Aboriginality, particularly amongst young people, who appear to accept and expect initiation with its attendant rights and obligations to kin, ceremony and law. Although few women took part in the consultations, the researchers were told that young Aboriginal women generally accept promised marriages, which involve a range of choices within kin groups acceptable to the community. Elders retain great authority and power including, in some instances, the undoubted power of death through physical and supernatural means. Although punishment by death appears to have all but disappeared, other tribal punishments, including spearing and severe beating, goes on, is accepted and is expected, as part of dispute resolution procedures in Aboriginal society. Western laws, and particularly Western punishments, are frequently regarded as puny or, putting it generously, irrelevant. 90% of offences which bring in white police are alcohol-related. Most juvenile offences are self-regarding (petrol sniffing) or involve minor larceny. Many arise from the fact that until initiated, a boy is not "responsible".

The courts, justices and magistrates alike, seek to take notice of the tribal context, wherever it is a relevant and mitigating factor. Many of the communities expressed a desire to have Aboriginal police, or police aides as have been established in Western Australia. The notion of Aboriginal assessors sitting with white magistrates was considered a "good idea". However, such proposals involve special difficulties because of the kinship system which dictates that certain people, in traditional Aboriginal society, cannot be looked at, let alone spoken to, by others. Furthermore, in some offences involving alcohol and women, some communities express a desire to be able to call in a "neutral" white policeman armed with appropriate authority.

The A.L.R.C. is to conduct wide-ranging consultations in Aboriginal and non-Aboriginal communities in all parts of Australia over the next eighteen months. A research programme and details of field trips are available from the Secretary, A.L.R.C., for those interested to comment. The Commission is carrying out its task in close consultation with the National Aboriginal Conference and the Institute of Aboriginal Studies. The project on customary laws is not an isolated one. With the legislation on land rights, proposals in the Criminal Investigation Bill 1977 for special protection for Aboriginals and other moves, it represents part of the effort to adjust Australian society to the rights of its indigenous people.

More Human Rights

> "We owe it to our ancestors to preserve entire those rights which they have delivered to our care: we owe it to our posterity not to suffer their dearest inheritance to be destroyed."
> Junius, *Public Advertiser*, 1769.

The debate about the protection of human rights in Australia shows no signs of dying down. Federal Attorney-General, Senator Durack, Q.C., has repeated the government's determination to establish a Human Rights Commission. The Bill is expected later in 1978, after one further effort is made by the Commonwealth Government to involve the States of Australia in the organisation of the Commission. Speaking at a seminar on human rights held in Sydney on 13 May 1978, Senator Durack stated the government's position:

> "It must now be quite clear that the introduction of legislation in the form of a Bill of Rights to implement the *International Covenant on Civil and Political Rights* is not necessary. . . . The Commonwealth Government has repeatedly expressed the view that it does not regard a Bill of Rights as an appropriate vehicle for giving effect to the Covenant. . . . Having regard to the existence of such safeguards as the common law, statutory and procedural remedies (such as those provided by the various Ombudsmen and the Administrative Appeals Tribunal) the system of representative and responsible government, the rule of law, the independence of the judiciary and the freedom of the press, Australia is already substantially in conformity with the Covenant. Nevertheless there are still a number of areas which require attention. It would be a function of the proposed Comission to identify these and to advise government on appropriate legislative and/or administrative measures that need to be taken."

Senator Durack pointed out that more than forty-four states, including the United Kingdom, have ratified the Covenant which came into force on 23 March 1978. President Carter has announced the intention of the United States to move to ratification. Australia was elected in 1978 a member of the United

Nations Commission on Human Rights. In the government's view there are "compelling reasons for the ratification by Australia of the Covenant in the near future". The Prime Minister has written to State Premiers seeking their support for this ratification. It seems that ratification by Australia is not far off.

A national televised debate on whether the proposed Commission goes far enough took place on *Monday Conference* on 27 March 1978. Participants were Senator Fred Chaney (W.A.) and Senator Elect Gareth Evans (Vic.). Mr. Evans, whilst not opposing the notion of a Commission, described it as dipping "half a toe in the water". He called for a legally enforceable Bill of Rights which the affected consumer, the citizen, could operate for self-protection in the courts.

Senator Chaney expressed doubts about the wisdom of turning over the important affairs of the country into the hands of the judges, "people who are not elected and not accountable". This theme found reflection in the Stawell Oration by the Chief Justice of Victoria, Sir John Young (see p. 39)

> "I find the whole proposal [for a Bill of Rights] surprising and to some extent paradoxical. It is surprising because it would put very great power into the hands of the judges and somewhat paradoxical because a large section of the community seems habitually to contend that the law makes it too difficult to prosecute and obtain a conviction of persons alleged to be guilty of a crime and yet it seems likely that a Bill of Rights would make it more difficult. It also seems paradoxical that there should be a demand for a Bill of Rights in an age in which it is said by some that individual freedoms must be subordinated to what are regarded as collective social interests . . . It is notorious how the interpretation of fundamental rights have fluctuated from time to time . . . The situation in the United States led one of our own distinguished writers to say that 'Under the guise of the supremacy of law, America has achieved the supremacy of judges.' "

Lord Hailsham, former Conservative Lord Chancellor, visited Australia during the last quarter to deliver the first *Robert Menzies Oration* on 12 May 1978 in Sydney. Whilst in Australia, he referred on a number of occasions to his conversion to a Bill of Rights enforceable by the judges. It was, he said, our society's answer to the Utilitarian who ignored the banner of freedom and riveted all attention on social utility. In his new book *The Dilemma of Democracy* Lord Hailsham devotes a chapter to this issue:

> "To the argument that it would create a breed of political judges, I reply that whether these rights are incorporated or not, British judges are inevitably involved in decisions having sensitive political consequences. Examples can be found each year and might include among recent decisions the Laker Airways case, the conflict between the Secretary of State and the Thameside Education Authority and recent decisions affecting the power of the Attorney-General, the Post Office, the Water Rates and the wireless licences. These, which spring to mind at once, are, of course, only a few among many. . . . I simply do not believe that English, Scottish and Northern Irish judges are constitutionally incompetent to deal with the same questions as the European judges . . . [I]n the armoury of weapons against elected dictatorship, a Bill of Rights embodying and entrenching the European Convention might well have a valuable, even if subordinate, part to play."

At the New Zealand Law Conference (see p. 40) the new Chief Justice of New Zealand, Sir Ronald Davison, opened the Conference with an address warning lawyers to be vigilant against allowing political change to sweep so far "as to threaten some of the basic rights of the individual". The rule of law, he said, was essential in the establishment and maintenance of a free society. Throughout history, the rights and liberties of the individual have been balanced by the needs of society. In today's society where there was a call for harsher measures, as for example with drug pedlars or drunken drivers:

> "we should always be on the alert that measures proposed are not more restrictive or oppressive than the problem they seek to remedy requires and do not bear unjustifiably on one section of society."

In Canada, the *Canadian Human Rights Act* 1977 has now come into operation. Part I forbids various kinds of discrimination. Part II establishes a Canadian Human Rights Commission comprising a Chief Commissioner (Mr. Gordon Fairweather) and a number of other Commissioners, including Miss Inger Hansen Q.C., who is designated the Privacy Commissioner. The Commission deals with complaints it receives concerning discriminatory practices and is required to maintain close liaison with similar bodies in the Provinces.

Part III of the Canadian Act sets out the procedures for handling a complaint. If conciliation fails, a Human Rights Tribunal may

be assembled to inquire into the complaint. The Canadian Commission supplements earlier legislation passed during the Diefenbaker government enacting a *Canadian Bill of Rights*, enforceable in the courts.

Speaking at a United Nations Association Conference in Perth on 21 April 1978, A.L.R.C. Chairman, Mr. Justice Kirby, scrutinised the debate on human rights protection in Australia:

> "In this country we pass every year more than a thousand statutes. There are still more laws governing citizens if we include regulations, by-laws and other subordinate legislation. The peril in this proliferation of lawmaking is the erosion of rights by oversight. A Bill of Rights, so it is said, would arm the judiciary with new tools with which to fight the battles of the twentieth and twenty-first centuries. Listing them in a public document, available from schooldays, would inculcate in citizens the accepted principles of our living together in Australian society. It would provide a touchstone against which laws, that are often hastily drawn, could be measured. . . . It is a good thing that in Australia there is a broad measure of bipartisan recognition that new tools *are* needed. That there is a division of opinion about the form the tools should take is less important."

Land Compensation Hearings Conclude

> "Dosn't thou 'ear my 'erse's legs, as they canters awaay?
> Proputty, proputty, proputty — that's what I 'ears 'em saay"
> Tennyson, *Northern Farmer*, 1869.

One of the few "Bill of Rights" provisions to slip into the Australian Constitution is now up for review. Section 51(xxxi) permits the Parliament to make laws with respect to the acquisition of property *on just terms* from any State or person for any purpose in respect of which the Parliament has power to make laws. The A.L.R.C. project to review the *Lands Acquisition Act* has produced a detailed working paper and short discussion paper (D.P.#5). These have been debated in all parts of the country during the past eight weeks.

The Commissioner in charge of the reference, Mr. Murray Wilcox Q.C., has interrupted his practice at the Sydney Bar to lead seminars in all capitals at which judges, practising lawyers, valuers and government officials, Commonwealth and State, have turned critical attention upon the A.L.R.C. proposals for reform.

Four major reform themes stand out:

- *A pre-acquisition inquiry.* It is proposed that in the event of a disputed acquisition, the property owner should be entitled to require a public inquiry to scrutinise the needs for acquisition, any alternatives and, possibly, environmental implications.
- *Procedural Reforms.* New informal procedures, utilising the Commonwealth's Administrative Appeals Tribunal, should be introduced to permit speedier and cheaper resolution, particularly of small claims.
- *New Compensation Formula.* To "spell out" how "just terms" are to be arrived at, a new compensation formula is proposed. This suggests assessment on the basis of full indemnification of financial loss and proposes adding other benefits, including a solatium for intangible losses not presently compensated.
- *Injurious Affection.* The Commission has proposed a limited entitlement to compensation arising out of injurious affection caused by some Commonwealth operations, without the necessity of actual acquisition, as is required at present.

In addition to the seminars, public sittings have been held in every capital city and in Darwin and Canberra. They have been busy. A long parade of Members of Parliament, public servants, experts and ordinary citizens have come along to complain about the injustices and inadequacies of current lands acquisition law. Many citizens who had been on the "receiving end" of compulsory government acquisition recounted their experience. Unhappily, tales of insensitivity and rudeness on the part of government officials marked almost every public sitting. Whatever the Act says, it is difficult to overcome the sense of resignation and futility on the part of most citizens who receive notice of an acquisition. Many told the A.L.R.C. Commissioners that they had no idea where to turn. The need for plain English notices and a statutory right at least to initial legal and valuation advice seems convincing.