need for a 'wide-ranging review of the methods of setting up companies' in a bid to restrict their use for tax and debt avoidance. In mid September 1983 the Attorney-General announced the appointment of the Companies and Securities Law Review Committee, the establishment of which he described as 'long overdue'. Chairman of the committee is Professor H Ford of the University of Melbourne Law School. That committee will provide an ongoing major review of Australia's companies and securities law, of a kind not seen since the work of the committee chaired by Sir Richard Eggleston in the late 1960s.

- Attorney-General Evans has also announced the intention to introduce a Cheques Bill to allow cheques to be cleared more speedily and to dispense with the need to mark cheques 'not negotiable'. The intention would be to revise the Bills of Exchange Act 1909 to make allowance for modern technology of cheque clearances.

- Federal Minister for Tourism, Mr John Brown, has warned that Federal authorities will apply onerous new regulations to travel agents to prevent travellers losing their money, unless State Governments immediately introduce their own standardised legislation (*Australian*, 19 July 1983).

There is a hint of impatience in recent Federal developments. The pace of legal life quickens. But will the machinery and achievement of uniform legal change in Australia catch up?

marriage law changes

Marriage is a great institution. But I'm not ready for an institution, yet.

Mae West

distant sequel. The appointment of Professor David Hambly, noted above, as a full-time Commissioner of the ALRC, marks the entry of the Australian Law Reform Commission into family law reform. This is a natural development, having regard to the significant Federal power over family law. But until now, the ALRC has not been involved directly in the ever-moving world of family law reform in Australia.

In August 1980 the report of the Joint Select Committee on the Family Law Act was tabled in the Australian Parliament. The committee, chaired by Liberal MP Philip Ruddock, made numerous suggestions for changes in the Family Law Act 1975. The reference to the ALRC on matrimonial property law reform by the new Federal Attorney-General, Senator Evans, is a distant sequel to a recommendation made by the Parliamentary Committee that such a reference should be given. Before the change of Federal Government, it had been indicated that the reference would not be given to the ALRC but to an ad hoc committee. With the change of government, the decision was made to involve the ALRC and to establish the Canberra office.

There were 43,008 divorces in Australia in 1982. Property applications were made in only 28% of these cases, and there is a high settlement rate, partly due to the system of pre-trial conferences with Registrars. In only 1,984 cases (about 4%) was the division of property decided by a judge after a contested hearing. However, Professor Hambly cautions:

> This does not mean, of course, that 96% of divorcing couples are content with the state of the law on which they based their negotiations. Perhaps they may have achieved a quicker, cheaper and more acceptable outcome if the law had provided clearer guidelines. Nevertheless, the figures help to keep in perspective some of the more flamboyant criticisms of the Act and the Family Court process.

The discretion conferred on Family Court judges to reallocate the property of a broken marriage according to justice and equity in the particular case has been described by Chief Justice Sir Harry Gibbs as:

> ... extraordinarily wide. Such orders may, of course, disturb existing rights; few curial orders can have a greater effect on ordinary citizens of modest means. (*de Winter v de Winter* (1979) 23 ALR 211, 218).

overseas reforms. The Parliamentary Committee gathered many criticisms of the operation of the present wide discretionary rules for post-divorce property distribution. Such criticisms are probably inevitable where large powers are conferred on judges without much legislative guidance. The Chief Judge of the Family Court, Justice Elizabeth Evatt, once said:

> More definite rules for the division of property would enable the principle of equality to be applied directly instead of through the intermediate step of assessing contributions of different kinds and according to them a kind of notional equality.

With these criticisms in mind, the Parliamentary Committee drew attention to reforms in matrimonial property law enacted in New Zealand and in many of the Provinces of Canada and States of the United States during the 1970s. These reforms were in part a recognition of the equal status of husbands and wives and a rejection of the overwhelming weight given by the previous law to financial contributions to the acquisition of property. They generally prescribe rules for the equal division of defined categories of property following the breakdown of marriage. But the defined categories varied from one jurisdiction to another, as did the exceptions. The Parliamentary Committee considered whether it should recommend such a regime for Australia. However, it concluded that before any such reforms were introduced as part of the Family Law Act, they should be preceded by a full study by the ALRC.

It was against this background that the Federal Attorney-General, Senator Evans, gave his reference to the Commission. It asks:

> whether any changes should be made to the law relating to the rights of the parties to a marriage in respect of property acquired by either or both of them, whether before, during or after their marriage, including their rights during, and upon dissolution of, the marriage.

In particular, the ALRC is required to consider:

- whether a system prescribing a fixed share of some or all of the spouses' property should be introduced, and
- if so, the extent to which the shares could be varied by agreement or by court order.

extreme views. Views about matrimonial property reform vary between extremes at either end of the discretionary spectrum:

- One view urges that all property acquired during a marriage should be jointly owned and managed while the marriage subsists and shared equally on termination. This view was advocated in a discussion paper published in 1981 by the Women's Electoral Lobby. A spokesman for that Lobby, Dr Jocelynne Scutt (who is Secretary to the VLCC) is reported as saying that however much judges might wish to remain neutral, their decisions are inevitably influenced by 'sex-discriminatory philosophies' (*Age*, 22 June 1983).

- On the other hand, some feminist commentators have expressed the view that such a fixed rule would disadvantage women, particularly those left with the care and upbringing of dependent children.

- Between these views are various versions of 'deferred community of property', envisaging the acquisition and management of separate property during marriage and the equal division of matrimonial property (as defined) at the end of marriage.

The New Zealand Matrimonial Property Act 1976 applies the 'equal division rule'. There

are narrow exceptions. Generally the matrimonial home and family chattels, whenever and however required, and other property acquired by joint and several efforts during the marriage, are divided equally on divorce. Other property owned before the marriage or acquired by gift or inheritance normally remains with its owner.

Reports coming out of New Zealand generally speak highly of the operation of the New Zealand law. However, a recent report in the New Zealand *Herald* (11 June 1983) indicated that Mr Peter Mahon, a former High Court judge, expressed a view that the courts are powerless sometimes to avoid injustices in dissolution of property on marriage breakdown:

> In the majority of cases [the present] approach may be justified. But this thinking, inspired almost always by people with no experience in matrimonial legislation, leaves on one side the very considerable number of cases where the breakdown of the marriage has been the decision of one spouse alone, and where that spouse has deliberately planned the marital parting in the knowledge that he or she may recover an individual financial reward ... [T]here is no discretion available to the court to avoid equal apportionment in cases where equal apportionment will be manifestly unjust.

This, then, is the scope of the debate facing Professor Hambly and the ALRC:

- introduce rules, to promote consistent and equal treatment, but at the price of inflexibility in some cases;
- maintain great flexibility, but at the price of a high lawyerly component in the costly litigation before judges exercising very wide discretions; or
- achieve a mixture between rules and discretion?

other implications. The English Law Commission has suggested the creation of a 'statutory joint tenancy' in the matrimonial home which would apply in the absence of a formal agreement to the contrary. Otherwise a discretionary jurisdiction to adjust property at the termination of marriage would be retained. The Law Com argues that this solution would confer equal rights to the most substantial asset of most couples, the matrimonial home. The Australian Parliamentary Committee made a more moderate proposal, namely that the Family Law Act should be amended to provide that, during a marriage and at its end, the spouses are presumed to own the matrimonial home 'as tenants in common in equal shares'. Such a presumption of joint tenancy has operated in Victoria since 1962.

In the course of its inquiry, the ALRC will have to consider:

- the empirical research on the way in which orders under the Family Law Act Part VIII are presently operating
- the economic analysis of the impact on men and women and on the economy of the breakdown of marriage and distribution of property
- the implications of matrimonial property law for other areas of the law eg maintenance of children and dependent spouses
- the interaction of company law and superannuation law where substantial assets are in the form of company-owned property or superannuation insurance.

Professor Hambly has already had discussions with the judges of the Family Court of Australia, the Institute of Family Studies in Melbourne and the Family Law Council. Shortly after he took up duties, a major article was published in the Australian *Women's Weekly*. Titled 'After a Divorce Who Gets What?' the article, a serious piece written by leading writer Rosemary Munday, canvassed the problems of matrimonial property and contained a quiz inviting responses to key questions about the division of property on divorce. The mail to the ALRC from the *Weekly's* readers provides daily reminders of the intense feelings throughout the community about this topic, and the limitless range of marital situations for which the law must seek a fair solution. The Australian *Women's*

Weekly has an estimated monthly readership of three million, and a print run of more than a million copies distributed in all parts of the country – somewhat more than *Reform*. It is hoped that, as the ALRC project continues over the next three years, further involvement of the community can be achieved through journals such as the *Women's Weekly*. Community involvement is essential. Beyond the specific legal issues, the project raises questions about the values that should underlie the relationship between the sexes, and the institution of marriage.

legal jungle? Coinciding with the ALRC inquiry into matrimonial property is the publication of a controversial book by Patrick Tennison, *Family Court : The Legal Jungle* (Bookwise, $7.95). It is not surprising that such a radical reform as the Family Law Act 1975 should invite critical scrutiny eight years down the track. Tennison is a journalist, highly critical of the Family Court. His book opens:

> Tragedy. Heartbreak. Shock. Confusion. Despair. These are too often the bitter fruits, the luckless harvest of so many people who have been through the process of the Family Court.

Tennison quotes a number of case histories drawing on unnamed litigants and lawyers. His criticisms:

- Family Court judges are not top lawyers.
- They are not adequately trained in non-legal disciplines such as psychology and social work.
- They exercise inadequate control over the lawyers appearing before them.
- They take inadequate steps to enforce maintenance and other orders which are too often disobeyed.
- They preside over cost-ineffective work, such as uncontested divorces which should be dealt with administratively.
- They permit lawyers to lock their clients into adversary antagonisms.

Needless to say, Tennison's book generated a major public controversy about the success of the Family Court experiment:

- Mr L Gruzman QC and Mr D B Milne QC, both Sydney barristers, wrote to the *Sydney Morning Herald* (19 and 27 May 1983) suggesting criticisms of the Family Court, particularly judicial appointments and delays and technical rules, including in property cases.
- Mr Philip Twigg, barrister, wrote in defence (*SMH*, 14 June 1983), pointing out that common sense and compassion are needed in Family Court cases even more than ability in commercial or equity problems in the 'big money cases'.
- Julian Disney (NSWLRC), reviewing Tennison's book, claimed that the 'most telling criticisms' were of the legal profession for their divisive conduct. Disney was much less impressed by the proposals to reimport the 'fault concept' into divorce so that one party could be 'blamed' for the divorce and 'punished' by property and other orders. Disney pointed out that this approach had been decisively rejected by the bipartisan Parliamentary Committee in 1980.
- Yet Philip Twigg (*SMH*, 2 July 1983) responded with 'a secret'. 'Fault has not disappeared from the Family Court scene as much as believed (or hoped for)'. 'The number of disputes over money matters where fault in-

trudes is increasing rather than decreasing', said Mr Twigg. A lesson here for the ALRC.

- Commenting on the latest divorce figures, Peter Joseph, Secretary of the Australian Family Association, wrote on 2 August 1983 that since the Family Law Act 'four hundred thousand children have seen their parents divorced'. 'The statistics by themselves cannot convey the terrible trauma and sorrow endured by so many Australian children who have had to cope with an unhappy and broken family and the choice of living with only one parent or being shunted from one parent to another, with feelings of loss and resentment and the accompanying social and psychological disturbances'. As well, Mr Joseph claimed an increasing cost to the taxpayer resulting from supporting parent benefits and widows' pensions paid to 170,000 divorced, separated and deserted partners, at a cost of more than $800 million a year. Just what implication for law reform Mr Joseph had in mind in a time of social and moral changes is not clear. By inference, if not statement, he wants it made harder to get a divorce. 'The Family Law Act is bad in principle ... intolerable in practice'.

- Yet in the Melbourne Roman Catholic journal, the *Advocate* (30 June 1983), Vivien Hill's book review of Tennison's effort criticises the 'fundamental weaknesses' of his approach – of taking case studies hearing only one side of the argument and asking no questions of the judges involved. 'All parties to a marriage break-up, even the most honest, see the events from their own point of view and many such persons lie, exaggerate and misconstrue'. 'Nonetheless', concludes Hill, 'irritating, biased and selective, Tennison's book nevertheless succeeds in bringing to public attention the basic weaknesses in the Family Law Act'.

The ALRC now has an obligation to examine those weaknesses in the context of matrimonial property reform.

doing the impossible. Federal Attorney-General Evans, responding to the criticisms of the Act and the Family Court, pointed out that the law here was 'trying to do the virtually impossible : seeking to regulate by legal rules issues which are fundamentally unsuited to legal regulation'. Senator Evans was foreshadowing reforms of the Family Law Act which have been introduced by way of amendments to implement, in whole or in part, 37 of the recommendations made by the Joint Parliamentary Select Committee. The Bill follows pressure from the Family Law Council, the Institute of Family Studies, the Australian Council of Social Service and legal professional bodies. The Chairman of the Victorian Bar Council and past ALRC member, Mr Brian Shaw QC, pointed out (*Age*, 13 August 1983) that it was now three years since the Joint Parliamentary Select Committee reviewing the Family Law Act had made recommendations for reform. Amongst reforms promised are:

- the extension of the definition of 'children' to include step-children, some ex-nuptial children and children born as a result of artificial insemination by donor procedure;
- opening the Family Court to the public and press, with limits on reporting of names;
- extending the jurisdisction of the Family Court to deal with property disputes regardless of whether a 12 month separation period has elapsed;
- providing criteria for custody disputes;
- enabling the power of arrest to be attached to an injunction where bodily harm has been threatened.

divorce by post. In response, Senator Evans indicated that the government had taken a number of steps for family law reform:

- referring the matrimonial property inquiry to the ALRC;
- setting up a departmental inquiry into maintenance collection and enforcement procedures, with a view to the possible establishment of a national maintenance collection agency;
- securing agreement of the Standing Committee of Attorneys-General on legislation concerning the status of children born as a result of in vitro fertiliation and AID;
- introducing the legislation for amendment of the Family Law Act to lie on the table for debate during the Budget Sittings.

The Leader of the Australian Democrats, Senator Don Chipp, said on 1 September 1983 that the Democrats would move to amend the proposed legislation to provide further protection for children in the case of 'divorce by post'. Senator Chipp said that he had no dispute with the suggestion that if they both agreed, divorcing partners should not be required to attend court hearings:

> However, I am deeply concerned to find that this provision is available also for the dissolution of marriages where there are children. Under present provisions the court may call for a court coursellor's or welfare officer's report on the welfare of the children concerned, but this is not mandatory. I believe that such a report should be before the court before it agrees to accept divorce documents without personal appearance.

On 12 September, Attorney-General Evans agreed to limit divorce by post to cases where there are no children of the marriage under 18 years. It now seems fair sailing for the delayed amendments to the Family Law Act. More will follow.

de facto law

A man may be a fool and not know it, but not if he is married.

H L Mencken

palimony arrives? The banner headline declared 'palimony major recommendation of NSW Law Commission' (*Canberra Times*, 18 August 1983). Defining 'palimony' as a 'court-ordered financial settlement after unmarried couples split', the journalist encapsulated a two-year review of the law on de facto relationships in New South Wales, concluded by the State Law Reform Commission. The major recommendation in the 411-page report of the NSWLRC tabled in the NSW Parliament mid-August is that people who have been living in a de facto relationship for two to three years should be able to take court action, similar to divorcing spouses, to settle property and maintenance claims. They should also be able to share the estate of a partner who dies without a valid will and to be protected in cases of domestic violence.

According to the NSWLRC report, despite certain legislative changes, the law concerning de facto relationships in NSW 'is seriously deficient'. As a 'substantial and increasing' number of people live in de facto relationships, the previous policy of the law to discourage such arrangements should not continue. Instead, the law should move 'to minimise injustices and remove anomalies'.

The four Commission members who constituted the NSWLRC division on de facto laws divided equally on whether partners should qualify for the application of the new regime when they had lived together for two or three years. The Commission Chairman, Professor Ronald Sackville, and part-time Commissioner Bettina Cass, recommended a two-year period. Mr Denis Gressier, a full-time member and Justice Nygh of the Family Court (a part-time Commissioner) recommended a three-year qualifying period. Apart from this difference, however, the report is unanimous on the need for significant changes:

- provision for maintenance where one partner is unable to provide for himself or herself due to the need to care for a