same, so far the Federal legislation has apparently worked more smoothly than the NSW legislation complained of by Ms Armstrong. Diminishing the powers of the Commonwealth Ombudsman and altering the balance may weaken the role of the citizens' guardian in this vital area of administrative review.

matrimonial property and elton john

Marriage is a feast where the grace is sometimes better than the dinner.

Charles Caleb Colton, c 1810

famous knot. The institution of marriage received a major fillip in Australia in recent weeks with the tying of the knot by famous English singer Elton John and his wife Renata at fashionable St Marks Church, Darling Point, near Sydney. But even this ceremony drew attention to the complex rules that govern marriage and its incidents in Australia . The 1961 Marriage Act required seven days' notice of marriage. This was changed in 1976 to 30 days, although it was allowed that a 'prescribed authority' could authorise the celebrant to solemnise marriage with less than such notice in certain circumstances. A bemused Mr John had to seek the approval of NSW Attorney-General Paul Landa, to reduce his period of notice when the much-announced wedding struck the rock of the 30-day requirement. The approval was forthcoming and the wedding bells rang out.

In the past quarter this may have been the most spectacular single instance of high publicity marriage law. But there have been other developments which should be noted.

surveys galore. Under the direction of Professor David Hambly, the ALRC continues its major inquiry into matrimonial property law reform. An earlier note on this inquiry is to be found in [1983] *Reform* 145. Professor Hambly is supervising the gathering of a unique collection of legal and social data upon the basis of which the ALRC will make its proposals for matrimonial property reform. Among surveys that are currently proceeding are:

- The collection of data from Family Court judges concerning matrimonial property orders made in contested hearings. This survey commenced in November 1983 and is proceeding with the full co-operation of the Family Court judges.

- A survey form concerning applications for approvals of settlements under s 87 of the Family Law Act has been discussed by Professor Hambly with the Family Court Judges' Law Reform Committee. With the aid of the judges, the survey will collect data on s.87 settlements in three categories – cases settled without a conference with a registrar, those settled after a conference, and those settled at the door of the court or during a contested hearing.

- A survey of conferences held under regulation 96 of the Family Law Regulations is also planned. These conferences, in which parties seek to negotiate a settlement with the aid of a registrar, are a focal point of current practice under the Family Law Act.

- In February 1984, it was announced that the Chief Judge of the Family Court, Justice Elizabeth Evatt, was writing to 3 500 divorced people in Victoria asking them to take part in a survey of property and financial arrangements following their divorce. Justice Evatt indicated that the purpose of the enquiry was to discover whether the present law was fair and to make recommendations for the improvement of the law. She assured the litigants that the information supplied by them would be treated in strict confidence. Those who agree to take part in the survey will be interviewed

by a researcher from the Institute of Family Studies. The Research Director of the Institute, Dr Peter McDonald, has indicated that the survey is being conducted as part of the co-operation between the ALRC and the Institute, requested by the Federal Attorney-General in giving his reference on matrimonial property reform to the ALRC.

- Additionally, relevant data available from census and other material collected by the Australian Bureau of Statistics is now being examined.

- There will be consultation with judges and members of the legal profession, specifically after the distribution of an issues paper.

- Finally, with the co-operation of the Melbourne *Age* it is hoped to include a number of key questions in a future *Age* poll, in order to test public opinion concerning various options available to the ALRC on matrimonial property law reform.

The approach being taken by the ALRC in the use of survey material was called to notice in a leading article in the *Australian Law Journal* (see 58 *ALJ* 7) in January 1984. The editor (Professor J G Starke QC) expressed the view that the survey of Family Court cases involving property disputes between divorcing couples would be 'generally welcomed'. He pointed out that a major criticism of the Family Law Act 1975 had been directed at the 'width of the discretion' apparently conferred by s.79 of the Act as to orders in respect of matrimonial property. The ALRC inquiry, which has gone beyond simple study of court judgments and overseas legislative models, should be better able to provide a new legislative regime suitable for Australian conditions because of the detailed and painstaking approach now being taken.

alternative regimes. Professor Hambly is now leading his research team to the preparation of an issues paper on matrimonial property reform. It is hoped that this will be distributed in June 1984. The preparation of the issues paper will coincide with the collection of social and economic data on matrimonial property distribution as well as the preparation of a series of research papers leading up to the report. The research papers will deal with such matters as:

- an examination of the limits of Federal constitutional power to deal with matrimonial property;
- the legislative history and judicial interpretation of Part VIII of the Family Law Act 1975;
- a report on contested hearings and the present operations of s 87 and Regulation 96 Conferences in the Family Court;
- a report by the Institute of Family Studies on the project on 'the economic consequences of marital breakdown';
- a study of the principal options available to the ALRC, including by reference to experience of other countries with recent reforms, namely in New Zealand, Canada, United States and countries of Western Europe;
- an examination of property rights within marriage as well as upon breakdown of marriage;
- discussion of a proposal for matrimonial law reform in Australia.

Put very broadly, the range of choices available to the ALRC appear at this stage to include:

- adherence to the present rule of broad judicial discretion which allows fine tuning in individual cases;
- adoption of modifications to the discretionary system eg by providing more specific legislative guidelines. This is basically the approach of the Matrimonial and Family Proceedings Bill 1983 (Eng) and is urged in the

report of the Scottish Law Commission on Aliment and Financial Provision (1981);

- adoption of a system based on fixed entitlements. A glance at overseas models suggests a number of approaches that can be taken here including listing particular fixed entitlements; or classifying all property as either 'matrimonial' or 'separate' and fixing the scope of the judicial discretion to vary the fixed entitlements in special circumstances.

The ALRC is examining specifically areas of 'hidden' discretion which may sometimes be used to 'soften' the fixed entitlement – valuation, 'new property', rights of children, lump sum maintenance and the form of the order including 'buy-out clauses', the postponement of sale of real property and the occupation of the matrimonial home. Numerous ancillary questions need to be examined by the Law Reform Commissioners, including:

- the idea of marriage contracts;
- the operation of companies and trusts and their potential to avoid the literal application of matrimonial property law;
- the consistency between the principles of property allocation on divorce and on death; and
- new procedures designed to promote conciliation and mediation and to minimise expense and delay in the resolution of property law conflicts.

The *ALJ* editor in his comment also commended the ALRC's announced intention to emphasise two factors, amongst others, in considering its proposals, namely:

- the financial effects on a parent with custody of a child or children; and
- the position of divorced wives who have been out of the work force for a long time during their marriage and who may be at 'special risk' following dissolution of marriage.

great aussie syndrome. Meanwhile, on 7 February 1984 Federal Attorney-General Evans released a report by officers of his department on the subject of reform of Australia's maintenance laws. According to the Attorney-General, 74 000 Australians were the beneficiaries of maintenance orders. More than a million people were affected in some way by the maintenance system. Yet the 'Great Aussie Syndrome' suggested that it was for the State, not for separated parents, to support the children. This had led to a major drain on the social security system of Australia. Many people were actually adjusting their maintenance agreements in order to maximise means tested social security payments. At best, according to the report released by Senator Evans, only 40% of maintenance orders were complied with.

In the light of the report, Senator Evans said that a national agency to enforce and negotiate maintenance orders, as proposed in the report, would be considered by the government. According to the estimates in the report, such an agency would cost $2 million to set up and $13 million a year to run. However, it could save $25.5 million a year in legal aid and social security payments. The report recommended a number of initiatives to tighten up Austalia's maintenance laws including:

- further consideration of proposals to make maintenance payments tax deductible;
- wider use of contempt proceedings against defaulters;
- introduction of a scheme allowing for diversion of tax refunds owing to defaulters to be paid to the maintenance agency;
- establishment of a Federal locations unit to track down maintenance avoiders; and
- provision of data by the Australian Taxation Office and the Social Security Department and other government bodies to facilitate the search for

people defaulting on maintenance payments.

Senator Evans said that the proposed agency would be based on a South Australian system which had a collection rate of 80%, which was about double the national average in Australia:

> Default is rampant and the situation is such that if you are sufficiently determined, the payment of maintenance in this country is voluntary rather than obligatory.

Commenting on the report, the *Sydney Morning Herald* (9 February 1984) agreed with Senator Evans' lastmentioned conclusion:

> The result has been an enormous addition to the national welfare bill as spouses, most of whom are women, are forced to rely on supporting parents' benefits to survive.

However, the *Herald* suggested a few cautionary warnings:

- Some may shudder at the thought of another bureaucracy employing 450 people and costing $30 million, although, it conceded, there 'seems to be little alternative'.
- The recommended powers to use tax records to find defaulters could be 'controversial'. Yet on the other hand 'there seems little point in establishing such an agency without giving it necessary powers to achieve its purpose'.
- The proposal for tax deductibility to be considered once again would be controversial, because ordinary supporting spouses do not get this benefit.

It can be confidently predicted, concluded the *Herald*, that 'this further consideration will take some time'. Clearly it will be necessary for three ALRC projects to be borne in mind in the development of any such maintenance agency, namely:

- the recent report on privacy with its implications for the use of personal data supplied to the record-keeper for one purpose and then used for others (see [1984] *Reform* 2);
- the current inquiry by the ALRC on contempt law (see above p ???) with the suggestion from many quarters of the minimisation, not the enhancement, of the use of contempt as a sanction for disobedience of court orders.
- the inquiry into the related issues of reform of matrimonial property.

whose law? The endemic problem of shared constitutional powers affecting matrimonial property law has reared its head once again in litigation in the Full Court of the Family Court in late February 1984. In the case *Smith v Smith*, the Federal and NSW Governments have intervened to argue the extent of Federal legislative power and the interaction of the Family Law Act and the NSW Family Provision Act of 1982. Under the State Family Provision Act an ex-wife is entitled to claim against a husband's estate in certain circumstances. In the present case, the parties had reached a maintenance agreement which was approved by the Federal Family Court prior to the commencement of the NSW State Act. NSW Solicitor-General Mary Gaudron QC told the court that there was no conflict between the Federal and State laws. She also said that New South Wales wanted the interaction between the two statutes determined by the High Court of Australia. Mr Malcolm Broun QC said that he hoped the court would declare that the property agreement provisions of the Federal Family Law Act overrode the NSW Family Provisions Act. Unless this happened, he said, the NSW Act would be used to frustrate the 'clean break' intention of the Family Law Act by applications to the State courts following orders of the Family Court. The Federal Solicitor-General, Dr Gavan Griffith QC, agreed that there was a conflict. The case was proceeding when

Reform went to press. It is clear that Professor Hambly and his team will have to prepare their proposals for matrimonial property law reform with a clear-sighted appreciation of the interaction of property provisions of the Family Law Act with the complex web of State laws, institutions and procedures governing real and personal property.

one-year rule. Meanwhile, in England the House of Lords has approved the Matrimonial and Family Proceedings Bill, based on a report of the Law Commission of England and Wales. The Bill proposed the reduction from three years to one year of the minimum duration of a marriage before a divorce can be sought.

Lord Denning, the former Master of the Rolls, speaking in the Debate, urged that there should be no time limit at all before married couples were able to seek a divorce. He pointed out that a divorce petition could be launched at any time in Scotland if there was an irretrievable breakdown of marriage. He argued for uniformity between the laws of Scotland and England on such a matter. The Bishop of London (Dr Graham Leonard) supported this amendment. He said it would avoid giving the impression that one year was an adequate time in which a couple could and should judge if their marriage was a success. Lord Hailsham, the Lord Chancellor, agreed that not a single marriage had been saved by the imposition of a time bar. However, he said that the House of Lords would be making a 'grievous error' if it failed to 'back the Law Commission' in the relatively small change that it was recommending. He said that those members of the Church who had opposed the change had 'every right to legislate' for the Church's own communicants. However, they did not have the right to impose their views about marriage on the other kinds of marriage which the State had to celebrate. In the result, Lord Denning's amendment was rejected by 63 votes to 40 and other amendments were withdrawn. The Bill then passed through the committee stages. In Australia, a new and more flexible response to the problem of precipitate marriage and divorce was provided in the 1983 amendments to the Family Law Act. An application for divorce within the first two years of marriage must be accompanied by a certificate that the parties have considered a reconciliation with the aid of a marriage counsellor or an officer of the Family Court. A judge may dispense with this requirement in special circumstances.

passions and violence. Where marriage and the law are concerned, whether it is Elton John or the unknown citizen, passions tend to be aroused. The most shocking reminder of this truism in the last quarter occurred on 6 March 1984 in a bomb attack on the Sydney suburban home of respected Family Court judge Richard Gee. Justice Gee is President of the Lawyers Christian Fellowship. By an irony of history, Justice Gee was appointed in 1980 to replace Justice David Opas of the Family Court who was gunned down at the door of his home in Sydney by an assailant still at large. The special risks of Family Court judges doing their duty were remarked by many shocked commentators following this terrible incident.

lawyers' conveyancing

There is no doubt that there will be plenty of work for all lawyers in the future.
Mr JH Kennan, Victorian Attorney-General, Address, 7 December 1983

christmas bounty. On 28 December 1983 the NSW Attorney-General, Mr Landa, sent a letter to the Chairman of the NSWLRC requesting advice from that Commission on 'a number of policy options' concerning the fee-fixing process employed to determine changes that might be applied to different aspects of legal work. Specifically, he asked the NSWLRC:

- whether the present apparatus for determining fees should be maintained;
- whether the factors considered were appropriate;
- whether non-lawyers should be per-