- In October came an issue of the Law Council of Australia publication *Australian Law News*. In it, Sydney lawyer Trevor Nyman urged that judges and lawyers in the Family Court should return to wearing robes and working in the traditional adversary system so that litigants will clearly understand their removal from 'the arena of conflict'. Mr. Nyman described the notion of a 'helping court' as 'a naive view of the attitude of litigants, who are burning with passion over their cause'. He criticised delays and what he describes as 'judicial pressure, counsellor bias and brow-beating'. This observation did not find favour with Senator Gareth Evans who declared to the Senate:

  > Mr. Nyman has in fact made a number of suggestions about restoring all the awful in terrorem majesty of the court system in the Family Court area, about recreating that atmosphere of polished wood and judges sitting on high and, of course, recreating the atmosphere of the presence of the bewigged and begowned lawyers, no doubt including Mr. Nyman himself. Let us be clear about it, no-one, human nature being what it is, will be too anxious to step into the inner sanctums of the legal process once again, unrepresented, when they are confronted with all this traditional, but no more familiar for that to the ordinary layman, panoply of the law. It is a concept which I personally reject. ... *CPD* (Senate) 13 October 1981 1121.

- Amendments to the Family Law Act presently before Federal Parliament envisage procedures for securing an order for the dissolution of marriage, without the necessity of persons attending court. This notion of 'divorce by post' has been criticised by the Law Council of Australia. It is said that it may lead to unexpected or unintended divorces. But Senator Durack points to the very great savings that can be secured in this way.
- In Sydney, the President of the Parramatta Law Society has urged that upon divorce a will made during a marriage should be automatically revoked. He said that it should not be necessary for a person to remarry in order to revoke an old will.

In Australia and overseas, family law is a fruitful area for constant law reform. The Melbourne *Age* (15 October 1981) urged that urgent attention should be given to supplementing the Federal Family Law Act with a single uniform code that would require, under the Constitution, State participation:

> What is disappointing is the continued resistance to the idea of a single uniform code of law by the backwoods States. Four of the States have agreed in principle to handing over their powers in the field of custody and property to the Commonwealth. But both Queensland and Western Australia have refused to co-operate.

The *Canberra Times* (17 October 1981) in the same vein, concluded:

> And there are still recalcitrant States to be worked on in the interests of achieving uniformity. Senator Durack has said that the Commonwealth has not exhausted its legislative power over the family law and he intends to test it to the limit. May he do so and may he win.

legal profession progress

Money often costs too much —
Ralph Waldo Emerson, circa 1870

n s w l r c proposals. In November 1981 the NSW Law Reform Commission delivered two further discussion papers in its major review of the law governing the legal profession in New South Wales. They were:

- DP5 Advertising and Specialisation
- DP6 Solicitors' Trust Accounts and the Solicitors' Fidelity Fund.

The discussion paper on trust accounts is a 241-page document which reviews the current law and practice governing solicitors' trust accounts in New South Wales. It points out that in the course of the year hundreds of millions of dollars pass through the accounts. Only a minute proportion of this money becomes the subject of a claim on the Solicitors' Fidelity Fund. Though the dishonesty of only a minute number of solicitors is involved, the total of the claims is large. In the year ended 30 June 1980, expen-

diture in respect of claims admitted and paid was $4.3m. Claims admitted but unpaid amounted to $3.4m. Contingent liabilities totalled $4.3m.

The major suggestions in the discussion paper include:

- production at annual audits of solicitors' trust accounts;
- provision for more detailed accountants' reports on such accounts;
- differential provisions in respect of sole practitioners or with more stringent audit and inspection requirements governing them;
- stricter rules to apply to solicitors using nominees and private finance companies in which they are involved. Personal liability for acts or omissions of such companies, associated with solicitors, is proposed;
- introduction of a statutory register of mortgage investments and securities;
- provision for a sharp increase in contributions by solicitors to the Fidelity Fund;
- multiplication of current rules to take into account the development of professional indemnity insurance for solicitors;
- broadening of the eligible claimants, enhanced rights of appeal and provision of time limits.

One sorry feature of the discussion paper is the record that between January 1968 and June 1981, 82 solicitors were struck off the role in New South Wales. Of these, 59 had broken the law relating to trust accounts. The President of the NSW Law Society, Miss Mahla Pearlman, said in Sydney on 4 December 1981 that she 'accepted in broad principle' much of what the NSWLRC had recommended, though she differed on the detail. In particular the NSW Law Society proposes the provision for annual audits of solicitors' trust accounts.

The Commissioner in charge of the project, Mr. Denis Gressier of the NSWLRC, said that the incidence of defalcation was much lower in other States than in NSW.

The discussion paper on advertising urged that solicitors should be allowed to advertise in all media, including on fields of practice, fees and the use of credit cards, guarantees of speed of service and other listed matters. Limitations are proposed excluding certain types of fee advertising and prohibiting false, misleading, vulgar, sensational or disreputable advertising. It is suggested that these limitations should be policed by professional bodies. Specific recommendations are also made concerning barristers' advertisements about field of practice. It is suggested that such advertisements might be restricted to the Law Society Journal, a referrals directory or other approved publications. The Commissioner responsible for the discussion paper, Mr. Julian Disney (NSWLRC) told the Melbourne *Age* (23 November 1981) that the main fear of those opposed to advertising was that costs would flow on to the public in the form of increased fees. However, he said that this and the fear of damage by bigger firms to smaller firms had not been borne out by American experience. On the contrary, competition caused by advertising had 'led to the general reduction in fees of about 10%'.

w a inquiry. Meanwhile, the other inquiry into the legal profession which is proceeding on the other side of the continent in Western Australia has suffered a blow. On 17 October 1981 it was announced that the Chairman of the Inquiry into the Future Organisation of the Legal Profession in Western Australia, Mr. Justice Brinsden, had resigned because of increasing pressure of work caused by the shortage of Supreme Court judges:

> I do not have time to do anything outside my official duties. The situation has been bad for some months, but in recent months it has deteriorated considerably. I do not wish to remain on the Committee if I cannot perform my task effectively. We don't just need one more Supreme Court judge — by the end of this year we will need at least three. Until the Government does something there is no possibility of judges being available for extra duties.
> *West Australian*, 17 October 1981.

Mr. Justice Brinsden chaired the Inquiry for 18 months and in July 1981 the Committee released

a preliminary working paper recommending major changes in the organisation of the legal profession. Amongst the recommendations was the appointment of an independent ombudsman to investigate complaints against lawyers. The Committee has still to report on some of the items in the terms of reference, including the subject of the appointment of Queen's Counsel in Western Australia.

QCs and judges. On the subject of QCs, an address by the Chief Justice of Australia, Sir Harry Gibbs, to the Sydney University Law Graduates' Association, took a firm line on the appointment of judiciary from those barristers who reach the top of the profession. In contrast to a speech by Federal Attorney-General Durack at the opening of the Supreme Court Building in Alice Springs in July 1980, Sir Harry Gibbs took a more traditionalist viewpoint. Senator Durack had urged the selection of Federal judges from a wider pool and pointed to his appointments which included 12 solicitors, four women lawyers, 2 Government lawyers and one academic lawyer. Now, the Chief Justice:

> There are two heresies I would like to see extirpated. The first is that it is justifiable to appoint judges whose point of view is generally favourable to the Government in power. The second is that the judiciary should somehow be made representative of the community, that is should be recruited from a wider and widening class — from solicitors, academics, women and ethnic groups.

The Chief Justice said that all appointments to the Bench should be on merit and that academic lawyers and public servants lacked experience in the workings of the courts, as did some solicitors. One advantage of the separate Bar was that it made selection of the judiciary easier:

> It is more obvious in the case of a barrister whether he has risen to the top of his profession. It is easy to see whether an appointment is made otherwise than on merit. But barristers lead a life of almost exaggerated independence and independence is a quality that judges need the most.

law and politics. An associated theme was raised by Mr. Justice Brennan of the High Court of Australia in an address to the Monash University Law School Graduates' Association on 18 November 1981. Returning to his view that all lawyers are 'in our several ways the ministers of the judicial branch of Government' Sir Gerard Brennan, a past ALRC member, addressed the need for the development of the law, with the consequent requirement of attention to 'the judicial method':

> It is a method which seeks to adjust the court's imperviousness to political influence with the creation of new rules. We are accustomed, of course, to associate changes in the law with political activity, and that association is at the heart of a democracy. Changes in the law effected by the political branches of Government are usually attended with more media publicity than the changes, often times not so dramatic, effected by judicial decision. ... But the strength of the judicial system lies in its independence from the influence of shifting political support, and the changes in the law which are worked by judicial decision must be based on a more enduring foundation than the political opinions which reflect current and sometimes ephemeral aspirations. Judicial changes come more slowly.

Mr. Justice Brennan referred to the important role of law schools in assisting the creative work of the judiciary by promoting examination of the phenomenon of judicial change. Without this, a law school would deny its lawyers 'the challenge of propounding new solutions for new problems or revised solutions for old ones'.

The troublesome question of the extent to which judges should become involved in creative activity is referred to in a number of important addresses and papers delivered in the last quarter. Sir Ninian Stephen in a commentary at the seminar held in the Australian University on 'Power in Australia : Directions of Change' returned to his discussion on the disadvantages of a Bill of Rights, with the warrant this might give to judges to step beyond legitimate creativity:

> The sort of limits upon legislative power with which the High Court has, in the past, been concerned, with one notable exception, have tended to be limits imposed on State or on federal legislative power in the interests of the other parties to the federal compact. ... The notable exception is s.92, the greater part of all that effectively remains of what was anyway in the beginning a rather meagre collection of constitutional

> guarantees in our Constitution. ... Some would no doubt say that the fate [of other constitutional guarantees] over the years is an illustration of the lawmaking, or rather law erasing powers of the judiciary. But introduce a Bill of Rights and immediately whole new areas of potential restraints upon legislative and executive action open up. In each of these areas it will in our system be the ultimate constitutional court which will find itself more than ever in the role of extending, in Professor Blackshield's words, mercy, tender or other, to legislation of the States and the Commonwealth. ... This is not by any means to say that Bill of Rights provisions should not come to pass, whether in legislative or constitutional form; only that we should clearly appreciate what we are doing and where we are going in having these new expanded powers reposed, in the High Court.

More emphatic is the article by Professor P. H. Lane, 'Neutral Principles in the High Court' (1981) 55 *ALJ* 737. Professor Lane illustrates his thesis that the creativity of the High Court should be limited to interpretive or 'interstitial' lawmaking by reference to the creation, now, of established law reform agencies. Referring to the Australian Conservation Foundation case, (1980) 54 *ALJR* 176, on the law of standing, Lane says:

> It was not merely that the Court should not act as the legislature, inventing new rules of law. In addition, this very matter of standing in federal issues was at present the subject of an inquiry which had been referred by the Federal Government to the Law Reform Commission (Cth). Given that the topic of standing was created and is moulded by the Court anyway, to cry, 'the elected legislature', seems beside the point. On the other hand, the Law Reform Commission's inquiry into standing, including the specific kind of standing now being raised by the parties before the High Court, seems precisely in point. ... [T]he High Court defended its neutralism by the laudable reference to the role of the legislature as the arbiter of competitive electoral interests, by the justifiable reference to the High Court's lack of the facilities and know-how of legislators and law reformers or by the convenient reference to a chance assignment elsewhere in the Law Reform Commission (Cth).
> ibid, 740.

the future : must it be bleak? Returning to lawyers and the future, many reviews have been conducted in the past quarter of likely lines of future development. In an address to the Eastern Solicitors' Association of Victoria at Tyabb, the ALRC Chairman, Mr. Justice Kirby, said that the next two decades would probably see a significant decline in at least three areas of present legal practice. He mentioned:

- accident compensation cases;
- divorce cases with the introduction of 'do-it-yourself' divorce and 'divorce by post';
- land conveyancing, with the introduction of computerisation of land titles.

However, Mr. Justice Kirby said that new areas of practice would open up. These would include:

- representation of parties before proliferating administrative tribunals;
- dealing with problems created by the new technology. He instanced the impact of computers upon individual liberties;
- the possible growth of new forms of action, including representative or class actions;
- provision of more telephone advice services and legal 'checkups';
- development of prepaid legal services;
- extension of joint practices, including between doctors and lawyers or engineers and lawyers to provide specialist services.

media reform

> Journalism consists largely in saying 'Lord Jones dead' to people who never knew that Lord Jones was alive
> G. K. Chesterton, circa 1930

defamation breakthrough? The Standing Committee of Federal and State Attorneys-General, meeting in Perth, announced on 26 November 1981 that agreement had been reached on the main categories of remedies that should be available in the proposed uniform defamation laws. The laws are being developed based on a report of the Australian Law Reform Commission. That report was in turn the subject of a commentary by the Western Australian Law Reform Commission. The Federal Attorney-General, Senator Durack, indicated that the main categories of remedies agreed on were: