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

child of the relationship or where a person's earning capacity has been adversely affected by the relationship;
- jurisdiction in the Supreme Court and Local Courts to adjust property rights and award maintenance;
- de facto partners to be able to make legally binding agreements setting out the terms of their cohabitation and separation, such agreements to override the court's power to order financial adjustment on splitting up;
- a surviving partner to the relationship, where a deceased partner fails to make a will, should be entitled to the same share of the estate as a surviving spouse would have had;
- de facto partners to have full protection under the Workers' Compensation Act;
- equal protection under the law against domestic violence to be provided as for married couples;
- a single statute to replace fragmented State legislation on custody, maintenance and guardianship of children of de facto relationships;
- couples who have lived together for three or more years to have the right to apply jointly to adopt a child of one of the partners.

community support. The State Attorney-General, Mr Paul Landa, releasing the report, indicated that he expected the recommendations to receive 'strong community support'. He said that he hoped to put forward proposals for legal change within two months.

Mr Landa's prediction may be justified by reports from the Australian Bureau of Statistics and the Institute of Family Studies indicating changing patterns in personal relationships in the Australian population. Although marriage remains very popular in Australia, de facto relationships are also increasingly popular, including amongst the young. The NSWLRC proposals apply solely to heterosexual relationships, no recommendations being made for equivalent stable homosexual relationships. Figures quoted in the report include:

- In 1982 4.7% of all couples in Australia were living in de facto relationships. In New South Wales this would mean a total of 116,200 people in this position.

- The number of such relationships increased markedly between 1976 and 1982 from 0.6% to 4.7% of all couples.

- De facto relationships were more common amongst people under 30, although more than 40% involved people over 30.

- Almost 59% of de facto relationships in 1982 had existed for at least two years. About 20% had lasted for more than five years. 8% had continued for more than ten years.

- About 20,000 de facto couples (36%) had dependent children in their household and 18% had the care of children born during their relationships. Where the female partner was between 25 and 44 years, children were present in 51% of families.

- There are no significant differences in terms of the education, religion or ethnic background between the profiles of de facto partners and married couples.

According to a report in the *Australian* (19 August 1983) an official spokesman for the Roman Catholic Church in Sydney said that, given that de facto relationships could not be 'put on the same level as' marriage, it was fair that any injustices should be removed from the relationship:

> The Catholic Church would take the attitude that public policy should take account of private morality and the effects of what people are actually doing.

A spokesman for the Anglican Church said that the general thrust of the NSWLRC report was 'in line with' the Church's submissions to the NSWLRC. The NSWLRC proposals followed years of criticism from the Bench of the unjust application of present laws to de facto relationships. In particular, a series of cases brought under the old Testators' Family Maintenance Act, which deprived stable de facto dependants of support in favour of earlier married spouses, had been criticised by judges of the Supreme Court of New South Wales. Commentary on the NSWLRC proposals was generally favourable:

- Attorney-General Landa said that the proposals would actually 'enhance marriage' by attaching legal obligations to de facto relationships, as people may conclude 'why don't we get married?'

- On the other hand, Deirdre Macken, writing in the *Age* (25 August 1983) said that the opposite logic would be 'just as applicable' – 'that is, if there were certain obligations and protections given to de factos, couples may not see extra benefit in a marriage contract'.

- Also according to Deirdre Macken, the recommendations 'fall short of granting the legal status of marriage to de factos' although they 'tackle most of the inequities that have dogged de facto relationships'. Of course, some couples might resist the notion that their legal status should be assimilated to that of married couples, protesting that if they wanted marriage, they would 'take the plunge'. The NSWLRC has covered this position. If a couple choose to live together without any subsequent responsibility to each other when they split up, they will be able to provide a contract to protect this freedom.

living in sin. According to John Schauble (*Sydney Morning Herald,* 29 August 1983) the expression 'living in sin', a previous description of de facto relationships, has 'almost disappeared from the language'. This is a response to changing moral and social attitudes, in part reflected in the growing numbers of people living together under de facto relationships. Commenting on the reactions to the report, the NSWLRC Chairman, Professor Ronald Sackville, said that he was surprised at just how 'constructive' had been the contributions of the Churches on the topic:

> I don't think it was an easy thing for the Churches to direct their attention to something with which historically they would not have had a great deal of sympathy. In general, there was substantial support for the proposition that the approach ought to be that of identifying the injustices and correcting them.

Speaking at a meeting of the Law Society of the Australian National University, Justice Nygh, a Family Court judge and a part-time Commissioner of the NSWLRC, explained that personal maintenance actions against de facto spouses had not been recommended. The NSWLRC believed that maintenance led to a 'dependent relationship' which was 'anachronistic and sexist'. Financial support could be claimed for children dependent on a partner to a de facto marriage if the child was under 12 years old or, if financially or mentally handicapped, under 16 years old. According to the judge, the report had favoured a qualifying period to define a 'bona fide de facto relationship' in order to avoid 'minimal claims and the overburdening of the courts'. But it was on this point that the Commission divided between those who favoured a two-year and a three-year qualifying period. Justice Nygh said that the consensus in the submissions to the NSWLRC had been 'almost exclusively' in favour of some form of legal recognition for de facto marriages.

family law council. The Family Law Council will promote Australia-wide discussion of the NSWLRC report. Submissions and com-

ments from professional and community organisations and individuals will be taken into account by the Council in advising the Commonwealth Attorney-General whether the report should be used as a basis for law reform in the ACT and for consideration of uniform legislation by the Standing Committee of Attorneys-General.

court reforms. In New Zealand, coinciding with the report of the NSWLRC, was a forward-looking decision of the NZ Court of Appeal (*Auckland Star,* 29 June 1983). The court upheld a claim for a half share in a property owned by a deceased woman with whom the claimant had lived in a de facto relationship. The couple had lived together for nearly ten years. A purported will had left the entire property to the de facto husband but it was invalid because it was not witnessed. Nonetheless, the New Zealand court unanimously ruled in favour of the claimant, Edward Hayward. Sir Robin Cooke said that there might be a lingering sense that the law should refuse to recognise relationships between men and women as having any bearing on property rights, if they fell short of legal wedlock:

> But a function of the courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them.

Perhaps if there were more judgments of this kind, there would be less need for law reform reports.

new new zealand?

I live much further away from Sydney than any of you people in Auckland do.

Paul Hasluck, 1967

c e r agreement. In March 1983, following the delay resulting from the Federal election and change of Australian Government, a new trade agreement was signed between Australia and New Zealand. Called the Closer Economic Relations Treaty (CER for short) the agreement contemplates a major increase in trans-Tasman trade. It foreshadows 'second generation' issues, including the need to provide neutral courts and tribunals for resolution of the increasing numbers of commercial and trade disputes that will inevitably accompany rapidly growing trade between Australia and New Zealand.

In this context, the Legal Research Foundation of New Zealand organised, on 22-23 July 1983, a major international seminar at Auckland University, New Zealand, to discuss the legal implications of CER. Participants were present from the judiciary, government and law firms on both sides of the dividing sea. The ALRC Chairman (Justice M D Kirby) was invited to deliver an address on the potential for a trans-Tasman court.

In a wide-ranging paper, he explored various possibilities that have been debated over the past decade or so, including by such legal luminaries as former Chief Justice Sir Garfield Barwick:

- revival of the Judicial Committee of the Privy Council for Australia and New Zealand;
- creation of a special South Pacific Privy Council;
- creation of an entirely new Court of Appeals for the South Pacific as called for by the Chief Justice of Fiji;
- conferring jurisdiction on the High Court of Australia in New Zealand cases;
- creation of a specialised trans-Tasman commercial court.

Justice Kirby concluded that none of these proposals was viable. Only if New Zealand were at last to join the Australian Federation would the possibility of appeals to the Australian High Court, enlarged by the appointment of New Zealand judges, be appropriate and possible. Led to this conclusion, he pointed to the active steps in the late 19th century towards federation between Australia and New Zealand: