blamed on the Constitution and its interpretation by members of the High Court.

the law and literature. In the course of an entertaining speech delivered to a 'Literary Dinner' of the Tasmanian Committee of the National Book Council in Launceston on 17October1986 and entitled 'The Law as Literature – A Contradiction in Terms?', Justice Kirby considered the topic of reforming the law of defamation. He pointed out that, at present, an author must look not only to the defamation laws of his own State or the State of publication but also the laws of any State into which his work is distributed. This means that an author must seek the lowest common denominator of permissible publication. Justice Kirby describes the lack of a uniform law governing publications as 'a monstrous blight upon free speech in our country'. He told his audience that the Australian Law Reform Commission's report on Unfair Publication (ALRC 11) which made proposals for removing the 'monstrous blight' has, after a long debate, been shelved.

Justice Kirby said that some have argued that there should be a general defence to defamation and privacy actions for works of literary, artistic, historical, scientific or educational merit. He pointed out that no country gives such a blanket defamation defence which could result in 'scurrilous attacks ... dressed up as literature'. However, 'accidental defamation', where a character with a particular name and occupation is created who happens to share certain characteristics with an actual person, should be cheaply and quickly disposed of. More generally, he argued that 'the blight on artistic writers that arises from the "pot of gold" syndrome of current defamation laws must be removed'.

matrimonial assets and liabilities

The disparity of post-separation incomes is the dominant source of injustice in the present Australian system.

(*Settling Up*, 311)

findings of survey published. The findings of the survey conducted by the Australian Institute of Family Studies (AIFS) entitled '*Settling Up: Property and Income Distribution on Divorce in Australia*' (referred to in the July, 1984 issue of *Reform*) have now been published by PRENTICE-HALL of Australia.

The Study has been described by the Director of the Institute, Dr Don Edgar, as 'the most important yet completed' by the Institute and is based on data from an Australian Family Reformation Project: AIFS Economic Consequences of Marriage Breakdown Survey which 'provides some fundamental, but previously unknown, Australian information about the nature and extent of matrimonial assets and liabilities of people married for specific periods, their distribution of these assets, and their use of the legal process, together with its influence on the way they managed their affairs'.('Settling Up' 13)

relationship of study to alrc matrimonial property reference. The survey, which was designed in close consultation with the ALRC and the Family Court, is also a component of the research program for the ALRC's reference on Matrimonial Property. Together with the ALRC's survey of Family Court property cases, it provides an important empirical dimension to the assessment of the present law. The ALRC's report, which is in the final stages of preparation, draws extensively on the findings of both surveys.

fundamental questions. The study raises some fundamental questions about the principles upon which the Family Law Act is based and its current workings, such as:

- compensation for time out of the workforce;
- a more certain system of payment for child maintenance; and
- the whole issue of 'contributions' versus 'needs' as a basis for matrimonial property settlement.

methodology. The survey sample of 825 (which included 126 couples) was selected from the Melbourne Registry of the Family Court because that Registry, being the largest in Australia and, at the time, the only Registry in Victoria was considered 'to best meet the criteria of a manageable geographical region with cases representative of the general divorcing population in Australia.' (*Settling Up*, 18)

The sample was selected from two groups which had used different processes in settling their property matters and which were considered 'economically vulnerable' and therefore presumably able to test most effectively the extent to which the principles embodied in Family Law Act were working in practice and indeed the extent to which those principles were in fact appropriate to deal with current needs. The two groups were:

- *younger groups:* married between 5 & 14 years, with two dependent children and divorced in 1981 – separated between 4-6 years at the time of interview, or divorced in 1983 - separated less that 3 years at the time of interview.
- *older group:* married at least 15 years, divorced in 1981 – separated between 4-6 years at the time of interview and where the wife was at the time of separation between 45 -59 years old.

various processes. For 20% of this sample the Court and/or lawyers had played no role in the resolution of property division. Of the remaining 80%, only 4% were involved in a contested hearing; 7% settled by way of s.86 agreements and 87% by way of s.87 deeds.

The AIFS is careful to point out, however, that these percentages are not necessarily indicative of the extent to which of these different mechanisms are used in the general divorcing population. Because the sample selected was overrepresentative of higher socio-economic groups, and because it has become apparent that the more property involved the more likely a couple is to settle the division of their property by means of a s.87 deed, there is a distinct likelihood that the percentage in this survey who settled by s. 87 deed may be artificially high.

survey limitations. The AIFS acknowledges that the conclusions able to be drawn from the survey may not be representative of the Australian population as a whole. There are a number of reasons for this. For example, the group selected exhibited some features of sample bias: ethnic groups were underrepresented (all surveys were conducted in English) and higher socio-economic groups were overrepresented. Other reasons cited as reducing the general applicability of responses included that the factual value of responses relied on the subjective assessment of respondents, for example in reply to answers such as the extent of their involvement in domestic activities or the nature of the legal process used in their case where it was not clear that the respondent had a sufficient recollection or understanding of what was happening, leaving the conduct of their case to their legal advisor. Adjustments in the analysis were made to reduce the effect of these limitations in the survey sample AIFS has expressed the hope that certain aspects of the study will be replicated using other samples. (*Settling Up*, 31)

survey over time. One of the significant features of the survey was that it investigated the financial, social and other effects of divorce over time: respondents were asked about:

- their financial arrangements and non-financial contributions during the latter part of the marriage;
- how immediately after separation they coped financially and with other effects such as change in social status; and
- their position both financial and otherwise at the time of interview.

complex survey. The range of questions and issues addressed by the survey was extensive.

The questions were designed to measure the economic effects of marriage breakdown on men, women and children, as a basis for assessing the operation of the Family Law Act. They also sought to discover the extent to which the criteria specified in the Family Law Act determined the division of property in each case, other factors that may have featured in the bargaining process between the parties.

inadequacies of the present system. The last chapter of the book gives the authors' views on the appropriate directions for law reform and social policy in the light of the findings of the survey. The AIFS suggests that the present discretionary approach of Australian matrimonial property law is inappropriate because it is based on an incorrect presumption that justice can best be achieved if every case is considered to be unique.

One of their main criticisms of the present system is therefore its inefficiency and unpredictability:

> the law provides few guidelines and relies on the capacities of those involved to sort out a solution based on the balance between the relative contributions of the parties and their envisaged future needs. Inevitably such an approach scores low on the dimensions of predictability and efficiency. Couples may bargain in the shadow of the law but when the law is itself shadowy, they have little basis to estimate what would be a fair result in their case.
>
> (*Settling Up*, 310)

The AIFS does not consider that the present system achieves a fair balance of the relative contributions of each party against their respective future needs.

The findings show, it is said, that variations in contributions to household tasks and to the value of the house and contributions through workforce participation make little or no difference to the shares of property received. Rather, it is contributions to non-basic assets such as businesses or farms, superannuation or investments which do make a difference. Thus, because these are generally related to the activities of the husband, variations in the contributions of wives play almost no part in property divisions. Furthermore, on the needs side of the equation, the only future need which appears to have a significant bearing on outcomes is any need created as a result of having custody of the children of the marriage.

The AIFS comments: 'Astoundingly the future need for income on the part of wives was not a significant factor in property divisions' with the practical result that there is widespread recourse to the State to provide the future survival income through social security.

fundamental principles. The AIFS concludes that the present discretionary system where each party has to prove their respective contribution to the marriage and their needs on its breakdown is 'far too indefinite providing a stimulus to an adversarial approach'.

Fundamental principles are required, it says, which 'should form the basis for dealing with the economic consequences of marriage breakdown in the Australian context. The fundamental principles suggested are these:

- marriage is a partnership of equals founded in its economic aspects upon a functional division of co-operative labour between spouses . . .
- an individual has an exclusive right to his or her own personal resources such as qualifications, experience, reputation and skills both during marriage and upon the breakdown of marriage
- parents, according to their respective financial resources, are responsible for the support of their children who are under 18 years
- if a party's resources are insufficient for his or her support or for support of the children, then the State must bear the responsibility.

proposals. The AIFS endorses retention of the present system whereby couples may, upon the breakdown of their marriage, make their own financial arrangements. In addition, it supports the right of parties, by contract during the marriage, to determine their respective property rights upon breakdown of the marriage.

The main AIFS proposal is that the legislation should prescribe a system or regime governing the division of property between spouses upon the breakdown of the marriage.

The regime the AIFS proposes dictates as a starting point and on the basis of the first of the fundamental principles, that property will be divided equally. A broad definition should be given to property to include assets such as superanuation entitlements, earning capacity and work-related fringe benefits.

However, according to the AIFS:

> it seems clear that the law's recognition of the value of unpaid work should logically be extended to include the deferred costs to the individual who makes these economically and socially valuable contributions.'
>
> (*Settling Up*, 98)

Their first principle requires that the couple's joint endeavour must bear the disadvantage suffered (usually by the wife) where one party's contribution (duties in the home as a consequence of child rearing) has not been remunerated during the marriage. The justification for compensation is, it is said, 'because that disadvantage is directly attributable to their joint productive and reproductive endeavour'. The amount of compensation could be determined according to a table drawn up on the basis of Australian experience of the impact on income-earning potential of child bearing and child rearing.

The AIFS concedes that the proposal stands or falls according to whether such a table can be produced. This compensation component would have these features:

- it would be immutable and post-divorce circumstances would not alter it;
- the amount would be payable, preferably by lump sum, as part of the property settlement – although payment by instalments would be considered where there was insufficient property to cover payment of compensation or where payment in a lump sum would involve sale of major income-earning assets such as businesses or farms.

maintenance. The AIFS proposes that economic relationships of parties to a marriage should no longer be divided into maintenance and tangible property components. Upon the breakdown of marriage, the obligation of one spouse to support the other should cease. Thus, future needs should no longer be considered as valid reasons for the variation of property rights.

The resons behind this conclusion would appear to be threefold:

- the inadequacy of maintenance orders to meet real needs;
- the difficulties of enforcement; and
- the principle of 'clean break'.

Where one party has custody of children of the marriage, it is proposed that that party should obtain a greater share of the property. Thus lump sum maintenance would be dealt with rather as a component in the calculation of the respective shares to which parties will be entitled. The AIFS comments:

> We would prefer to see compensation payments as part of an integrated scheme of income support, housing, retraining, work incentives and child care operating in the initial years after marriage breakdown.
>
> (*Settling Up*, 316)

role of state. Of course, difficulty will arise where there is insufficient property to cover the share payable to the custodial parent. In that case, the AIFS suggests that provision be made for substituting payment of the full

mandatory amount with increased on-going maintenance payments. Only where the non-custodial parent could not meet even an instalment order does the AIFS suggest that the State should provide child support payments at a minimum level

advantages of maintenance proposal. This proposal, it is said, would have a number of advantages. First, by incorporating payment of maintenance as part of the overall division of property, it is intended to ease the present burden on the State where sole parents are forced to rely on social security. Secondly, by taking the issue of maintenance out of the arena of post-separation negotiation, so that entitlement to maintenance will no longer provide the battleground for disputes over custody and access, it is hoped that relations between former spouses, and relations between non-custodial parents and their children should improve.

urgent need for further enquiry. The AIFS warns that even from the small amount of information obtained in their study, it became obvious that an enquiry into the issues of custody and maintenance is urgently required. The government has recently announced that it is preparing proposals on child maintenance, to be introduced this year.

One of the important issues which the ALRC's forthcoming report will be addressing is how best to achieve a balance between flexibility and consistency within a discretionary framework. In the July 1986 edition of *Reform* it was indicated that the current thinking of the ALRC was that there were compelling reasons for the formulation of guidelines within a new legislative scheme.

human rights and the hreoc

> All animals are equal, but some animals are more equal than others.
>
> George Orwell, *Animal Farm*

The question whether Australia needs a Bill of Rights was recorded in a recent issue of *Reform* (See [1986] *Reform* 10). Arguments for and against were recorded in some detail. In the 1986 Senate debates on the Bill of Rights and the Human Rights Commission some rather novel arguments were put forward. It was alleged that under the proposed Bill of Rights:

- a country could never be regarded as a Christian country;
- censorship would be abolished and pornography distributed freely to everyone;
- the police and the army would be prevented from functioning competently;
- children aged 14 would be allowed to do as they liked;
- there would be an end of Australia's federation and the constitutional rights of the States;
- the Constitution would become a useless anachronism;
- there would be an end to local government in Australia as we know it.

Perhaps Justice Marcus Einfeld had some of these arguments in mind when he spoke at the launching of the new Australian Human Rights and Equal Opportunity Commission (HREOC) in December 1986. He said in his speech:

> The birth of the Commission has been, to say the very least, traumatic and agonising. Its consideration by the nation and Parliament was marked by some of the most vitriolic, nasty and abysmally ill-informed fervour and by a standard of public debate for which the whole country should hang its head in shame.

In one of the lengthiest debates in the history of the Senate the Government argued that the International Covenant on Civil and Political Rights, which the Holt Government agreed to along with 105 other countries, and which was ratified by the Fraser Government in 1980, specifically committed Australia to adopting legislative measures to give effect to the rights contained in it.

There are many rights now enjoyed by Australian citizens which are not protected