clarifying the magistrate's role in assessing the likelihood of a jury convicting the defendant. Criticism of the 1985 amendments prior to their enactment centred on the lack of clarity in the wording of the amending section.

A second option is the use of suppression orders to prevent publication of reports of court proceedings. The recognition of the potential prejudice of publicity surrounding summary proceedings has caused legislatures in some jurisdictions to introduce either discretionary or mandatory suppression orders in the interests of the defendant's privacy or right to fair trial. In Victoria, since 1975, magistrates have had a discretion to prohibit reports of proceedings or part thereof if they are satisfied that such a report 'would be likely to prejudice the fair trial of any person' (Magistrates (Summary Proceedings) Act 1975 (Vic) s44(4)). In a similar vein, s44(2) of the same Act prohibits the publication of reports of any opening statement made on behalf of the prosecution.

Both the South Australian and Western Australian legislatures have given their magistrates a discretionary power to issue orders suppressing the reporting of evidence given at preliminary hearings. And, inspired by a similar concern for potential prejudice, the Tasmanian Parliament has prohibited the reporting of bail application proceedings, save for the mere fact of the application and the fact that an order has been made (Justices Act 1959 (Tas) s37A(1)). The British Parliament enacted legislation in 1967 which is stronger in terms than any of the Australian enactments. Under the Magistrates Courts Act 1980 (UK) s8, quite strict reporting restrictions automatically apply to committals unless specifically lifted. The restrictions apply until after the trial, although in practice, reports are generally not made at this time, as the committal has by then become stale news.

The changes to the NSW Justices Act, which could arguably increase the potential for prejudice to a defendant's trial through media publicity of the committing magistrate's comments raise for public debate the wisdom of the use of suppression orders as a means of protecting a defendant from prejudice. The ALRC is currently considering the use of suppression orders as one option in its review of contempt laws as they apply to prejudicial publicity.

family law debate

> Second marriages represent the triumph of hope over experience.
>
> Samuel Johnson

the flight from justice. The debate about family law and the Family Court system continues to engage the attention of lawyer and philospher alike. In a speech entitled 'The Flight from Justice', Professor Lauchlan Chipman, who is a Professor of Philosophy and also a lawyer, cited the Family Law Act as one example of a current shift from justice as that concept is traditionally understood. Justice, Professor Chipman argued, is essentially backward looking, in that it is concerned with such matters as restoration, restitution, compensation and even retribution. It assigns disputed claims in terms of prior rights, rather than looking to the future. It makes judgments about desert, based on past acts and omissions.

Since the radical utilitarians of the nineteenth century it has been recognised that justice is at best no assistance and at worst an obstacle to any planned distribution or redistribution of goods, because these aims look entirely to advantages in the future. Advocates of redistribution must therefore base their justification on a different concept, one which they call 'social justice'. Social justice, as opposed to traditional justice, attaches importance to such goods as meeting certain needs, whether of a status or material nature, and removing legal or economic inequalities.

Professor Chipman argued that one way in which, in common law countries, social justice is displacing justice as traditionally

understood is in the phasing out of the concept of fault. In family law an application for divorce no longer needs to be supported by citing a fault. Marriage is no longer analogous to a contract which can be repudiated by demonstrating that the other party violated its terms. Nor is the concept of fault applicable in determining the distribution of property after the divorce. Professor Chipman continued:

> it is fair to say – and of course this is no reflection on the calibre or integrity of the judges – that the Family Court is not concerned with justice at all. ... In determining to dissolve the marriage, the question of where fault lies need not be addressed, which means that any party who is, in terms of justice traditionally understood, an innocent party, is robbed of judicial recognition of that innocence. In disposing of the property, once again fault, or its absence, are irrelevant in determining the new entitlements. Thus it is hardly surprising that so many people emerge from the Family Court seething with anger; the reason quite simply is that they rightly sense, in many cases, that justice in the traditional sense has not been done to them. While they have been dealt with according to law, the law no longer recognises the relevance of the justice which they sense has not been done. It is my belief that this is the stuff of which violent anger is made, and so long as our family law is pre-eminently concerned with future goods, at the expense of giving even as little as judicial recognition of rightness and wrongness in conduct, Family Court judges will continue to need armed guards.

fault no longer required. Delivering the opening speech at the Second National conference of the Australian Association of Marriage and Family Counsellors, Professor David Hambly, Commissioner in Charge of the Matrimonial Property reference, called for a 'sense of moderation' in the debate on family law and commented:

> I don't think it helps to refer to the violent outrages that occurred in 1984 as if they were in some way a contribution to the debate on family law and its administration ... in reality they are an outrage against all society.

Professor Hambly noted that under the old divorce law it was necessary to show that a spouse had committed a matrimonial offence. But by 1975 that law was thoroughly discredited. There was hypocrisy and routine perjury. People were willing to behave this way because they felt there was no great moral force supporting the law.

Turning to the substance of Professor Chipman's comments, Professor Hambly acknowledged that it is true to say that marriage is no longer analogous to a contract, but he added that to talk in terms of contract when people are constantly changing, both as individuals and in a relationship, is to apply a theoretical construction which is inappropriate when dealing with human behaviour. He also pointed out that not all matrimonial behaviour is irrelevant in family law: it remains an issue when determining the allocation of property, for example, if it has economic effects. But no court can fully identify the 'causes' of the breakdown of a marriage and properly allocate 'blame'. To inquire into the spouses conduct simply to allocate 'blame' for the breakdown would be superficial, expensive and ultimately futile. Moreover, to allow an imputation of 'blame' for the breakdown of the marriage to influence property and financial matters would revive many of the worst features of the law before the Family Law Act. It would increase both the emotional and financial cost of divorce for the spouses, who will in many cases have a continuing relationship as parents, with shared responsibilities for their children. The Commonwealth Parliament itself has reaffirmed this policy on a bi-partisan basis as recently as 1983.

changing society. Speaking on the topic 'Do families change the law or do laws change families?', Professor Hambly cast doubt on the assumption that the laws regulating the formal dissolution of marriage have a significant bearing on the incidence of marital breakdown. He emphasised a number of social forces that operate quite independently of the rules regulating entry into marriage or its dissolution:

- ***abnormally high marriage rate.*** The years since the second world war have seen remarkable changes in attitudes to marriage. Immediately after World War II Australia experienced the 'marriage revolution' – more than 90% of people being married by the age of 30. During the 1970s there was a downturn in the marriage rate, but the overall percentage has remained high both in contrast with figures from other countries, and compared with Australian figures prior to the second world war. The divorce rate has been steadily rising, although it has levelled off in the past two years. This does not necessarily indicate a decrease in the stability of marriage. One explanation for the increase in the divorce rate in the 1970s is the universal marriage phenomenon of the 1960s. As one acerbic commentator noted, 'If you have more than 90% of people marrying before 30 that must include a proportion of people who had no evident vocation for marriage'. More marriages are likely to involve people who have been married previously. In 1975 the proportion of new marriages in which at least one partner had married before was 19%. In each of the years in the 1980s that figure has been 32% – that is, just under one third.
- ***permanent separation.*** Prior to the introduction of the Family Law Act in 1975 substantial numbers of people were permanently separated but not divorced; in recent years the increased divorce rate has been accompanied by a decrease in the number of permanent separations. A high separation rate is also a feature in countries where divorce laws are restrictive, such as Italy and Ireland.
- ***changes in expectations.*** The rise in the divorce rate may also be a sign of changing expectations in regard to marriage. Longer life expectancy, child raising being limited to a shorter period of the marriage, the increase in social security payments and the increase of female participation in the work-force mean that a greater number of people over a longer period of their lives are no longer dependent on marriage for economic security. More people now look to the emotional satisfactions that marriage is supposed to provide. If that satisfaction is not found, greater numbers of people can choose (though usually at considerable emotional and economic cost) to divorce and seek a more fulfilling relationship. Marital breakdown has greater economic repercussions on women than men, yet the majority of applicants for divorce are women, and more women initiate the final separation.

response of the law. Examining the response of the law to these changes in society, Professor Hambly identified several major themes:

- ***easing rules for the entry and dissolution of marriage.*** The law is withdrawing from the comprehensive regulation of rules governing marriage. In adopting the non-fault ground of divorce the formal requirement of permanence has been removed in the sense that the law no longer requires a person to remain married against his or her will. In that sense the durability of marriage is acknowledged to rest on the consent of both parties.
- ***convergence of marriage and de facto relationships.*** De facto relationships are being increasingly recognised by the law. But this raises a profound problem for law and social policy. The law relating to marriage is converging with the law relating to non-marriages. The key remaining distinction is in the lack of formal commitment in a de facto relationship. That difference can justify certain differences in the law governing each type of relationship.

But nothing would be gained for the institution of marriage if laws to protect women from domestic violence, for example, applied only to those who are legally married.

- ***responsibility in family relationships.*** Rather than concentrating on symbolic measures such as making divorce more difficult, an efficient maintenance collection and enforcement system in Australia would do more to instil a sense of responsibility in marital and parental relationships than any other reform, although of course this would involve considerable expenditure.
- ***factors identified by the Family Law Council.*** Much of the criticism being levelled at the Family Courts is due to factors other than the substantive family law. As the Family Law Council noted in its report to the Attorney-General in Fabruary on the administration of Family Law, Family Court premises are generally inadequate, seedy and depressing. There is a massive task of reconstruction of the courts ahead, especially in the eastern States. Similarly, radical steps are needed to reduce delays at the various registries. There should also be more emphasis on early conciliation and a greater demarcation between the adjudicative and counselling functions. Accreditation of family law specialists should be considered.

Finally, Professor Hambly declared there was a need to explain to the public what they can expect from the family law system. It is necessary to convey to them the very real limitation on the capacity of the law to resolve family disputes according to traditional notions of justice. We need to see the law as having an adjustive function, rather than simply adjudicating on past events.

matrimonial property discussion paper released. The Australian Law Reform Commission has proposed changes to the law of property division on divorce in a discussion paper released on 16 June 1985. New guidelines are proposed, not only to control the discretion of judges, but to help divorcing couples to reach agreement on their property arrangements. Under the Family Law Act, if a divorcing couple cannot agree, a judge has a wide discretion to reallocate their property between them. This flexible approach tries to achieve a tailor-made solution for each marriage, but critics say that it is too uncertain, slow and expensive.

While the Commission favours change, it argues against an automatic equal sharing of property on divorce. According to the Commissioner in Charge of the Reference on Matrimonial Property, Professor David Hambly:

> Our surveys of hundreds of cases show that in many marriages, equal shares would not be fair shares, especially for parents who have custody of children.

Studies by the Commission and the Institute of Family Studies, soon to be published show that wives generally have a much lower standard of living than husbands after they separate, even though wives often receive more than half of the property. A husband's earning capacity is often the couple's most valuable asset and it is usually unaffected by divorce. A wife's earning capacity is often reduced by the marriage and she generally retains custody of the children. Maintenance and social security do not make up the difference. In these cases, a rigid rule of equal property division could aggravate the unequal economic effects of divorce, and damage the welfare of children.

the proposal. The Commission proposes three stages in the process of property division:

- First, shares are assessed on the basis of the spouses' contributions to the family. These are presumed to be equal unless one can prove a clearly

greater contribution than the other. The presumption of equality should avoid wasteful arguments, especially in long marriages.
- The shares can then be adjusted to compensate for any difference, due to the marriage, in the parties' living standards after divorce. This could take account of differences in earning capacity and child care responsibilities.
- Any maintenance would be assessed in the light of the division of property.

the aim. Professor Hambly said:

> Marriage breakdown almost always causes economic hardship as well as emotional distress. The resources that sustained one household must be stretched between two. The law cannot enlarge the assets available to the family but our proposals aim to treat husbands and wives fairly, and to help them to settle their property affairs with the least cost and stress, by applying guidelines that strike a balance between flexibility and predictability.

marriage contracts. The Commission suggests that couples should be allowed to make their own contracts before or during a marriage, setting out the financial and property arrangements that are to apply during marriage and in the event of marital breakdown. But there would need to be safeguards to prevent injustice from contracts that are unfair or unreasonable either when they are made or when a dispute arises, perhaps many years later,' Professor Hambly said.

property during marriage. The Commission argues against the introduction of a 'community property' system under which a husband and wife would own jointly all property acquired during the marriage. 'Such a scheme would be too rigid and complex and would not achieve greater fairness in many marriages,' said Professor Hambly. Instead the Commission is considering ways of protecting the non-owner spouse in cases where the home is not owned jointly.

other questions. Amongst other questions discussed in the paper are:

- Should there be a special strict rule of equal sharing of the house and household goods on divorce?
- Should certain assets (for example, gifts, inherited property, some business assets) be exempt from sharing on divorce?
- Should a divorcing wife have stronger rights to share in a husband's expected superannuation benefits?
- How should a spouse's interests in companies or trusts be dealt with?

The discussion paper calls for comments and submissions. The Commission will hold meetings throughout Australia later in the year to discuss the issues and assess public opinion before preparing a final report.

odds and ends

■ ***victoria to establish insolvency task force.*** The Victorian Attorney-General, Mr Jim Kennan, recently announced the establishment of a Task Force within the Corporate Affairs office to review the provisions of the law relating to insolvency and liquidation. The Task Force will consist of Corporate Affairs investigators and will draw on the expertise of the Insolvency Practitioners Association where appropriate. It will examine the operation of the law and in particular, the existing investigation and prosecution practices of the Corporate Affairs office. A news release issued by the Attorney-General said that the work done by the Task Force will contribute to and complement the work of the Australian Law Reform Commission in relation to its reference on the whole issue of insolvency law and administration.

■ ***bankruptcy and insolvency.*** During debate in the House of Representatives on the Bankruptcy Amendment Bill 1985, various Members spoke of the need for the financial counselling of debtors. The former Attorney-General of South Australia, Mr Peter Duncan, referred to the recommendations of the