

"Over the details of the proposals ... people will inevitably dispute. About the need to take duties and liberties seriously, however, there can be no dispute. This is the meaning of the principle that written rules and actual practice should correspond. A legal system which preclaims rules which it is not prepared to uphold is indulging in a dangerous form of hypocrisy. Thus, once an acceptable framework for criminal investigation is settled, it must be reinforced by safeguards and sanctions. In the front line should be the safeguards designed to ensure that individuals are notified of their liberties, are given the facilities to exercise them, and are not disadvantaged by any departure from the procedure. In reserve should be the sanctions, designed to ensure that when breaches do occur, they are properly and effectively dealt with. Few people can be expected to welcome increased formalities and procedures with enthusiasm, especially those who have to operate them. Yet if this is the price for the reintroduction of the rule of law into criminal investigation, then it ought to be paid." *ibid* p.609

The Australian Attorney-General's announcement indicates that the Commonwealth Government is conscious of the need to modernise and reinforce the criminal investigation process.

## Human Rights and Prisoners' Rights

"The first prison I ever saw had inscribed on it 'Cease to do Evil : Learn to do Well'; but as the inscription was on the outside, the prisoners could not read it".

George Bernard Shaw

One of the References which Senator Murphy first proposed for the new A.L.R.C. related to Prisoners' Rights. The reference was never formally given. Senator Murphy became Mr. Justice Murphy. The only substantial federal prison at Fanny Bay, (near Darwin), was significantly damaged in Cyclone Tracy. Thus law reform specifically directed at prisoners' rights in Australia remains for the future.

Nevertheless, despite a number of recent setbacks, there does appear to be a growing awareness in Australia about the international debate concerning the rights of prisoners.

First, the bad news. In *Collins (Hass) v. The Queen* (1975) 8 A.L.R. 150, the High Court of Australia denied the prisoner Hass the facility of appearing in person to seek special leave to appeal against his conviction for armed robbery. The Court held that he was validly barred from doing so by the Rules of Court made pursuant to the Judiciary Act. One writer, Mr. G.A. Rumble (1976) 7 Fed.L.Rev. 235, asserts that "Natural justice has been offended in the matter of a man's liberty." Asked about this decision in the Parliament, the Attorney-General, Mr. Ellicott, said that the decision would be placed before the Judiciary Act Review Committee. Cwth.P.D. (H of R.) 8 Dec. 1976, p.3553.

In *Dugan v. Mirror Newspapers Limited* on 18 June 1976, Yeldham J. in the Supreme Court of New South Wales upheld an objection by a newspaper to a suit for defamation brought by a convicted felon. The action by the prison was held to be incompetent.

"The plaintiff, having been ordered to serve a sentence of life imprisonment is, during the whole of such sentence, unless he be granted a pardon, incapable of suing in this or any other court".

Yeldham J. reached this conclusion after tracing the history of attainder in England, corruption of blood and forfeiture or escheat of land, personal property and rights of action. The decision is presently the subject of an appeal to the N.S.W. Court of Appeal.

In July 1976 a prisoner wrote to the A.L.R.C. complaining at the unfairness of this legal principle.

"I hasten to add ... although I am charged and convicted of crimes of a serious nature and for which I am currently serving a sentence, at no time was I charged with the rape of which the newspaper has accused me of committing ... a crime completely foreign to my nature".

The A.L.R.C. Chairman, Mr. Justice Kirby, referred to this issue in his Turner Memorial Lecture "Human Rights : The Challenge for Law Reform" delivered at the University of Tasmania on 14 October 1976. Mr. Justice Kirby contrasted the decision of the European Court of Human Rights in *Golder v. United Kingdom* (see (1976) 50 A.L.J. 229). He referred to the question asked of Australian society, through him, by a prisoner:

"What protection does the ... law offer a convicted person by denying him the right to sue for damages or have an action determined under common law? ... Although I am a prisoner, and in some respects a second class citizen, I would respectfully draw the Commission's attention to the enlightened views concerning a prisoner's right to sue for defamation which the European Court of Justice handed down in February 1975".

Mr. Justice Kirby referred to the special provision in the Law Reform Commission Act 1973 inserted in the Bill on the motion of the late Senator Ivor Greenwood Q.C. That provision (s.7) requires the Commission, in the performance of its functions, to ensure that as far as practicable its proposals are consistent with the International Covenant on Civil and Political Rights. Mr. Justice Kirby suggested a possible role for the Law Reform Commission in scrutinising laws to see whether they accord with the International Covenant. Australian signed the Covenant on 18 December 1972. It came into force on 23 March 1976. It has not yet been ratified by Australia although discussion will be held with the States to explore this possibility. Cwth.P.D. (H of R.) 10 Nov. 1976, p.2587.

Since October 1976 there have been a number of relevant proposals. At the turn of the Year, Mr. Ellicott announced the intention of the Government to establish a Federal Human Rights Commission. One of the tasks of the Commission would be to check legislation against the International Covenant. It is to be hoped that the Commission will have a role wide enough to enable it to deal with offences to human rights originating otherwise than in legislation e.g. by force of outmoded common law rules.

The matter of voting rights for prisoners is under review in at least two States. The relevant Minister told the Victorian Parliament on 26 October 1976 that he supported the proposal to grant voting rights to prisoners and believed that in due course appropriate legislation would be proposed. The N.S.W. Minister for Justice, Mr. Mulock, announced the intention to extend the vote to all short-term prisoners. Mr. Landa told the N.S.W. Legislative Council on 30 November 1976, that the whole question of the loss of civil rights by prisoners was under consideration. The position in New South Wales will no doubt come under further scrutiny when the Government has the Report of the Royal Commissioner investigating N.S.W. Prisons, Mr. Justice Nagle.

In England, proposals are now being put forward for a special Prison Ombudsman. (Times, 4 Oct. 1976).

Some will see the tender concern for prisoners as a sign of weakness on the part of society. Others will assert that it is a sign of society's strength that it will concern itself with the wrongs and injustices worked by the law, especially upon minorities who have no immediate leverage. Although a comprehensive project for reform of prisoners' rights remains for the future, it is encouraging to see the V.S.L.R.C. presently working on prisoners' voting rights in Victoria and the W.A.L.R.C.'s forward looking Working Paper, just published, on Compensation for persons detained in custody who are ultimately acquitted or pardoned.