notably compensation rights, the legislation would rank with any in the English speaking world, at least.

pre-acquisition review. Under certain circumstances property owners may seek a review of the decision to acquire the property by the Administrative Appeals Tribunal. In the second reading speech, Mr West said:

> One of the particularly significant provisions of the Bill is that an owner can seek a review of the government's decision to acquire a property. . . Following that, if the Minister re-affirms the decision to acquire, clauses 28 and 29 provide that the owner is able to seek review by the Administrative Appeals Tribunal of the Minister's decision. . . Any review by the Tribunal should be limited to whether the Minister's decision was fair, sound and necessary for the implementation of the policy decision. The review should not include environmental matters where an inquiry has been held under the Environment Protection (Impact of Proposals) Act and should take into account technical, operational and economic factors. It is intended by clause 31 that any such review would encompass a number of matters, including the nature of the public purpose; the extent to which the public purpose is in the public interest; the suitability of the land for the public purpose; the effect of the acquisition on the land owners; the environmental effect of the use and development of the land; and any other means of achieving the public purpose. However, clause 22 makes it clear that the policy decision of government which has led to the acquisition cannot be subject to review.

Mr West outlined the circumstances where a review by the Administrative Appeals Tribunal is considered inappropriate and should not be allowed. He said:

> However, such circumstances are clearly defined and constrained and include, for instance, at clause 24, where the Minister is prepared to certify that the review should not be held due to urgency or where to not acquire would be prejudicial to the national interest.

review procedures criticised. However the Bill provides that in certain instances review by the Administrative Appeals Tribunal should not be allowed. Justice Wilcox was very critical of this. He said:

> In relation to one important area, pre-acquisition procedures, people might fairly say that the government and the parliament had lacked the courage of their own convictions; that, having accepted an important principle necessary for the protection of private citizens against the bureaucracy, they had allowed bureaucrats fatally to undermine that principle. That is a harsh criticism. Let me justify it. It was a central tenet of the Law Reform Commission recommendations that a person who was threatened with the compulsory acquisition of his or her land should be afforded the opportunity to challenge before an independent tribunal the necessity for that acquisition . . . . Review of the decision to acquire was fundamental to the Law Reform Commission recommendations.

Justice Wilcox was particularly critical of exclusions from pre-acquisition review. He said:

> I am glad to say that the Government has accepted the case made by the Commission — and others, such as the Lands Acquisition Reform Committee Forum — for an independent review of acquisition proposals . . . . But, unhappily, two major loopholes have crept into the provisions regarding review, so great that they have the potential to subvert the principle and to discredit completely this aspect of the legislation.

pre-acquisition review: the implementaton of policy. Clause 22 of the Bill empowers the Minister to make what the Bill calls a 'pre-acquisition declaration', that is a declaration that specified land appears to be suitable for use for a particular purpose. This declaration is important to the scheme of Part V of the Bill, dealing with the pre-acquisition procedures. The review procedures depend upon it. Generally, the effect of the service of a pre-acquisition declaration is that an affected person may, within 28 days, seek reconsideration, and then review, of the decision to acquire.

Clause 22(3) provides that the Minister may include in the declaration 'a statement that the proposed use of the land is connected with the implementation of a policy, particulars of which are set out in a declaration'. Justice Wilcox said there can be no quarrel with that provision. However, he continued:

> However, clause 22 goes further than to render the policy itself immune from review. Sub-clause (4) empowers the Minister to include in the pre-acquisition declaration a statement that it is essential for the implementation of the relevant policy that the particular land be acquired and that, for that reason, the decision is not subject to review by the Administrative Appeals Tribunal. If this course is taken, the declaration may not be reviewed by the Tribunal. The Minister is not required to report to Parliament the fact that he has excluded review in this manner. So much for Parliamentary accountability.
>
> The logical vice in clause 22(4) is that it treats two dissimilar mental processes as if they were the same. As I have said, the making of policy is an exercise in judgment, subjective and intuitive factors being important to the outcome. It is a judgment made in the wider community interest and, normally, without reference to the circumstances of individual cases. But a determination whether it is necessary, in the implementation of that policy, to acquire a particular piece of land involves a finding of fact, objectively made upon the ba-

sis of proved facts. Moreover, it is a judgment which directly impinges upon one or more individuals. It is a judgment capable of independent review, without transgressing upon the right, and duty, of the elected government to determine the content of general public policy.

Let me illustrate by an example. Suppose that the Commonwealth Government decided that Australia should lift its annual migrant intake by 50 000 people, all of whom would be refugees and who would temporarily be housed in accommodation constructed for that purpose. The adoption of such a policy would probably be a controversial decision. It would be a judgment based upon a host of factors — humanitarian, social, economic and political — which would be incapable of satisfactory resolution in a forensic environment. The appropriateness of the policy should properly be left for political debate and, in the end, the verdict of the electorate.

But suppose the Minister then decided that, in order to provide the necessary accommodation, a particular area of land should be acquired. The suitability of that land for a migrant centre is a factual, not a political, question. Why should the affected land owner be precluded from demonstrating, if he or she can, that — accepting the policy — the land is in fact not very suitable for the purpose; for example, because it would be more expensive to service than other land which is available? Yet clause 22(4) would permit the Minister to foreclose that debate by certifying the acquisition of the particular land to be essential for the implementation of the new refugee policy. pre-acquisition review: 'essential that interest be acquired'. The second provision unjustifiably excluding review is contained in clause 24(1)(b). Paragraph (b) is tucked in amongst the provisions dealing with the two exclusions recommended by the Law Reform Commission: urgency, and prejudicial disclosure of information. As in those cases, the effect of a certificate under s 24(1)(b) is that no pre-acquisition declaration need be prepared; that is, the owner is not even to be told the basic information, set out in clause 22(2) and (3) of the Bill, relating to the intended purpose. Nor will the land owner have any formal right to require reconsideration by the Minister; this entitlement is limited to persons affected by a pre-acquisition declaration.

The certificate referred to in para (b) is simply that 'the Minister is satisfied that, having regard to the purpose for which the land is proposed to be used, it is essential that that interest, rather than some other interest in land, be acquired by the acquiring authority'. In other words, the Minister is empowered conclusively to certify that lot X ought to be take rather than lot Y, or any other land. But whether or not the acquisition of a particular piece of land is essential to the fulfillment of the desired purpose is precisely the matter about which the Administrative Appeals Tribunal was supposed to make inquiry and a recommendation.

Paragraph (b) of s 24(1) is a provision capable of use in every case. It is subversive of the whole notion of pre-acquisition review. One can already hear the Sir Humphreys of Canberra, having formulated a proposal and not relishing the prospect of justifying it before an independent tribunal, assuring their political masters: 'Minister it is the only way'. I am sure that it is not the intention of the present Minister, or of the present Government, to abuse the spirit of the legislation by resort to para.(b). But if this provision is left in the legislation it will be used. Upon the first occasion there may be a protest. Then it will be used again and again, each exercise being justified by reference to the earlier; in the same way as we saw the increasing resort of the Wran Government to special legislation to by-pass, whenever convenient, the provisions of its own *Environmental, Planning and Assessment Act.* Before long this Act, and the present Government's achievement in getting onto the statute books, will become discredited.

decision of minister on AAT recommendation: tabling time. The Bill provides for the Minister to reject a recommendation by the Administrative Appeals

Tribunal regarding acquisition. Justice Wilcox supports such a provision on the basis that there be accountability to Parliament. However the Bill provides that the Minister must table a statement of his reasons for rejecting the Tribunal's recommendations within 15 sitting days. Justice Wilcox points out that months could elapse before the expiration of 15 sitting days. He says a more reasonable time would be 3 sitting days.

public parks. Mr West pointed out that a significant aspect of the new Bill is the acquisition of land in public parks by the Commonwealth. This has caused problems in the past for instance where the government needs a facility such as a navigation beacon or a communications tower in a location within a park. The proposed legislation provides for the Commonwealth to acquire such land. In his speech Mr West said:

> Whilst recognising that the Commonwealth should be able to acquire land in public parks it is also essential that safeguards be provided within the legislation to ensure that this power is used properly. For this reason in clause 42 the Bill requires that where the Commonwealth wishes to acquire land in a public park the following conditions must be met. Firstly, the relevant State must agree to the acquisition. Secondly, there must be a full inquiry under the Environment Protection (Impact of Proposals) Act except that both Houses of Parliament may veto the need for a full inquiry. Where that happens the requirements of the Environment Protection Act must still be met with a further stipulation that where the property to be acquired is part of a World Heritage property or a property on the National Estate than a full environmental impact statement must be prepared. Finally, once the acquisition has occurred, clause 46 provides that either House of Parliament will have a veto power whereby the acquisition can be made null or void.

Justice Wilcox was also critical of these provisions. He said:

> The problem I have with this proposal is that it contains no mechanism — except in national estate and world heritage areas — for ascertaining the likely environmental effects before the relevant decisions are taken. In the usual case no environmental impact statement is necessary. There is no requirement of publicity or consultation before the State or Territory government gives its consent. That government may not be alive to the effect of the proposal upon the park or to the likely local reaction. The attitude of that government may be influenced by party political considerations. The same may be said for the members of the two Houses of the Commonwealth Parliament. The acquisition for Commonwealth purposes of dedicated parkland ought to be a rarity; a measure of last resort. It is not unreasonable to suggest that, in all cases, there ought at least to be an environmental impact statement to assess the consequences of acquisition. This requirement would have the added advantage of enabling public comment, thus leading to better decision making and reducing the possibility of confrontation at a later stage. I would suggest that the provision for a resolution by both Houses of Parliament, in the absence of information, is a futility. It would be better to require, in all cases, either an inquiry or an environmental impact statement and to permit either House to block the acquisition by an appropriate resolution after it has the information.

disallowance. Justice Wilcox was also critical of the disallowance provisions. The Bill provides that the right to disallow a declaration of acquisition by either House of Parliament may only be exercised within 28 calendar days after a copy of the declaration has been laid before the House. He points out that:

> If this event took place towards the end of a Parliamentary sitting, the period for disallowance might elapse before there was

> any real opportunity for the House to deal with it. It seems to me that time should be stated in sitting days, a relatively small number of days being allowed so as to minimise uncertainty.

costs provisions. Justice Wilcox criticised certain costs provisions in the Bill. He said:

> The Bill adopts the suggestion of the Law Reform Commission that provision be made for the payment out of Commonwealth funds of costs reasonably incurred by land owners in the Administrative Appeals Tribunal, whether in connection with a pre-acquisition inquiry or in relation to compensation. But the Commission suggested that, where the Tribunal made a recommendation for payment of costs, there be a legal obligation to make payment. The proposal of clause 130(3) is merely that the Attorney-General 'may' make payment pursuant to the Tribunal's recommendation. This gives to the Attorney-General a discretion to refuse payment. Bearing in mind that the Attorney-General will probably be advised about the matter by officers who have been opposing the land owner before the Tribunal, and who may have developed some personal antagonism towards the land owner, it seems to me that this is not satisfactory. If the system is to work adequately, the land owner needs to have the security of knowing that, if he or she acts reasonably, the Tribunal is likely to make a recommendation for payment of costs and that the Commonwealth definitely will give effect to that recommednation. The Attorney-General should be obliged to implement the recommendation of the Tribunal.

form of draft legislation. Justice Wilcox praised the form of the draft Bill. He said:

> I would like to add a tribute to the officers responsible for the form of this draft: both within the various government departments and within the office of Parliamentary Counsel. I was involved in the preparation of the draft legislation attached to the Law Reform Commission's report. I experienced at first hand the difficulties of reducing a complex set of proposals to accurate and comprehensible statutory form. Since the Commission's report was delivered there have been a number of other drafts, which departed substantially from that adopted by the Commission. I saw some of them. It is enough to say that, in structure and in clarity of meaning, the present draft is the best of all those I have seen; including that which the Commission prepared. No doubt, in the course of time ambiguities will emerge even from this draft; that is almost inevitable. But I think that the clearly delineated structure of this Bill, combined with generous use of cross-referencing, will maximise public and professional comprehension of the rights and obligations of people whose land is affected by the legislation, and of government officers in dealing with them.

* * *

sentencing aboriginal offenders

> It usually takes a hundred years to make a law, and then, after it has done its work, it usually takes a hundred years to get rid of it.
>
> Henry Ward Beecher, 1887

At the Second International Criminal Law Congress held at Surfers Paradise in June 1988 Justice Toohey of the High Court delivered a paper on sentencing Aboriginal offenders. Justice Toohey has a significant amount of experience in this area. He was the first Aboriginal Land Commissioner appointed under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and was a member of the Northern Territory Supreme Court and the Federal Court prior to his appointment to the High Court.

Justice Toohey's paper notes at the outset that: