to co-operate fully with them in its sentencing reform project.

courts and judges

the family court. There has been yet another brutal attack on a judge of the Family Court with tragic consequences. This prompted a degree of criticism of the Family Court in the media. The Chairman of the ALRC, Justice Kirby was quick to spring to the defence of the Family Court and the Family Law Act. Justice Kirby criticised the reactions of the media, the legal community and commentators in general to the tragic occurrence. He expressed regret at:

- the lack of balance in media coverage of the Family Court and the Family Law Act;
- the failure of the legal profession to adequately defend the Family Court and the Family Law Court against recent criticisms;
- the suggestion that there was an 'ethnic element' in the bomb attacks on Family Court Judges;
- the proposal of simplistic solutions such as a return to fault-based divorce for the problems of the Family Court.

Justice Kirby said that it was appropriate to note the many positive attributes of the Family Court and the Family Law Act. Among these he mentioned:

- the abolition of offensive publicity concerning 'the private crises of individual citizens';
- the replacement of 'salacious' grounds for divorce such as adultery by the simple concept of 'irretrievable breakdown of marriage;
- the provision of a range of services, including counselling, conciliation, information, child minding services, improved legal aid, and even video-tape advice for litigants;
- the process of on-going review of the operation of the Family Court and the Family Law Act including the active participation of the judges of the Family Court in the ALRC inquiries into Matrimonial Property, Domestic Violence and Contempt of Court.

Chief Justice Evatt of the Family Court said that the tragedy had increased the pressure on Family Court judges, who already were depressed and feeling hopeless about the problems confronting them. She pin-pointed the lack of staff, including judges and counsellors, and over-crowding as major causes of the enormous pressures on the court. She said that a staff increase of 25 as announced by the Attorney-General would help, but that a lot more needed to be done.

The Attorney-General, Senator Gareth Evans, proposed three further reforms:

- a media campaign to familiarise the public with the family law system, based on market research;
- an increase in experienced salaried lawyers, possibly involving a system of accreditation of practitioners;
- consideration of reversion to the wearing of wigs and gowns by judges of the Family Court.

the judges revealed. Some judges in New South Wales recently consented to being interviewed for a five part series on the judiciary in the Sydney Morning Herald. This emergence from relative obscurity perhaps reflects a recognition both on the part of the media and of the judiciary that there is a greater community need to have information about the judiciary and the courts. It is possible that some of the impetus for the recognition of this need came from the Boyer lectures delivered by the ALRC Chairman, Justice Kirby. The *Sydney Morning Herald* claimed that a 'composite portrait' could be assembled. Judges are 'witty, shy, confident, capricious, demanding, generous and tardy'. Whether these attributes are true of all, or any judges, is unknown. Some items of interest about the judiciary that emerge from the series included:

- New South Wales District Court Judges may be divided into a 'dove society' and a 'heavy sentence brigade'. The former of these two informal groupings tends to hand-out more lenient prison sentences than the latter.

- There is a degree of concern amongst judges at the extreme disparity between the wages of leading barristers compared with the vastly reduced wages they will receive when they go to the court. This has led to concern that the best barristers are sometimes failing to go to the Bench because it would cost them too much financially. It also seems that some barristers fear that life on the Bench may not be as exciting as the life they presently lead. One barrister was quoted, only partly in jest, as saying, 'I can imagine nothing more dull and boring than sitting and listening to someone like me'.

- It has been revealed that one judge of the NSW Supreme Court had been approached on two occasions by different senior politicians in attempts to influence his judgment in cases on which he was sitting.

- Some judges fear that if they take too high a public profile they will lose the ability to be the anonymous face of justice, and that persons appearing before them will fear that they are receiving less than a fair trial.
- Not all judges are as keen on law reform as is the Chairman of the Australian Law Reform Commission and the future President of the NSW Court of Appeal, Justice Kirby. One of the Judges in the series was quoted as saying 'law reform is a cheap method of making out that great things are happening. It is not all reform, it is obsession with change'.

judges and controversy. A contrast to the deferential treatment accorded the judges in the *Sydney Morning Herald* series and generally in the media, is controversy that has lately surrounded some judges. Issues include:

- There has been recent criticism in parliament about the findings by judges in Royal Commissions or Special Commissions of Inquiry. This raises problems for the persons the subject of the findings (who cannot appeal) and for the judge (who has no appropriate forum in which to respond).

- There has been debate amongst judiciary, the legal profession, and the community generally concerning Justice Stewart's appointment to the newly-established National Crimes Authority. The row was only resolved by the judge stepping down from the Supreme Court of New South Wales and being given the designation, style and entitlements of a judge of the ACT Supreme Court, whilst not actually becoming a member of any court. Althought this procedure managed to dampen the controversy surrounding the appointment, it does highlight the issue of whether judges should be appointed to investigative roles, particularly when these roles appear to be likely to become politicised.

- New South Wales Chief Stipendiary Magistrate, Mr Clarrie Briese has made accusations that Judge Foord of the New South Wales District Court and Justice Murphy of the High Court of Australia acted in a manner that could have been improper, with reference to, among other things, the trial of Sydney solicitor, Morgan Ryan. Mr Briese's accusations were made in evidence he gave to the Senate Standing Committee on Constitutional and Civil Affairs, which was investigating the so-called Age Tapes affair.

investigating the judges. Two legal issues out of the Senate Committee's report.

The first is the meaning of 'misbehaviour' of a

judge under s 72 (ii) of the Constitution. The Committee received conflicting advice from senior counsel. The opinions differed as to whether conduct of a judge outside the duties of his or her office could be 'misbehaviour' if it fell short of a criminal offence. Mr David Bennett QC said, 'private misconduct falling short of a criminal offence can never amount to "misbehaviour" within the meaning of Section 72 and that, in any event it cannot amount to "proved misbehaviour" in the absence of criminal conviction". The Solicitor-General has advised that, to be caught by s 72, misbehaviour of a judge outside the duties of office must involve a breach of the general law of such a quality as to indicate unfitness for office. Mr CW Pincus QC said, 'As a matter of law, I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "technical" relevant meaning of misbehaviour and in particular it is not necessary that an offence be proved". The matter remains unresolved.

The second issue is how allegations of judicial misconduct ought to be investigated. Although the Senate Committee found unanimously that the *Age* tapes and transcripts themselves revealed that no facts had been established in respect of Justice Murphy's conduct which constituted 'misbehaviour', however defined, it disagreed as to whether the allegations by Mr Briese were sufficient to constitute a *prima facie* case of misbehaviour.

- Justice Murphy demanded that Mr Briese, if he persisted in claims that Justice Murphy had interferred with the administration of justice, should without delay lay a charge against Justice Murphy, or ask the police to do so on his information. Justice Murphy said this would enable the matter to be properly dealt with by a jury.

- Senator Chipp, leader of the Australian Democrats, and Liberal Senators Lewis and Durack suggested that a 'parliamentary commission', possibly a retired judge, be appointed to conduct further inquiries. This suggestion was criticised by Labor Senator Michael Tate, Chairperson of the Senate committee as 'a 19th century Bristish anachronism".

- A joint Federal-State Royal Commission into the allegations has also been proposed.

- Referral of the matter to the Director of Public Prosecutions, Mr Ian Temby QC, was suggested by Senator Tate and Labor Senators Crowley and Bolkus. Mr Temby was quoted as saying it was not his function to solve problems for politicians, whatever their political persuasion. However, if material alleging the commission of Federal offences were given to him, he would be obliged to make sure it was assessed to see if Federal charges were justified.

- The suggestion was made that an opinion be sought from the Solicitor-General Dr Griffith.

However the present matter is resolved, the issue arises whether we need a formalised system of investigation of allegations of judicial misbehaviour. In his Boyer Lectures, the outgoing chairman of the ALRC, Justice Kirby, addressed this issue squarely. He noted that, unlike the United States, where most States have developed systems for the impartial examination of complaints against the judiciary, 'In Australia, the reforms are yet to come'. But he closed on a cautionary note. A system for redress of legitimate grievances against the judiciary "must be one compatible with the defence of the proper independence of Judges and the finality of litigation'.

judges and the media. At least one judge feels that the judiciary are becoming too accessible to the media. Addressing a joint seminar of judges and journalists in Brisbane, Justice Yeldham of the NSW Supreme Court said that, although the media played an important role in telling the community about what goes on in

the courts and in checking judicial behaviour, the role was limited. It did not extend to interviews with judges. His Honour was critical of the *Sydney Morning Herald* series on the judiciary, saying that the subject matter was not an appropriate one to be dealt with by a non-lawyer, no matter how expert a journalist, in the popular press. He also felt that disproportionate publicity was given by the media to law reform bodies. His Honour conceded that not all judges shared this view.

academics and the judiciary. A different tack has been taken by a Sydney academic. In a review of Justice Kirby's Boyer Lectures law lecturer David Brown agreed that the lectures opened up popular debate about the role of the judiciary. He urged that this potential be acted on in an attempt to further 'demystify' the judiciary.

judges overseas. It seems that it is not only in Australia that judges and courts are becoming the centre of public discussion.

- The Chief Justice of New Zealand, Sir Ronald Davison has called for judges not to ignore the current climate of responsible public opinion. Speaking at the closing session of the 1984 New Zealand Law Conference, the Judge said that those who frame and those who administer the law cannot afford to be unaware of responsible public opinion.

- A Japanese High Court judge is reported to have resigned after being accused of shoplifting two books from a Tokyo store.

- The American Supreme Court is reported to be demonstrating a marked conservative bias. *The Economist* suggests that 'conservative justices already control the court and their majority judgments provide, in effect, steady judicial ballast for a right wing adminstration'. Some of the effects of this alleged conservative trend include a cut-back on rules which excluded illegally obtained evidence and a series o rulings which weaken the so called 'Miranda rule' which requires police to warn suspects of their constitutional rights before questioning them.

the alrc — scandalising. The recent increase in notoriety of judges indicates an increase in public and media interest in information about the judges and the courts. One of the problems that arises when members of the judiciary are discussed is the extent to which it is proper to discuss and criticise individual judges. This is particularly so given the reluctance of judges to sue for defamation. This is one of the problems confronting the Law Reform Commission in its inquiry into the law relating to scandalising as part of its Contempt Reference headed by Professor Chesterman.

defamation and sensitive private facts

The rich are different to us.
F. Scott Fitzgerald.
Yes, they have more money.
E. Hemingway.

Defamation continues to fill reams of newsprint. The much discussed attempt to get a national defamation code was again on the agenda of the Standing Committee of Attorneys-General which met at the end of August, but no substantial headway was made. Recommendations to reform defamation laws were made by the Australian Law Reform Commission in its 1979 Report: *Unfair Publication* (ALRC 11). The major obstacle to a uniform code is the disagreement of Attorneys-General of the various States whether truth alone should be a defence to defamation, or whether there should also be some sort of a requirement that publication served some public interest.

Meanwhile two lawyers from Macquarie University, Michael Newcity and Brendon Edgeworth, announced their preliminary findings that defamation law in New South Wales operates largely to protect public figures, the wealthy and the prominent from scrutiny and criticism. The two academics are undertaking a