imprisonment is enforced;
- empowering re-examining courts to review fine orders, in the light of changed circumstances.

Justice Kirby said that some aspects of the ALRC proposals were adopted in the Crimes Amendment Act 1982 but that the implementation of this Act had been delayed pending negotiations between Federal and State authorities.

other moves. A number of other moves relevant to the law affecting the poor should be noted:

- Legislation for changes to Victoria's debt collection laws has been passed by the Victorian Parliament. Known as the Judgment Debt Recovery Act 1984, the proposals were designed, according to the Victorian Attorney-General Mr Jim Kennan, to ease the 'draconian provisions' of previous Victorian legislation in which debtors often faced criminal penalties in cases where they were not criminally culpable in the normal sense.

- In England a White Paper issued by the British Government following the Cork Report has now at last reached Australia. In the major recommendations of the Cork Committee, it was proposed that a scheme of repayments similar to the United States 'wage earner' plans and the ALRC 'regular repayment of debts programs' should be introduced in England. See [1984] *Reform* 60. The White Paper, without giving reasons, has not implemented these proposals. Instead, it opts for reform within the bankruptcy administration and encourages the use of deeds of arrangement, with meetings of creditors and the other costly and inhibiting procedures which the ALRC scheme and the Cork Committee proposals sought to avoid. See the *Economist* (3 March 1984), 71.

- The British White Paper, nonetheless, proposes major reforms of insolvency, particularly corporate insolvency, a matter that will have to be studied closely by the ALRC when it activates its insolvency reference, following the forthcoming appointment of a full-time Commissioner to take charge of the project.

- The impact of technology in credit law was highlighted by a statement in the Senate by Federal Attorney-General Evans on 28 March 1984. Answering a question by Senator Crowley (Lab, SA) Senator Evans said that there was an 'urgent need' for legislation to deal with consumer protection and privacy issues following the introduction of new systems of electronic fund transfers. He indicated that he had written to the Treasurer, Mr Paul Keating, seeking 'the speedy establishment of an Interdepartmental Working Party' to discuss the new technology which, by use of plastic cards, enables the instant transfer of funds within the banking system. Senator Evans said that the committee would be chaired by the Reserve Bank of Australia and would consist of both bank and non-bank representatives, including consumer and credit counselling organisations.

divorce blues and hoary chestnuts

Divorce is probably of nearly the same date as marriage. I believe, however, that marriage is some weeks more ancient.

Voltaire, 'Divorce', *Philosophical Dictionary*, 1764.

empiricism rampant. Divorce law and its complications have continued to hit the headlines in Australia during the last quarter. The major ALRC inquiry on matrimonial property, proceeding from the Canberra office of the Commission under Professor David Hambly, continues to gather an unprecedented empirical data base. Some information on this fact-finding process was contained in [1984] *Reform* 74. In the last quarter, the collection has con-

tinued apace. The most ambitious exercise is a large sample survey of the experience and attitudes of recently divorced men and women in Victoria. This involves high-level co-operation between the ALRC, the Family Court and the Institute of Family Studies (IFS). Primary responsibility for the conduct of this study lies with IFS, which is also funding the project at an estimated cost of $150,000. This represents one of the largest expenditures on gathering empirical data and opinion as a basis for law reform that has ever occurred in Australia. The IFS had scheduled as part of its long-term research program a major study on divorce and its aftermath. The idea of focusing such a study on economic consequences was first put forward in 1982 by Professor Hambly in discussions with Dr Donald Edgar (Director, IFS) and Justice Elizabeth Evatt (Chief Judge of the Family Court of Australia). These discussions were revived in June 1983, and they coincided with decisions by IFS on its future research program. The Board of IFS agreed that the study on economic consequences of marital breakdown should be carried out in 1983/84 so that the findings of the research could be made available to the inquiry into matrimonial property law reform. This reorganisation of research priorities has meant postponing for some time an IFS follow-up study involving a national sample of 18-34 year olds on attitudes to marriage and family formation issues.

The design of the investigation involved extensive consultation between the ALRC, the Family Court and the IFS, as to both aims and methodology. A Steering Committee and a Working Party were established to ensure coordination of ideas concerning the study. Since it was agreed by all concerned that the first purpose of the study was to yield information of value to the ALRC reference on matrimonial property, ALRC was required to define its own needs and priorities in some detail. Representatives of the ALRC and the Family Court were heavily involved with IFS in the planning of the survey and refinement of the questionnaires, through several drafts. Invaluable advice was given in this work by Dr Meredith Edwards and Dr Bettina Cass, who are ALRC honorary consultants on the matrimonial property reference. A number of senior officers of IFS have been engaged full-time on the study for many months. Extensive pre-testing, recruitment and training of interviewers, field work, and overall administration of the study have been the responsibility of the IFS staff, headed by Deputy Director of Research, Dr Peter McDonald, and Fellow in charge of Family Law Studies, Margaret Harrison. The Family Court of Australia made available Melbourne files for 1981-83 for sampling purposes. In order to meet the Court's obligations as to complete confidentiality, those included in the sample were written to personally by the Chief Judge, seeking their agreement to participate. In all, some 3 500 letters were sent out. In the result, more than 900 acceptances were received – considered a high response level for a survey of this kind. Since many file addresses were inevitably out of date, not every 'non-response' statistic comprises a positive refusal. The Institute of Family Studies and the ALRC have expressed great pleasure at the 25% agreement to participate in the survey. According to Institute Director, Dr Don Edgar, it is the best response rate in any survey of a divorced population known to researchers in the Institute.

Because of the high response level, the IFS has decided that it should conduct interviews with all of those who have indicated their agreement. As a result, the number of interviews to be conducted has 'blown out' from 600 to more than 900, hence the overall cost of $150 000. As this issue of *Reform* goes to press, the IFS has a large team of trained interviewers in the field. Each interview takes approximately two hours. Coding and 'cleaning' of data will inevitably be a large exercise. However, the IFS has expressed its hope to be able to provide preliminary findings to Professor Hambly from August 1984 onwards. Dr McDonald has said that the aim is to get a full report on the study to the inquiry by the end of 1984. The ALRC will use the results in designing its reform recommendations. The Institute of Family Studies will publish its own full report on the study at a later time.

vital co-operation. According to ALRC Commissioner, Professor David Hambly, the success of the survey research program could not have been achieved without a high level of collaboration between the ALRC, IFS and the Family Court. According to Professor Hambly, there is a very co-operative working relationship between officers of the IFS and the ALRC. He paid tribute to Dr McDonald who is directing the IFS project. The IFS has agreed that ALRC officer John Schwartzkoff, an experienced social scientist, will take part in the analysis of the survey data. Indeed, Mr Schwartzkoff will be appointed as an honorary consultant to the Institute for the IFS's own report. Commenting on the cost of the extra 300 interviews, resulting from the high response rate to the request for co-operation from the Chief Judge, Mr Schwartzkoff said that the increased size of the sample would 'add greatly to the strength of the report'. Professor Hambly expressed appreciation for the work of the Institute and its willingness to find additional funds to process the entire 900 responses. Direct enquiries about the methodology and progress in the IFS study of the economic consequences of divorce can be addressed to Dr Don Edgar or Dr Peter McDonald at the Institute of Family Studies, 766 Elizabeth Street, Melbourne, Vic, 3000.

court aid. Also during the last quarter, Professor Hambly paid tribute to the continuing high level of co-operation from the judges and officers of the Family Court of Australia. A progress report:

- Data collection on outcomes of contested hearings before judges of the Family Court finished on 11 May 1984. It is expected that the ALRC will have a sample drawn from all registries of the Family Court of Australia and also from the Family Court of Western Australia. Approximately 190 cases decided before the Family Law Amendment Act 1973 came into operation on 25 November 1983 will be available, together with approximately 200 cases decided since the change in the law.

- Surveys of applications for approval of agreements under s.87 of the Family Law Act and surveys of conferences under Regulation 96 of the Family Law Regulations have also been arranged. To gather a sample of s.87 applications, judges for a four-week period commencing in mid June 1984 are being asked to fill out forms seeking data on the parties' marital history and their property and finances, and the terms of their agreement. Registrars of the Family Court are also being asked to complete forms for a sample of Regulation 96 conferences held during a period of approximately three weeks in July 1984.

- The survey of divorced people in Victoria being undertaken by the IFS (above) has required a heavy allocation of staff resources in the Principal Registry of the Family Court in Sydney and in the Melbourne Registry of the Court. It was necessary for Court staff to identify from Court records the parties to divorce proceedings whose circumstances brought them within the classifications required by the survey design. It was then necessary to send a letter from the Chief Judge to all of these persons at their latest known address and to handle all responses. Chief Judge Evatt's letter appealed to the divorced litigants to co-operate with the ALRC/IFS inquiry. It assured them that the information given would be treated in confidence. It is perhaps a measure of the success of this approach (and a tribute to the effort of so many people) that such a high response has been received. The results will be interesting in their own right; but critical for the ALRC work on matrimonial property reform.

The survey of divorced couples is only one of many important projects being undertaken by the IFS. Further information on the work of the IFS can be found in the 1983 Annual Report published by the Board of Management of the IFS and just received. The report lists the cur-

rent research projects being undertaken within the IFS. Also just to hand is the study by Patricia Harper for the IFS on *'Children in Step-families : Their Legal and Family Status'*, 1984. This is one of a series of policy background papers. It reviews recent legislation on adoption of children, legal alternatives to adoption and changing community attitudes. The paper concludes that an order for guardianship or custody would more appropriately meet the typical needs of children in step-families rather than adoption.

discretion upheld. On 10 April 1984 the High Court of Australia handed down a decision highly relevant to the ALRC inquiry. See *Mallet v Mallet* (1984) 58 ALJR 248. The decision of the majority of the High Court has been billed as the 'first time the High Court have given firm guidelines on the interpretation of the property settlement provisions of the Family Law Act' (*SMH,* 11 April 1984, 7). Chief Justice Gibbs, leading the majority, said that the Family Law Act had been passed at a time when great changes had occurred and were continuing to occur in the attitudes of many members of society to marriage and divorce. It was still difficult, if not impossible, according to the Chief Justice, to say that any one set of values was commonly accepted or approved by a majority of society:

> Conflicting opinions continue to be strongly held as to the nature of marriage, the economic consequences of divorce and the effect, if any, that should be given to the fault or misconduct of a party when a court is making the financial adjustments that divorce entails.

All members of the Court agreed that the Family Law Act conferred a wide discretion on judges. This discretion should only be disturbed by an Appeal Court if it could be shown that an error had occurred in the exercise of discretion. It was not for Appeal Courts to substitute their own exercise of discretion for that of the trial judge.

Several decisions of the Family Court had suggested, as a broad guideline, that in a case involving a long marriage the notion of equality was an appropriate starting point, at least with assets such as the home and savings for retirement. The facts of a case might show that a departure from equal division was appropriate, but this starting point could at least avoid an undervaluing of contributions made as a homemaker or parent.

A majority of the High Court rejected this approach. In their view the Act required an assessment of the contributions to the property by each party, unfettered by starting points or presumptions.

Justice Deane, dissenting, thought that the Full Family Court's approach was 'sound common sense' in response to needs for a general consistency in decisions throughout the Family Court. It did not take long for commentators on the High Court decision to suggest that it demonstrated the vulnerability of women.

complexities lurking. Commenting on these perceptions of the High Court decision, Professor David Hambly (*Age,* 4 May 1984, 13) pointed out that 70% of divorcing couples do not even start property proceedings in the Family Court but make their own arrangements. Only about 4% of all divorcing couples take the property dispute to a judge for decision. He also pointed out that property negotiations are often determined by personal and emotional factors rather than legal rules and that a recent amendment to the Family Law Act, not considered in the April High Court decision, removes the need to show that efforts as a homemaker or parent contributed to the acquisition of property. In future they may be taken into account simply as a contribution 'to the welfare of the family'. According to Professor Hambly, the most immediate effect of the High Court decision may be 'to discourage appeals from decisions of individual judges, by emphasising the breadth of their discretion'. He also suggested that the decision 'gives a sharper focus to the debate on whether the law should be changed'. An alternative to the wide discretion would be to adopt a rule of equal division of matrimonial property on divorce. As Professor Hambly points out, this is the basis of

the law in many other countries, including New Zealand and in Provinces of Canada. However, he emphasized that 'complex questions lurk behind this simple formula':

- should it apply to equal liability for debts as well as to assets;
- should it be limited to property acquired during the marriage;
- should it be limited to domestic as against business property or gifts or inherited property;
- to what extent should discretion be permitted to vary the basic rules.

Concluded Professor Hambly:

> The ALRC will soon publish an issues paper and invite comments on this topic, which affects every Australian household. The law cannot remove the financial hardship which generally follows the breakdown of marriage, but we can aim for a set of rules which will reinforce the equal status of husbands and wives, whilst striking an acceptable balance between flexibility and predictability.

hoary chestnuts? Quite apart from the ALRC inquiry into matrimonial property, the work of the IFS and the comments of the High Court, family and marriage law continue to attract much attention in the past quarter:

- The Australian and New Zealand Association for the Advancement of Science (ANZAAS) 54th Congress at the Australian National University in May 1984 was told by Dr Jocelynne Scutt (Director of Research, VLCC) that when couples married they should be required by law to decide whether to share their previously owned property or to keep some or all of it separately owned. All property accumulated during the marriage would then be shared equally. Dr Scutt said that these reforms were necessary because the Family Court decisions were 'consistently favouring husbands in property settlements after divorce'. According to Dr Scutt, judgments had 'varied greatly but were often 70:30 in the husband's favour ... Some judges try to rise above their socialisation but it is very hard. These are the values of our legal system'. Dr Scutt said that the 'greed' of women, their 'gold-digging natures' and 'marrying a man for his money' were 'hoary chestnuts haunting women' going through divorce property settlements and women living in marriages who were seen as dependent upon their husband's incomes, whether they earned or not.

- The Annual Report of the Institute of Family Studies for 1983, mentioned above, discloses that 40% of first and second marriages can be expected to end in divorce. The report showed that the number of divorces within the first five years of marriage had increased tenfold between 1950 and 1978 in Australia. It said that this increase in the divorce rate could be associated with a delay in child bearing within the first five years of marriage and possibly increasing lack of tolerance of relationships which show early signs of incompatibility. Economic conditions in recent years had also, according to IFS, increased pressure on the husband/wife relationship in the early years of marriage. On 23 May 1984 the Federal Government announced that it would spend $100 000 on a national publicity campaign designed to cut the number of broken marriages which are costing Australian taxpayers an estimated $1 200 million a year in social security benefits alone. The campaign will urge couples to use the 130 government-approved marriage counselling centres throughout Australia. The theme will be 'One in four gets this message too late'. According to the IFS figure, one in four is a conservative guesstimate.

- A NSW Court of Appeal judge, Justice DL Mahoney, in mid April 1984 called on Federal and State legislators to give urgent attention to the interaction between the Family Law Act and State

laws dealing with property and children. In a case involving an appeal to the State Supreme Court for a declaration that a family trust was valid, the Court of Appeal held that the State Court had no jurisdiction because of the Federal Family Law Act. Justice Mahoney pointed out that arguments about jurisdiction had gone on in the case for more than three years and would not end with the instant decision. He said that it was 'proper to describe this situation as appalling ... It does not result from an improper manipulation of the court system by either party. It is a direct consequence of the fragmentation of jurisdiction which has occurred [because of the Family Law Act]'.

- In Britain the Social Services Select Committee of the House of Commons has delivered a report calling for government funds for local and national marriage conciliation services to try to prevent marital breakdown; the teaching of 'parenting skills' to children at school; provision of more child-minding and day-care services as an alternative to long-term care; and more research into sexual abuse of children. See *Children in Care* (H of C), 1984. It has also been announced that the Lord Chancellor is to set up a unit to monitor and assess different kinds of matrimonial conciliation schemes. Some 70 schemes already exist in Britain, all designed to settle disputes between divorcing couples informally. The *Economist* (3 March 1984) expressed the opinion that 'the quality of information on family law is so low that more research on all its aspects is vital. But more important is the guarantee that another committee looking at the whole of matrimonial procedure will consider changing the rules to make conciliation and early settlement of disputes a real possibility. At present the workings of the legal aid system encourage lawyers to prolong cases into a Full Court hearing'.

- Finally, mention was made in [1984] *Reform* 78 of the bomb attack on the home of Family Court Judge Richard Gee. Justice Gee is now back at work, though a subsequent bomb attack on the Family Court in Parramatta, near Sydney, has caused further concern about the safety of Family Court judges. Commenting on the bomb attack, Senator Evans listed a number of additional protections for Family Court judges and staff introduced following meetings between Federal and State Government representatives. They include additional police protection for courts, additional police surveillance of judges' homes, upgrading alarm systems, provision of additional bomb protection equipment, special training instruction in security procedures for judges and staff and additional measures to ensure privacy of judicial home addresses. 'I am sure that this campaign of terror will not deter the judges and staff of the Family Court from continuing to carry out their onerous and difficult duties in a jurisdiction which deals with very important matters of human relations', said Senator Evans.

clean slate

There are many who dare not kill themselves for fear of what the neighbours will say.

Cyril Connolly, *The Unquiet Grave*, 1945, 2.

living it down. The reappointment to the ALRC as a part-time Commissioner of Associate Professor Robert Hayes (see p 127) signals the revival of a project relevant to two references given to the ALRC on privacy and sentencing of Federal offenders. Professor Hayes was the Commissioner in charge of the ALRC report on privacy. See [1984] *Reform* 2. Now he is to deal with those residual aspects of the ALRC reference on privacy and sentencing of offenders which deal with expungement of criminal records. Legislation for expungement of criminal records was introduced in Britain in 1974 following a report on *Living it Down* by Justice, the British Section of the International Commission of Jurists. Legislation has also